JAGDISH PRASAD

v.

STATE OF RAJASTHAN & ORS.

(Civil Appeal Nos. 5102-5103 OF 2011)

JULY 07, 2011

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

Service Law – Selection by promotion – Rajasthan Transport Service Rules, 1979 – rr. 6,10 & 24 – Selection/ promotion process – Validity of –Promotion to post of District Transport Officer (DTO) from the post of Motor Vehicle Inspectors – Amendment to Schedule I and deletion of Schedule II of the 1979 Rules in the year 1992 leading to deletion of requirement of passing qualifying examination for the higher post of DTO – Effect of – Selection/promotion order dated 8th July, 1994 – Action of the State government in clubbing all the vacancies of more than 10 years (from 1983-84 till 1993-94) and giving promotions challenged – Whether by amendment to Schedule I and the deletion of Schedule II of the 1979 Rules the effect of the statutory provisions like rr.6,10, 24 read in their plain language stood diluted and the statutory provisions were rendered ineffective and inoperative – Held: The services of the Transport Department in all relevant posts are covered under the provisions of the 1979 Rules and their purpose is to make promotions on merit or merit-cum-seniority in the prescribed proportion of 50:50 – The Schedule of the 1979 Rules has to be in conformity with, and is required to advance the object of the primary statutory provision and cannot in any way wipe out its effect and spirit – Even if Schedule II of the 1979 did not exist, it was obligatory on the part of the respondent to evolve a methodology to make promotions purely on merit – Right from 1983-84 till 1993-94 no examination was conducted by the appropriate authority despite issuance of notifications for holding exams on a few of these occasions – Representation from the

Transport Inspector's Union cannot be considered as a sufficient cause or reason for not holding the examinations for more than ten years and causing serious prejudice to the candidates who might have been sufficiently meritorious to qualify in the exams and be considered for promotion to 50% of the posts under the promotion quota – Even after 1993-94, the process of selection adopted by the State Government cannot be accepted – The preparation of seniority list, method of selection and clubbing of vacancies were apparently in violation of the statutory Rules – Selection/promotion order dated 8th July, 1994 accordingly set aside with further directions – Fresh process of selection to be held by the competent authority in accordance with Rules – Selection by promotion for yearwise vacancies shall be filled in by compliance to r.24(6) – The authorities shall fill 50% of the promotion vacancies purely by merit, for which it will evolve a methodology, either by holding a qualifying examination as was being conducted prior to 1992, or by any other examination which would satisfy the basic criteria of selection by merit – Remaining 50% of the promotion posts shall be filled by seniority-cum-merit for which the departmental DPC shall meet within stipulated time – Secretary (Transport), Government of Rajasthan directed to conduct an enquiry personally and fix responsibility on all the officers/officials responsible for not conducting qualifying examination in accordance with Rules from 1983 to 1994 and subsequent thereto in accordance with law – The vacancies would be clubbed only for the purposes of calculating an arithmetical figure but, will be filled in accordance with yearwise vacancies and considering the officers eligible for promotion to the post of DTO in accordance with seniority cum merit rule for 50% of the promotion post – All remaining 50% posts shall be filled up purely on merit and by holding an examination – Persons already promoted would not be reverted and none of them would be entitled to claim any financial benefits, if they have already retired from the post of DTO – Candidates now

selected in furtherance to the directions contained in the judgment shall not be entitled to any arrears of pay because though their promotion may be relatable to a previous year, such promotion shall be notional without any consequential benefits.

Administrative Law – Rule of fairness – Held: Is an essential feature in Government action.

The issue relating to promotion to the post of District Transport Officer (DTO) from the post of Motor Vehicle Inspectors arose for consideration in the present appeal.

On 13th April, 1992, a notification was issued by the respondents amending the Rajasthan Transport Service Rules, 1979 whereby Schedule 1 and Schedule 2 of the 1979 Rules were amended. Earlier the candidates were required to pass a qualifying examination for the post of DTO. However, by this amendment, the said requirement was deleted under Schedule 1 and syllabus for the same was deleted from Schedule 2. In other words, promotion became possible without holding the said examination for the higher post.

It was alleged before the Service Tribunal that the State of Rajasthan had violated Rules 10 & 24 of the 1979 Rules and that the action of the State government in clubbing all the vacancies of more than 10 years (from 1983-84 till 1993-94) was improper as the respondents were obliged to consider the vacancies in each given year in terms of Rule 10. The State filed reply before the Tribunal stating that though the vacancies had been determined year wise no one had passed the qualifying examination and nobody had been found eligible for promotion upto 1st April, 1994 as per Schedule II of the 1979 Rules; that thereafter, for administrative reasons including the representation made by Rajasthan Transport Inspector's Union, the qualifying examination

was done away with, and appointment/promotion to the post of DTO was made simply by promotion. The further case of the State Government was that vacancies in the post of DTOs could not be filled for want of eligible candidates and, therefore, the vacancies were carried forward for consideration to the subsequent years.

The Tribunal quashed the selection/promotion order dated 8th July, 1994 and directed the State Government to hold review Departmental Promotion Committee (DPC) to determine yearwise vacancies afresh holding that the State Government could not have circumscribed or diluted the provision regarding "year-wise" filling up of vacancies.

The High Court in substance upheld the order of the Service Tribunal and issued certain further directions to the respondents to undertake fresh exercise for promotion to the post of DTO from the post of Motor Vehicle Inspectors. The High Court held that the State Government had given a complete go-bye to the provisions of the relevant Rules; and that mere deletion of the condition of qualifying examination in the year 1992 did not justify the action of the State government in clubbing all the vacancies of more than 10 years (from 1983-84 till 1993-94) and giving promotions to persons making a new zone of consideration and reservation also accordingly. The Court held that clubbing of vacancies could be made only for the purpose of direct recruitment while promotions have to be made on the basis of year wise determination of vacancies to the candidates eligible for the particular year who come in the zone of consideration for the particular year; and that clubbing of vacancies for more than 10 years not only created complications so far as reservation of the posts as per relevant roster were concerned, but entire procedure of zone of consideration for each year was disturbed.

In the instant appeal, the question that arose for consideration was whether by amendment to Schedule I and the deletion of Schedule II of the 1979 Rules the effect of the statutory provisions like Rules 6,10 and 24 of the 1979 Rules read in their plain language stood diluted and the statutory provisions were rendered ineffective and inoperative.

Disposing of the appeal, the Court

HELD:1. The Rajasthan Transport Service Rules, 1979 clearly postulate merit to be the criterion for promotion to higher posts. The vacancies have to be determined as per Rule 10 of the 1979 Rules, on the 1st April of every year. If any fraction of vacancies is left over, after the apportionment of vacancies in the manner prescribed, the same shall be appointed through the quota of various methods prescribed in continuous cyclic order, giving precedence to the promotion quota. Appointing authority has to determine yearwise vacancies of earlier years, which were required to be filled in by promotion if such vacancies were not determined and filled earlier in the year they were required to be filled in, in the subsequent years. The emphasis of the language of these rules is on yearly vacancies and they are required to be filled in with reference to each particular year. The vacancies are required to be determined and filled in as on 1st April of every year, for the vacancies occurring during the financial year, in terms of Rule 10(1)(a). Under Rule 7(1), the requisite vacancies are to be reserved for Scheduled Castes and Scheduled Tribes in accordance with the order of the Government in force at the time of recruitment that is by direct recruitment or by promotion. These vacancies are to be filled by seniority-cum-merit and merit. If the vacancies, for the reasons stated, remained unfilled they can be carried forward only for a limited period of three recruitment years in total, and thereafter such reservation would

lapse, in terms of Rule 7(4) of the 1979 Rules. [Para 20] [25-B-G]

2. Another very important aspect of the Rules is that merit and seniority-cum-merit are the only relevant criteria for promotion to various posts. The language of Rule 24(1) of the 1979 Rules does not allow for any ambiguity and clearly says that a list of senior most persons, who are eligible and qualified under the 1979 Rules, will be prepared and from that list, promotion on the basis of seniority-cum-merit or on the basis of merit to the concerned class of posts will be made. Rule 24(6) of the 1979 Rules further postulates that all other higher posts or higher categories of posts in the Service shall be made on the basis of merit and on the basis of seniority-cum-merit in the proportion of 50:50. If upon merit alone candidates are not available then selection by promotion on the basis of seniority cum merit may be made in the same manner as is specified in the 1979 Rules. On reading of Rule 24 (6), 24(11) and 24 (11A) of the 1979 Rules conjointly, it is clear that promotions have to be made by the DPC by the criteria and procedure for promotion as applicable in that particular year, to which the vacancies relate. The service experience of an incumbent who has been so promoted, for promotion to higher posts for any period during which he has not actually performed the duties of the post to which he would have been promoted, shall be counted. It also requires that pay of a person who has been so promoted shall be re-fixed at the pay scale which he would have derived at the time of his promotion, but no arrears of pay shall be allowed to him. The Government or the appointing authority has the power to order for the review of the proceedings of DPC held earlier on account of some mistake apparent on the face of the record or on account of substantial error affecting the decision of the DPC or even for any other sufficient reason like

change in seniority, wrong determination of vacancies etc. [Para 21] [25-H; 26-A-B]

3. It is a settled principle of law that the Schedule of the 1979 Rules has to be in conformity with, and is required to advance the object of the primary statutory provision. Thus, a schedule cannot in any way wipe out the statutory provisions of the Act in effect and spirit. It is nobody's case, and in fact, nothing has been brought to the notice of this Court, that Rules 6, 10, 11 and 24 of the 1979 Rules have been subjected to any amendment by the competent authority. Once these provisions stand in the statute book, then respondents cannot escape from complying with them in the appropriate manner and without defeating the object of these Rules. The services of the Transport Department in all relevant posts is covered under the provisions of the 1979 Rules and their purpose is to make promotions on merit or merit-cum-seniority. Their prescribed proportion of 50:50 has to be maintained. When Schedule 1 of the 1979 Rules is read along with the above indicated provisions, it is obvious that under Clause 4 of Schedule 1 of the 1979 Rules, 50% posts of DTO are to be filled up by direct recruitment and 50% posts by promotion. [Para 23] [27-B-E]

4. Rule 24(6) of the 1979 Rules mandates that selection for promotion to all other higher posts or higher categories of posts in the Service shall be made on the basis of merit and on the basis of seniority-cum-merit in the proportion of 50:50. In other words, 50% vacancies are to be filled up on the basis of merit while the remaining 50% vacancies in the promotion quota are to be filled up by seniority-cum-merit. The persons have to be within the appropriate position in the seniority list before they can be considered for promotion under the latter category. Eligibility requirements have been specified under the 1979 Rules, which candidates must

satisfy to be considered under the seniority-cum-merit category. The other persons who are to be promoted to the post of DTO are on the basis of merit alone. Even if Schedule II of the 1979 Rules does not exist, it is obligatory on the part of the respondent to evolve a methodology to make promotions purely on merit. Once the framers of the Rules have intended to provide merit as the sole criteria of promotion, the appointing authority is not vested with the jurisdiction to waive the same or completely wipe out the same, on a flimsy excuse such as the one proposed in the present case. [Para 23] [27-E-H; 28-A-B]

5. Right from 1983-84 till 1993-94 no examination has been conducted by the appropriate authority despite the fact that they also issued notifications for holding exams on a few of these occasions. If there was a representation from the Rajasthan Transport Inspector's Union, it cannot be considered as a sufficient cause or reason for not holding the examinations for more than ten years and causing serious prejudice to the candidates who might have been sufficiently meritorious to qualify in the exams and be considered for promotion to 50% of the posts under the promotion quota. It is a matter of regret that a Government can take such a stand before a Court of law and expects the Court to accept such a submission. It is *ex facie* untenable. Once the rules stand clear, the Authority concerned is expected to act in accordance with law and not to defeat the law. One who defeats the law by his unjustifiable and unsustainable acts is liable for the consequences of such default. One fails to understand why the Government and its entire hierarchy had shut its eyes to this gross violation of statutory rules over such a long period. It is a matter of concern that any rule of good governance that an obligation is imposed upon the State to select the best candidates to higher posts and not to frustrate rules

which prescribe merit as this is essential to the process of selection. It is painful to note that the Government has put forward such a flimsy excuse for its inaction and unfortunately the same has weighed with the High Court to some extent, though it has dismissed the appeal of the State. The Government has no justification whatsoever in not holding the qualifying test for a long period of ten years and this is a matter which the hierarchy of the State Government needs to examine and fix responsibility. [Para 24] [28-C-H; 29-A-B]

6. Even after 1993-94, the process of selection adopted by the State Government cannot be accepted. The preparation of seniority list, method of selection and clubbing of vacancies are apparently in violation of the statutory Rules. The Tribunal, in its judgment, has noticed Rule 24(ii) of the 1979 Rules and observed that even if the DPC held together vacancies of several years, yet the vacancy of each year should be determined and also filled up separately. This Court does not approve of the observations made by the Tribunal that on the one hand the department has treated the rules as sacrosanct and on the other hand, right from introduction of the 1979 Rules not even a single examination was held. The fallaciousness in the stand of the Government, is clear from the fact that the representations against the procedure started after 8 to 9 years, but right from the first year i.e. from 1983, there can be no justification for not holding the examination in accordance with the Rules. It appears that the attempt was intended to suppress the rule of selection by merit. The Tribunal failed to notice other provisions of the relevant rules. It finally quashed the selection / promotion order dated 8th July, 1994 and issued direction to hold review DPC within the specified time by filling yearwise vacancies. One direction of the Tribunal, as is appearing from its order, certainly cannot be sustained. The Tribunal could not

have directed that 'ideally the notification dated 13.4.1992 should be amended retrospectively'. It is not clear whether the Tribunal meant that this notification should be given effect to retrospectively, in relation to the vacancies from of 1983-84, or that the said notification itself should be amended. This ambiguity was entirely uncalled for. [Para 25] [29-B-H; 30-A]

Vinod Kumar Sangal v. *Union of India* **(1995) 4 SCC 246: 1995 (3) SCR 734 and** *B.L. Gupta* v. *M.C.D.* **(1998) 9 SCC 223 – referred to.**

7. The High Court referred to the Rules to some extent and to the fact that for one vacancy, 5 eligible persons are required to be considered and for 2 vacancies, 8 eligible persons should be considered; and that such proportion in accordance with the zone of consideration as specified under Rule 24(6) of the 1979 Rules should be maintained. The High Court also referred to the judgment of this Court in coming to the conclusion that clubbing of vacancies was not proper, and that such a course could be adopted only in the case of direct recruitment. The High Court directed the making a completely fresh exercise and directed that the persons already promoted were not to be demoted but promotion be made yearwise. Though for somewhat different reasons, partially accepting the findings recorded by the Tribunal, this Court accepts some of the findings of the Tribunal and the High Court; but the conclusions arrived at cannot be accepted in their entirety. This Court is not only concerned with promotion or otherwise of any relief to the appellants or any persons in service but must also ensure that Rules are implemented and selection is made strictly in accordance with such Rules. Also this Court cannot ignore the fact that a Government servant gets a right, (though not indefeasible right), to be considered for promotion to the appropriate post to which he is eligible and entitled, in accordance with law. [Para 26] [30-B-G]

Union of India and Another v. Hemraj Singh Chauhan and others **(2010) 4 SCC 290: 2010 (3) SCR 755 – referred to.**

8. It is equally true that the rule of fairness in Government action is an essential feature. However, such fairness has to be founded on reasons. Usually, the providing of reasons demonstrates the concept of reasonableness but where the statutory rules provide the circumstances and criteria, ambit and methods by which the selection should be governed, they would become the yardstick of fairness. [Para 27] [31-C-D]

Manager Government Branch Press and Anr. v. D.B. Belliappa **(1979) 1 SCC 477: 1979 (2) SCR 458 – referred to.**

9. In the instant case, in view of the infirmities and illegalities from which the selection process suffers, this Court, though for different reasons, has come to the same conclusion as the High Court while also issuing directions. Therefore, while setting aside the selection/ promotion order dated 8th July, 1994, this Court further issues the following directions for strict compliance by all the authorities concerned and without any further delay: 1) Fresh process of selection shall be held by the competent authority in accordance with Rules, as expeditiously as possible and in any case not later than three months; 2) The selection by promotion for the yearwise vacancies shall be filled in by compliance to Rule 24(6) of the 1979 Rules. The authorities shall fill 50% of the promotion vacancies purely by merit, for which it will evolve a methodology, either by holding a qualifying examination as was being conducted prior to 1992, or by any other examination which would satisfy the basic criteria of selection by merit. 3) Remaining 50% of the promotion posts shall be filled by seniority-cum-

merit for which the departmental DPC shall meet within the stipulated time as afore-directed. 4) The Secretary (Transport), Government of Rajasthan is hereby directed to conduct an enquiry personally and fix responsibility on all the officers/officials responsible for not conducting qualifying examination in accordance with Rules from 1983 to 1994 and subsequent thereto in accordance with law. In other words, the officers must be held responsible for their lapses and be punished in accordance with law. 5) The vacancies would be clubbed only for the purposes of calculating an arithmetical figure but, will be filled in accordance with yearwise vacancies and considering the officers eligible for promotion to the post of DTO in accordance with seniority cum merit rule for 50% of the promotion post. 6) All remaining 50% posts shall be filled up purely on merit and by holding an examination. 7) The persons who have already been promoted would not be reverted and none of them would be entitled to claim any financial benefits, if they have already retired from the post of DTO. 8) The candidates now selected in furtherance to the directions contained in the judgment shall not be entitled to any arrears of pay because though their promotion may be relatable to a previous year, such promotion shall be notional without any consequential benefits. [Para 28] [31-E-H; 32-A-H; 33-A-B]

Case Law Reference:

1995 (3) SCR 734	**referred to**	**Para 25**
(1998) 9 SCC 223	**referred to**	**Para 25**
2010 (3) SCR 755	**referred to**	**Para 26**
1979 (2) SCR 458	**referred to**	**Para 27**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 5102-5103 of 2011.

From the Judgment & Order dated 17.4.2009 of the High Court of Judicature for Rajasthan at Jaipur Bench, Jaipur in D.B. Civil Special Appeal No. 1069 of 2006 and D.B. Civil Special Appeal No. 1364 of 2008.

M.R. Calla, Charu Mathur for the Appellant.

Dr. Manish Singhvi, AAG, R.N. Mathur, R. Gopalakrishnan, Bina Madhavan, Banwari Sharma (for Lawyer's Knit & Co.) for the Respondents.

The Judgment of the Court was delivered by

SWATANTER KUMAR J. 1. Leave granted.

2. These appeals are directed against the common judgment of the High Court of Judicature of Rajasthan, Jaipur Bench, at Jaipur dated 17th April, 2009 whereby the High Court in substance upheld the order of the Rajasthan Civil Services Appellate Tribunal, Jaipur (in short the 'Tribunal') dated 8th February,1999 and issued certain further directions to the respondents to undertake fresh exercise for promotion to the post of District Transport Officer (in short the 'DTO') from the post of Motor Vehicle Inspectors. At the very outset we may refer to the relevant part of the Division Bench judgment dealing with the subject in question and issuing the directions which reads as under:

> "There cannot be any dispute and as has been decided by the Apex Court that clubbing of vacancies could be made only for the purpose of direct recruitment. However, promotions have to be made on the basis of year wise determination of vacancies to the candidates eligible for the particular year who come in the zone of consideration for the particular year as also been referred above. In the present case, it appears that State Government had given a complete go-bye to the provisions of the relevant Rules and while clubbing the vacancies from 1983-84 fill 1993-

> 94, the promotions have been made accordingly. The clubbing of vacancies for more than 10 years have not only created complications so far as reservation of the posts as per relevant roster are concerned, but entire procedure of zone of consideration for each hear have been disturbed. Merely deletion of the condition of qualifying examination in the year 1992 will not justify the action of the State government in clubbing all the vacancies of more than 10 years and give promotions to persons making a new zone of consideration and reservation also accordingly. On the face of it the whole action of the State Government cannot be sustained in the eyes of law. More so when it is also not a case of one time promotion which also require a special notification and amendment in the Rules.
>
> Having considered entire facts and circumstances, since after due consideration proper discretion has been used by the learned Tribunal as also learned Single Judge, we find no ground for any further interference. The appellant State may now make a complete fresh exercise as per directions of the Tribunal as early as possible preferably within four months. It is further made clear that persons already promoted shall not be demoted till the exercise is made and fresh orders of promotions on the basis of yearwise determination of vacancies are passed. In case any person is not found suitable for the particular year and have already been given benefit of promotion, in case of reversion or change of year of promotion, the salary already paid, may not be recovered, however, pay fixation has to be made accordingly. If any person has retired during the intervening period, his retiral benefits already paid on the basis of last pay drawn may also not be recovered except for revision of pension if required.
>
> With the above observations and direction, the appeals are disposed of accordingly."

3. In order to examine the challenge to the impugned judgment in its proper perspective, it will be useful for us to refer to the basic facts giving rise to the present appeal. The appellant belongs to a Scheduled Caste and was initially appointed as a Motor Vehicle Sub-Inspector vide order dated 23rd August, 1980. He was confirmed in this post on 3rd May, 1983 whereafter, he was promoted upon his satisfactory performance of his duties to the post of Motor Vehicle Sub Inspector through Departmental Promotion Committee (in short the 'DPC') on the principle of seniority-cum-merit vide order dated 20th January, 1987. He was thereafter regularized in the said post on 15th October, 1988. On 13th April, 1992, a notification was issued by the respondents amending the Rajasthan Transport Service Rules, 1979 (in short the '1979 Rules') (marked as annexure P-5 to the Petition). By this amendment, Schedule 1 and Schedule 2 of the 1979 Rules to the existing Rules were amended. The Notification read as under:

> "In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Rajasthan hereby makes the following amendments with immediate effect in the Rajasthan Transport Service Rules, 1979m namely:
>
> AMENDMENT
>
> In the said rules:-
>
> 1. Amendment of Schedule-1:
>
> (i) the existing entries at item
>
> (ii) occurring in column 6 against to S.No. 4 shall be deleted.
>
> 2. The existing Schedule II shall be deleted."

4. As is evident from the above Schedule, earlier the

candidates were required to pass the qualifying examination for the post of District Transport Officer. However, by this amendment, the said requirement was deleted under Schedule 1 and syllabus for the same was deleted from Schedule 2. In other words, promotion would be possible without holding the said examination for the higher post.

5. On 27th May, 1994 a seniority list of Motor Vehicle Inspectors was issued. On the basis of this seniority list, a number of persons, including the appellant, were promoted to the post of District Transport Officer vide order dated 8th July, 1994. One Shri Pooran Singh, respondent No.2 belonging to the General Category, who was holding the post of Motor Vehicle Inspector in the Transport Department, preferred an appeal before the Tribunal against the order dated 8th July, 1994. According to him, he was senior to the persons who were promoted by that order and this was a supercession, contrary to the 1979 Rules. Therefore, it was to be declared as illegal and unjustifiable. He also prayed for consequential reliefs.

6. Another contention raised before the Tribunal was that the State of Rajasthan violated Rules 10 & 24 of the 1979 Rules and hence, the exercise of the State was arbitrary and discriminatory. The clubbing of the vacancies from the years 1983-84 to 1993-94 was for the total 21 vacancies, which was improper as the respondents were obliged to consider the vacancies in each given year in terms of Rule 10. According to the challenge raised before the Tribunal, out of the 17 promotees from the Motor Vehicle Inspector cadre, 10 from general category were actually senior to Pooran Singh but the candidates at serial nos.12 to 17 belonging to the Scheduled Castes, were junior to him. He was at serial No.23 of the seniority list and as such was entitled to promotion in preference to those candidates. The State filed a reply before the Tribunal and stated that though the vacancies had been determined year wise no one had passed the qualifying

examination and nobody had been found eligible for promotion upto 1st April, 1994 as per Schedule II of the 1979 Rules. Thereafter, for administrative reasons including the representation made by Rajasthan Transport Inspector's Union, the qualifying examination was done away with, as already referred, and appointment/promotion to the post of DTO was made simply by promotion. 21 vacancies became available and out of that 4 persons have already been promoted, leaving a balance of 17 vacancies. Out of these 17 vacancies, 5 vacancies were reserved for Scheduled Castes, 3 for Scheduled Tribes candidates and the remaining vacancies were clubbed and promotions were made on the basis of seniority cum merit. The detail of the yearwise vacancies are as follows:

Year	**Vacancies**
1983-84	2
1984-85	2
1985-86	1
1986-87	2
1987-88	2
1988-89	1
1989-90	1
1990-91	1
1991-92	2
1992-93	1
1993-94	2

7. It was further the case of the State that the vacancies

have to be carried forward from year to year and in want of eligible candidates, vacancies could not be filled in accordance with rules. It was further urged by the State that the vacancies in the post of DTOs could not be filled for want of eligible candidates and, therefore, the vacancies were carried forward for consideration to the subsequent years. It is also averred in the petition that the High Court had passed a judgment on 7th April, 1997 in SBCW No. 3423 of 1995 titled *Hiral Lal Joshi* v. *State* directing that Review DPC be held with regard to vacancies for the year 1993-94 to 1996-97 and then the appointments were made, however, averments with regard to supercession of Pooran Singh was denied.

8. Vide order dated 8th February, 1999, the appeal filed by Pooran Singh was set aside by the Tribunal, and the operative part of the judgment reads as under:

> "In the light of the above discussion, Annexure-6 dated 8.7.1994 is quashed and the State Government is directed to hold review DPC within two months to determine yearwise vacancies afresh. The State Government has already indicated yearwise vacancies in page 2 of its reply. The review DPC should be convened year wise and the promotion be done on the basis of year wise vacancies only. Since the departmental examinations were not organized by State Government from time (sic) and then that provision was deleted therefore, no candidate for any particular year should be treated to be unqualified on account of not clearing the departmental examination. Ideally the notification dated 13.4.1992 should be amended retrospectively but even if it is not done so, the State Government cannot circumscribe or dilute the provision regarding "year-wise" filling up of vacancies.
>
> In the net result this appeal succeeds and is accepted. The State Government would pay the cost to the Appellant which is determined at Rs.1000/-."

9. This order of the Tribunal dated 8th February, 1999 was challenged by the State Government before the High Court. The High Court vide its order dated 18th July, 2005 passed in Civil Writ Petition No. 2111 of 1999, dismissed the Writ Petition and maintained the direction to the State Government to hold review DPC. Another writ petition was also filed by private persons being Writ Petition No. 1025 of 1999 which was also dismissed vide order dated 23rd July, 2008. It may be noticed here that reversion of Pooran Singh-petitioner was stayed by an interim order. Later he sought voluntary retirement and retired. However, appellant Jagdish Prasad was promoted as Assistant Transport Commissioner vide order dated 24th January, 2003.

10. Against the order passed by the learned Single Judge, as afore-noticed, the appellant preferred an appeal before the Division Bench of that High Court. All these appeals came to be dismissed by the Division Bench vide its order dated 17th April, 2009, the relevant portion of which has already been reproduced above.

11. The judgment of the Division Bench is impugned in the present appeal. Before we proceed to discuss the contentions in relation to the factual matrix of the case, it will be useful to examine the scheme of the 1979 Rules. The 1979 Rules had been notified vide notification of December, 1979. In terms of Rule 2(e) of the 1979 Rules, 'Direct Recruitment' means recruitment made in accordance with Part IV of the 1979 Rules.

12. Rule 2(k) of the 1979 Rules contemplates that 'Service' or 'Experience', wherever prescribed in these Rules, as a condition for promotion from one service to another, or within the service from one category to another, or to senior posts in the case of a person holding a lower post eligible for promotion to higher post, shall include the period for which the person has continuously worked on such lower post after regular selection in accordance with Rules promulgated under proviso to Article 309 of the Constitution of India.

13. Rule 7 of the 1979 Rules deals with Reservation of vacancies for the Scheduled Castes and the Scheduled Tribes. Such reservation has to be made in accordance with the orders of the Government for such reservation in force at the time of recruitment i.e. by direct recruitment and by promotion. Furthermore Rule 7(4) of the 1979 Rules requires that appointments shall be made strictly in accordance with the rosters prescribed separately for direct recruitment and promotion. In the event of non-availability of the eligible and suitable candidates amongst the Scheduled Castes and the Scheduled Tribes, as the case may be, in a particular year, the vacancies so reserved for them shall be filled in accordance with the normal procedure and an equivalent number of additional vacancies shall be reserved in the subsequent year. Such of the vacancies which remain so unfilled shall be carried forward to the subsequent three recruitment years in total and thereafter such reservation would lapse, provided that there shall be no carry forward of the vacancies in the post or class/ category/group of posts in any cadre of service to which promotions are made on the basis of both by merit and by seniority-cum-merit under these Rules.

14. The proviso to Rule 7(4) of the 1979 Rules obviously restricts the application of carry forward. How the vacancies are to be determined has been specified in Rule 10 of the 1979 Rules and the same reads as under:

> "10. "Determination of vacancies:- (1)(a) Subject to the provisions of these Rules, the Appointing Authority shall determine on 1st April every year, the actual number of vacancies occurring during the financial year.
>
> (b) Where a post is to be filled in by a single method as prescribed in the rule or Schedule, the vacancies so determined shall be filled in by that method.
>
> (c) Where a post is to be filled in by more than one method

as prescribed in the rules or Schedule, the apportionment of vacancies, determined under clause (a) above, to each such method shall be done maintaining the prescribed proportion for the overall number of posts already filled in. If any fraction of vacancies is left over, after apportionment of the vacancies in the manner prescribed above, the same shall be apportioned to the quota of various methods prescribed as a continuous cyclic order giving precedence to the promotion quota.

(2) The Appointing Authority shall also determine the vacancies of earlier years, yearwise which were required to be filled in by promotion, if such vacancies were not determined and filled earlier in the year in which they were required to be filled in."

15. Procedure for Direct recruitment is dealt with in Part –IV of the 1979 Rules, which requires inviting of applications, scrutiny of applications, recommendations of the Commission, disqualifications for appointment and selection by the Appointing Authority.

16. Part-V of the 1979 Rules deals with 'Procedure for Recruitment by Promotion' with which we are primarily concerned in the present case.

17. Rule 24 of the 1979 Rules provides Criteria, Eligibility and Procedure for Promotion to Junior, Senior and other posts encadred in the Service.

18. It is not necessary for us to re-produce the entire Rule 24 of the 1979 Rules. It would suffice to refer to the relevant part of the said Rule 24 of the 1979 Rules which is as follows:

"24. Criteria, Eligibility and Procedure for Promotion to Junior, Senior and other posts encadred in the service:- (1) As soon as the Appointing Authority determines the number of vacancies under rule 10 and decides that a

certain number of posts are required to be filled in by promotion, the Appointing Authority shall, subject to provisions of sub-rule (9), prepare a correct and complete list of the senior-most persons who are eligible and qualified under these Rules for promotion on the basis of seniority cum-merit or on the basis of merit to the class of posts concerned.

(2) The persons enumerated in Column 5 of Schedule-1 shall be eligible for promotion to posts specified against them in Column 2 thereof to the extent indicated in Column 3 subject to their possessing minimum qualifications and experience on the first day of the month of April of the year of selection as specified in Column 6.

XXX XXX XXX

(6) Selection for promotion to all other higher posts or higher categories of posts in the Service shall be made on the basis of merit and on the basis on seniority-cum-merit in the proportion of 50:50.

Provided that if the Committee is satisfied that suitable persons are not available for selection by promotion strictly on the basis of merit in a particular year, selection by promotion on the basis of seniority-cum-merit may be made in the same manner as specified in these Rules.

XXX XXX XXX

(11) If in any subsequent year, after promulgation of these Rules, vacancies relating to any earlier year are determined under sub-rule (2) of rule relating to determination of vacancies which were required to be filled by promotion, the Departmental Promotion Committee shall consider the cases of all such persons who would have been eligible in the year to which the vacancies relate

irrespective of the year in which the meeting of the Departmental Promotion Committee is held and such promotions shall be governed by the criteria and procedure for promotion as was applicable in the particular year to which the vacancies relate and the service/experience of an incumbent who has been so promoted, for promotion to higher post for any period during which he has not actually performed the duties of the post to which he would have been promoted, shall be counted. The pay of a person who has been so promoted shall be re-fixed at the pay which he would have derived at the time of his promotion but no arrears of pay shall be allowed to him.

(11A) The Government or the Appointing Authority may order for the review of the proceedings of the D.P.C. held earlier on account of some mistake or error apparent on the face of record, or on account of a factual error substantially affecting the decision of the D.P.C. or for any other sufficient reasons e.g. change in seniority, wrong determination of vacancies, judgment/direction of any Court or Tribunal, or where adverse entries in the Confidential Reports of an individual are expunged or toned down or a punishment inflicted on him is set aside or reduced. The concurrence of the Department of Personnel and the Commission (where Commission is associated) shall always be obtained before holding the meeting of the review D.P.C."

19. Schedule I of the 1979 Rules provided for Post, Sources of recruitment, Qualification for Direct recruitment and Post from which promotion is to be made. Clause 4 of Schedule I of the 1979 Rules deals with the Post of DTO which reads as under, after amendment:

S. No.	Name of the post	Sources recruit-ment with percen-tage	Minimum qualification for direct recruitment	Post from which promotion is to be made	Qualifications and experience for promotion	Remarks
4.	District Transport Officer	50% by direct recruit-ment and 50% by promotion	Degree in Science Commerce, Arts or Engineering from a recognized Univer-sity established by law in India or declared equivalent thereto by the Government.	Motor vehicle Inspector	(i) 5 years' experience in the post mentioned in Column5. +(ii) Deleted	(i) Service rendered against the post of Sales Tax Inspector or Inspector Excise and Taxation prior to posting in the Transport Department or Motor Vehicle Inspector shall count in computing the period of 5 years' service as Motor Vehicle Inspector. (ii)Till directly recruited candidates are not available posts may be filled up from amongst the Rajasthan Administrative officers or Officers of any other State Service or Rajasthan Tehsildar Service.

20. As it is evident prior to the amendment, the expression used in the Schedule was *"in addition to the above must have passed qualifying examination as prescribed in Schedule – II"* This was notified to be deleted from the Rules vide Notification dated 13 April, 1992. Consequentially, Schedule II of the 1979 Rules was also amended and the syllabus provided for this qualifying examination was deleted in its entirety. If we analyse the above Rules in their correct perspective, it becomes evident that the Rules clearly postulate merit to be the criterion for promotion to higher posts. The vacancies have to be determined as per Rule 10 of the 1979 Rules, on the 1st April of every year. If any fraction of vacancies is left over, after the apportionment of vacancies in the manner prescribed, the same shall be appointed through the quota of various methods prescribed in continuous cyclic order, giving precedence to the promotion quota. Appointing authority has to determine yearwise vacancies of earlier years, which were required to be filled in by promotion if such vacancies were not determined and filled earlier in the year they were required to be filled in, in the subsequent years. In other words, the emphasis of the language of these rules is on yearly vacancies and they are required to be filled in with reference to each particular year. The vacancies are required to be determined and filled in as on 1st April of every year, for the vacancies occurring during the financial year, in terms of Rule 10(1)(a). Under Rule 7(1), the requisite vacancies are to be reserved for Scheduled Castes and Scheduled Tribes in accordance with the order of the Government in force at the time of recruitment that is by direct recruitment or by promotion. These vacancies are to be filled by seniority-cum-merit and merit. If the vacancies, for the reasons stated, remained unfilled they can be carried forward only for a limited period of three recruitment years in total, and thereafter such reservation would lapse, in terms of Rule 7(4) of the 1979 Rules.

21. Another very important aspect of the Rules is that merit and seniority-cum-merit are the only relevant criteria for

promotion to various posts. The language of Rule 24(1) of the 1979 Rules does not allow for any ambiguity and clearly says that a list of senior most persons, who are eligible and qualified under the 1979 Rules, will be prepared and from that list, promotion on the basis of seniority-cum-merit or on the basis of merit to the concerned class of posts will be made. Rule 24(6) of the 1979 Rules further postulates that all other higher posts or higher categories of posts in the Service shall be made on the basis of merit and on the basis on seniority-cum-merit in the proportion of 50:50. If upon merit alone candidates are not available then selection by promotion on the basis of seniority cum merit may be made in the same manner as is specified in the 1979 Rules. On reading of Rule 24 (6), 24(11) and 24 (11A) of the 1979 Rules conjointly, it is clear that promotions have to be made by the DPC by the criteria and procedure for promotion as applicable in that particular year, to which the vacancies relate. The service experience of an incumbent who has been so promoted, for promotion to higher posts for any period during which he has not actually performed the duties of the post to which he would have been promoted, shall be counted. It also requires that pay of a person who has been so promoted shall be re-fixed at the pay scale which he would have derived at the time of his promotion, but no arrears of pay shall be allowed to him. The Government or the appointing authority has the power to order for the review of the proceedings of DPC held earlier on account of some mistake apparent on the face of the record or on account of substantial error affecting the decision of the DPC or even for any other sufficient reason like change in seniority, wrong determination of vacancies etc.

22. The first and the foremost question that arises for consideration by this Court is whether merely by the amendment to Schedule I and the deletion of Schedule II of the 1979 Rules the effect of the statutory provisions like Rules 6,10, 24 of the 1979 Rules read in their plain language would stand diluted. Can it be argued that amendment to these schedules renders

the statutory provisions ineffective and inoperative?

23. It is a settled principle of law that the Schedule of the 1979 Rules has to be in conformity with, and is required to advance the object of the primary statutory provision. Thus, a schedule cannot in any way wipe out the statutory provisions of the Act in effect and spirit. It is nobody's case, and in fact, nothing has been brought to our notice, that Rules 6, 10, 11 and 24 of the 1979 Rules have been subjected to any amendment by the competent authority. Once these provisions stand in the statute book, then respondents cannot escape from complying with them in the appropriate manner and without defeating the object of these Rules. We have already discussed the scheme of the Act, which shows that the services of the Transport Department in all relevant posts is covered under the provisions of the 1979 Rules and their purpose is to make promotions on merit or merit-cum-seniority. Their prescribed proportion of 50:50 has to be maintained. When Schedule 1 of the 1979 Rules is read along with the above indicated provisions, it is obvious that under Clause 4 of Schedule 1 of the 1979 Rules, 50% posts of DTO are to be filled up by direct recruitment and 50% posts by promotion. Now, the question is how the 50% promotions are to be filled up by the respondents. Rule 24(6) of the 1979 Rules mandates that selection for promotion to all other higher posts or higher categories of posts in the Service shall be made on the basis of merit and on the basis of seniority-cum-merit in the proportion of 50:50. In other words, 50% vacancies are to be filled up on the basis of merit while the remaining 50% vacancies in the promotion quota are to be filled up by seniority-cum-merit. The persons have to be within the appropriate position in the seniority list before they can be considered for promotion under the latter category. Eligibility requirements have been specified under the 1979 Rules, which candidates must satisfy to be considered under the seniority-cum-merit category. The other persons who are to be promoted to the post of DTO are on the basis of merit alone.

Even if Schedule II of the 1979 Rules does not exist, it is obligatory on the part of the respondent to evolve a methodology to make promotions purely on merit. Once the framers of the Rules have intended to provide merit as the sole criteria of promotion, the appointing authority is not vested with the jurisdiction to waive the same or completely wipe out the same, on a flimsy excuse such as the one proposed in the present case.

24. In light of this, we now come to the conduct of the Government which we cannot but help to comment upon. Right from 1983-84 till 1993-94 no examination has been conducted by the appropriate authority despite the fact that they also issued notifications for holding exams on a few of these occasions. If there was a representation from the Rajasthan Transport Inspector's Union, it cannot be considered as a sufficient cause or reason for not holding the examinations for more than ten years and causing serious prejudice to the candidates who might have been sufficiently meritorious to qualify in the exams and be considered for promotion to 50% of the posts under the promotion quota. It is a matter of regret that a Government can take such a stand before a Court of law and expects the Court to accept such a submission. It is *ex facie* untenable. Once the rules stand clear, the Authority concerned is expected to act in accordance with law and not to defeat the law. One who defeats the law by his unjustifiable and unsustainable acts is liable for the consequences of such default**.** We fail to understand why the Government and its entire hierarchy had shut its eyes to this gross violation of statutory rules over such a long period. It is a matter of concern that any rule of good governance that an obligation is imposed upon the State to select the best candidates to higher posts and not to frustrate rules which prescribe merit as this is essential to the process of selection. It is painful to note that the Government has put forward such a flimsy excuse for its inaction and unfortunately the same has weighed with the High Court to some extent, though it has dismissed the appeal of

the State. We have no hesitation in observing that the Government has no justification whatsoever in not holding the qualifying test for a long period of ten years and this is a matter which the hierarchy of the State Government needs to examine and fix responsibility.

25. Even after 1993-94, the process of selection adopted by the State Government cannot be accepted. The preparation of seniority list, method of selection and clubbing of vacancies are apparently in violation of the statutory Rules as afore-noticed. The Tribunal, in its judgment, has noticed Rule 24(ii) of the 1979 Rules and observed that even if the DPC held together vacancies of several years, yet the vacancy of each year should be determined and also filled up separately. In this regard the reference was also made to the judgment of this Court in the case of *Vinod Kumar Sangal v. Union of India* [(1995) 4 SCC 246]. We do approve of the observations made by the Tribunal that on the one hand the department has treated the rules as sacrosanct and on the other hand, right from introduction of the 1979 Rules not even a single examination was held. The fallaciousness in the stand of the Government, to our mind, is clear from the fact that the representations against the procedure started after 8 to 9 years, but right from the first year i.e. from 1983, there can be no justification for not holding the examination in accordance with the Rules**.** It appears that the attempt was intended to suppress the rule of selection by merit. The Tribunal failed to notice other provisions of the relevant rules. While referring to the judgment of this Court in the case of *B.L. Gupta v. M.C.D.* [(1998) 9 SCC 223], it finally quashed the order dated 8th July, 1994 and issued direction to hold review DPC within the specified time by filling yearwise vacancies. One direction of the Tribunal, as is appearing from its order, certainly cannot be sustained. The Tribunal could not have directed that 'ideally the notification dated 13.4.1992 should be amended retrospectively'. It is not clear whether the Tribunal meant that this notification should be given effect to

retrospectively, in relation to the vacancies from of 1983-84, or that the said notification itself should be amended. This ambiguity was entirely uncalled for.

26. The Division Bench, while dealing with the judgment of the learned Single Judge and the Tribunal, referred to the Rules to some extent and to the fact that for one vacancy, 5 eligible persons are required to be considered and for 2 vacancies, 8 eligible persons should be considered; and that such proportion in accordance with the zone of consideration as specified under Rule 24(6) of the 1979 Rules should be maintained. The High Court also referred to the judgment of this Court in coming to the conclusion that clubbing of vacancies was not proper, and that such a course could be adopted only in the case of direct recruitment. The High Court directed the making a completely fresh exercise and directed that the persons already promoted were not be demoted but promotion be made yearwise. Though for somewhat different reasons, partially accepting the findings recorded by the Tribunal, which we have discussed above, we would accept some of the findings of the Tribunal and the High Court; but the conclusions arrived at cannot be accepted in their entirety. We are not only concerned with promotion or otherwise of any relief to the appellants or any persons in service but we must also ensure that Rules are implemented and selection is made strictly in accordance with such Rules. We also cannot ignore the fact that a Government servant gets a right, (though not indefeasible right), to be considered for promotion to the appropriate post to which he is eligible and entitled, in accordance with law. In the case of *Union of India and Another v. Hemraj Singh Chauhan and others* [(2010) 4 SCC 290] this Court while dealing with somewhat similar situation held as under:

> **"35.** The Court must keep in mind the constitutional obligation of both the appellants/Central Government as also the State Government. Both the Central Government and the State Government are to act as model employers,

which is consistent with their role in a welfare State.

36. It is an accepted legal position that the right of eligible employees to be considered for promotion is virtually a part of their fundamental right guaranteed under Article 16 of the Constitution. The guarantee of a fair consideration in matters of promotion under Article 16 virtually flows from guarantee of equality under Article 14 of the Constitution."

27. It is equally true that the rule of fairness in Government action is an essential feature. However, such fairness has to be founded on reasons. Usually, the providing of Reasons demonstrates the concept of reasonableness but where the statutory rules provide the circumstances and criteria, ambit and methods by which the selection should be governed, they would become the yardstick of fairness. In the case of *Manager Government Branch Press and Anr. v. D.B. Belliappa* [(1979) 1 SCC 477], this Court held that the essence of the guarantee under Articles 14 and 16 of the Constitution is 'fairness founded on reasons'.

28. Having discussed in detail the infirmities and illegalities from which the selection process suffers, we, though for different reasons, have come to the same conclusion as the High Court while also issuing directions**.** Therefore, while setting aside the selection/promotion order dated 8th July, 1994, we further issue the following directions for strict compliance by all the authorities concerned and without any further delay:

1. Fresh process of selection shall be held by the competent authority in accordance with Rules, as expeditiously as possible and in any case not later than three months from today;

2. The selection by promotion for the yearwise vacancies shall be filled in by compliance to Rule

24(6) of the 1979 Rules. The authorities shall fill 50% of the promotion vacancies purely by merit, for which it will evolve a methodology, either by holding a qualifying examination as was being conducted prior to 1992, or by any other examination which would satisfy the basic criteria of selection by merit.

3. Remaining 50% of the promotion posts shall be filled by seniority-cum-merit for which the departmental DPC shall meet within the stipulated time as afore-directed.

4. The Secretary (Transport), Government of Rajasthan is hereby directed to conduct an enquiry personally and fix responsibility on all the officers/ officials responsible for not conducting qualifying examination in accordance with Rules from 1983 to 1994 and subsequent thereto in accordance with law. In other words, the officers must be held responsible for their lapses and be punished in accordance with law.

5. The vacancies would be clubbed only for the purposes of calculating an arithmetical figure but, will be filled in accordance with yearwise vacancies and considering the officers eligible for promotion to the post of DTO in accordance with seniority cum merit rule for 50% of the promotion post.

6. All remaining 50% posts shall be filled up purely on merit and by holding an examination.

7. The persons who have already been promoted would not be reverted and none of them would be entitled to claim any financial benefits, if they have already retired from the post of DTO.

8. The candidates now selected in furtherance to the directions contained in the judgment shall not be entitled to any arrears of pay because though their promotion may be relatable to a previous year, such promotion shall be notional without any consequential benefits.

29. The appeals are partially accepted and are disposed of, with no order as to costs, with the directions afore-indicated. All the authorities concerned shall comply with these directions without default and submit their compliance report to the Registry of the High Court within 16 weeks from today.

B.B.B. Appeals disposed of.

DELHI JAL BOARD

v.

NATIONAL CAMPAIGN FOR DIGNITY AND RIGHTS OF SEWERAGE AND ALLIED WORKERS & OTHERS

(Civil Appeal No. 5322 of 2011)

JULY 12, 2011

[G.S. SINGHVI AND ASOK KUMAR GANGULY, JJ.]

Constitution of India, 1950 – Article 226 – Interference under – Judicial review – Petitions filed pro bono publico for protection of the rights of less fortunate and vulnerable sections of the society – Importance of – Safety and protection of workers who undertake jobs inherently dangerous to life – Duty and constitutional obligation of the Court – Respondent no.1, engaged in the welfare of sewage workers, filed writ petition by way of public interest litigation, raising issues relating to safety and protection of sewage workers – Whether the High Court was justified in entertaining the writ petition for compelling the respondents (in the writ petition) to take effective measures for safety of sewage workers and ordering payment of compensation to the families of the victims of accidents taking place during sewage operations – Held: The High Court, by entertaining the writ petition and issuing directions for protection of the persons employed to do work relating to sewage operations, discharged its obligation to do justice to the disadvantaged and poor sections of the society – The superior Courts will be failing in their constitutional duty if they decline to entertain petitions filed by genuine social groups, NGOs and social workers for espousing the cause of those who are deprived of the basic rights available to every human being – It is the duty of the judicial constituent of the State like its political and executive constituents to protect the rights of every citizen and every individual and ensure that everyone is able to live with dignity – Courts are not only entitled but are under constitutional obligation to take

cognizance of the issues relating to the lives of the people who are forced to undertake jobs which are hazardous and dangerous to life – Some time can always be devoted for hearing the grievance of vast majority of silent sufferers whose cause is espoused by bodies like respondent No.1 –Public Interest Litigation – Human Rights – Plight of sewage workers.

Constitution of India, 1950 – Article 226 – Judicial interference – Plight of workers employed/engaged for doing work inherently hazardous and dangerous to life – Constitutional obligation of the State and its agencies/ instrumentalities or the contractors engaged by them – Writ petition filed by respondent No.1 whereupon directions issued by High Court relating to safety and protection of sewage workers – Whether the directions given by the High Court amount to usurpation of the legislative power of the State – Held: It cannot be said that by issuing directions, the High Court assumed the legislative power of the State – What the High Court did was nothing except to ensure that those employed/engaged for doing work which is inherently hazardous and dangerous to life are provided with life saving equipments and the employer takes care of their safety and health – The State and its agencies/ instrumentalities cannot absolve themselves of the responsibility to put in place effective mechanism for ensuring safety of the workers employed for maintaining and cleaning the sewage system – Human beings employed for doing work in the sewers cannot be treated as mechanical robots, who may not be affected by poisonous gases in the manholes – Argument of choice and contractual freedom not available to appellant-public authority and the like for contesting the issues raised by respondent No.1 – Public Interest Litigation – Human Rights – Plight of sewage workers.

Constitution of India, 1950 – Articles 142 and 136 – Enhancement of compensation – Exercise of power u/Article 142 of the Constitution – Death of sewage workers – Writ

Petition – Interim directions of High Court directing payment of compensation of Rs.1.5 to 2.25 lakhs to families of deceased workers – Challenged by appellant – Held: Challenge of appellant not tenable – However, High Court should have awarded compensation which could be treated as reasonable – The High Court could have taken note of the increase in the cost of living and done well to award compensation of atleast Rs.5 lakhs to the families of those who died due to negligence of appellant-public authority which did not take effective measures for ensuring safety of the sewage workers – Public Interest Litigation – Human Rights – Plight of sewage workers.

Public Interest Litigation – Human Rights – Issue relating to safety and protection of sewage workers and their entitlement to grant of compensation – Directions issued by High Court in its earlier order dated 20-8-2008 – Non-compliance with – Held: Directions issued by Supreme Court to appellant-public authority to ensure compliance of clauses (a), (b), (d), (e), (f), (g), (i), (k), (m) and (n) of paragraph 9 of the said High Court order and to also ensure that these directions are complied with by the contractors engaged by it for execution of work relating to laying and maintenance of sewer system within the area of its jurisdiction – Appellant further directed to ensure that directions given by the High Court are made part of all agreements which may be executed by it with contractors/private enterprises for doing work relating to sewage system – Constitution of India, 1950 – Article 136.

Respondent no.1, which is engaged in the welfare of sewage workers, filed Writ Petition in the Delhi High Court highlighting the plight of sewage workers and making various prayers including issue of mandamus directing the respondents (in the petition) to provide every sewage worker with protective gears, clothing and equipments, pay compensation of Rs.10 lacs to the families of the

workers who died after entering the manhole for sewage cleaning and make provision for comprehensive medical checkup of all the sewage workers and provide them medical treatment free of cost along with full wages for the period of illness. The High Court, vide order dated 20-8-2008, passed interim directions pending final disposal of the writ petition and in order to ensure compliance of such directions constituted a Committee and subsequently passed order dated 21-4-2009 directing the appellant-Delhi Jal Board to deposit Rs.79,000/- with the Delhi High Court Legal Services Committee in addition to Rs.1.71 lacs already paid to the families of the deceased sewage workers.

The appellant-Delhi Jal Board contended before this Court that by entertaining the writ petition filed by respondent No.1 in the name of public interest litigation and passing orders dated 20-8-2008 and 21-4-2008, the High Court transgressed the limits of its jurisdiction under Article 226 of the Constitution and usurped the legislative power of the State; and that the High Court committed serious error by directing the appellant to pay compensation to the family of the deceased sewage workers.

The following three questions therefore arose for consideration in the instant appeal: (1)Whether the High Court was justified in entertaining the writ petition filed by respondent No.1 by way of public interest litigation for compelling the respondents (in the writ petition) to take effective measures for safety of sewage workers and ordering payment of compensation to the families of the victims of accidents taking place during sewage operations; (2) Whether the directions given by the High Court amount to usurpation of the legislative power of the State, and (3) Whether the High Court was entitled to issue interim direction for payment of compensation to

the families of deceased workers.

Dismissing the appeal subject to direction regarding the amount of compensation to be paid by the appellant-Delhi Jal Board, the Court

HELD:

Re: Question No.1:

1.1. It cannot be said that by entertaining petitions filed by social action groups/activists/workers and NGOs for espousing the cause of those who, on account of poverty, illiteracy and/or ignorance and similar other handicaps, cannot seek protection and vindication of their constitutional and/or legal rights and silently suffer due to actions and/or omissions of the State apparatus and/or agencies/instrumentalities of the State or even private individuals, the superior Courts exceed the unwritten boundaries of their jurisdictions. [Para 13] [59-H; 60-A-B]

1.2. In last 63 years, Parliament and State Legislatures have enacted several laws for achieving the goals set out in the preamble but their implementation has been extremely inadequate and tardy and benefit of welfare measures enshrined in those legislations has not reached millions of poor, downtrodden and disadvantaged sections of the society and the efforts to bridge the gap between the haves and have-nots have not yielded the desired result. The most unfortunate part of the scenario is that whenever one of the three constituents of the State i.e., judiciary, has issued directions for ensuring that the right to equality, life and liberty no longer remains illusory for those who suffer from the handicaps of poverty, illiteracy and ignorance and directions are given for implementation of the laws enacted by the legislature for the benefit of the have-nots,

a theoretical debate is started by raising the bogey of judicial activism or judicial overreach and the orders issued for benefit of the weaker sections of the society are invariably subjected to challenge in the higher Courts. In large number of cases, the sole object of this litigative exercise is to tire out those who genuinely espouse the cause of the weak and poor. [Para 15] [61-D-G]

1.3. This Court has time and again emphasized the importance of the petitions filed *pro bono publico* for protection of the rights of less fortunate and vulnerable sections of the society. What the High Court has done by entertaining the writ petition and issuing directions for protection of the persons employed to do work relating to sewage operations is part of its obligation to do justice to the disadvantaged and poor sections of the society. The superior Courts will be failing in their constitutional duty if they decline to entertain petitions filed by genuine social groups, NGOs and social workers for espousing the cause of those who are deprived of the basic rights available to every human being, what to say of fundamental rights guaranteed under the Constitution. It is the duty of the judicial constituent of the State like its political and executive constituents to protect the rights of every citizen and every individual and ensure that everyone is able to live with dignity. Given the option, no one would like to enter the manhole of sewage system for cleaning purposes, but there are people who are forced to undertake such hazardous jobs with the hope that at the end of the day they will be able to make some money and feed their family. They risk their lives for the comfort of others. Unfortunately, for last few decades, a substantial segment of the urban society has become insensitive to the plight of the poor and downtrodden including those, who, on account of sheer economic compulsions, undertake jobs/works which are inherently

dangerous to life. People belonging to this segment do not want to understand why a person is made to enter manhole without safety gears and proper equipments. They look the other way when the body of a worker who dies in the manhole is taken out with the help of ropes and cranes. In this scenario, the Courts are not only entitled but are under constitutional obligation to take cognizance of the issues relating to the lives of the people who are forced to undertake jobs which are hazardous and dangerous to life. It will be a tragic and sad day when the superior Courts will shut their doors for those, who without any motive for personal gain or other extraneous reasons, come forward to seek protection and enforcement of the legal and constitutional rights of the poor, downtrodden and disadvantaged sections of the society. If the system can devote hours, days and months to hear the elitist class of eminent advocates who are engaged by those who are accused of evading payment of taxes and duties or otherwise causing loss to public exchequer or who are accused of committing heinous crimes like murder, rape, dowry death, kidnapping, abduction and even acts of terrorism or who come forward with the grievance that their fundamental right to equality has been violated by the State and/or its agencies/instrumentalities in contractual matters, some time can always be devoted for hearing the grievance of vast majority of silent sufferers whose cause is espoused by bodies like respondent No.1. [Paras 16, 20] [61-H; 62-A; 67-D-H; 68-A-F]

People's Union for Democratic Rights v. Union of India **(1982) 3 SCC 235: 1983 (1) SCR 456;** *Hussainara Khatoon (IV) v. State of Bihar* **(1980) 1 SCC 98: 1979 (3) SCR 532;** *Municipal Council, Ratlam v. Vardhichan* **(1980) 4 SCC 162: 1981 (1) SCR 97;** *State of Uttaranchal v. Balwant Singh Chaufal* **(2010) 3 SCC 402: 2010 (1) SCR 678 – relied on.**

Re: Question No.2:

2.1. There have been instances in which this Court has exercised its power under Article 32 read with Article 142 and issued guidelines and directions to fill the vacuum and for ensuring justice to the common man and effective exercise of fundamental rights by the citizens. [Para 21] [68-G-H; 69-A]

2.2. It cannot be said that by issuing directions, the High Court has assumed the legislative power of the State. What the High Court has done is nothing except to ensure that those employed/engaged for doing work which is inherently hazardous and dangerous to life are provided with life saving equipments and the employer takes care of their safety and health. The State and its agencies/instrumentalities cannot absolve themselves of the responsibility to put in place effective mechanism for ensuring safety of the workers employed for maintaining and cleaning the sewage system. The human beings who are employed for doing the work in the sewers cannot be treated as mechanical robots, who may not be affected by poisonous gases in the manholes. The State and its agencies/instrumentalities or the contractors engaged by them are under a constitutional obligation to ensure the safety of the persons who are asked to undertake hazardous jobs. The argument of choice and contractual freedom is not available to the appellant and the like for contesting the issues raised by respondent No.1. [Para 24] [71-F-H; 72-A-B]

Vishaka v. State of Rajasthan **(1997) 6 SCC 241: 1997 (3) Suppl. SCR 404;** *Vineet Narain v. Union of India* **(1998) 1 SCC 226: 1997 (6) Suppl. SCR 595;** *Union of India v. Association for Democratic Reforms* **(2002) 5 SCC 294: 2002 (3) SCR 696 – relied on.**

Re: Question No.3:

3.1. This Court deprecates the attitude of a public authority like the appellant, which used the judicial process for frustrating the effort made by respondent No.1 for getting compensation to the workers, who died due to negligence of the contractor to whom the work of maintaining sewage system was outsourced. This Court also expresses its dismay that the High Court thought it proper to direct payment of a paltry amount of Rs.1.5 to 2.25 lakhs to the families of the victims. [Para 25] [72-C-E]

3.2. In view of the law laid down in the earlier judgments of this Court, the appellant's challenge to the interim directions given by the High Court for payment of compensation to the families of the workers deserves to be rejected. However, the High Court should have awarded compensation which could be treated as reasonable. The High Court could have taken note of the increase in the cost of living and done well to award compensation of atleast Rs.5 lacs to the families of those who died due to negligence of the public authority like the appellant who did not take effective measures for ensuring safety of the sewage workers. This Court could have remitted the case to the High Court for passing appropriate order for payment of enhanced compensation but keeping in view the fact that further delay would add to the miseries of the family of the victims, this Court deems it proper to exercise power under Article 142 of the Constitution and direct the appellant to pay a sum of Rs.3.29 lakhs to the family of the victim through Delhi High Court State Legal Services Committee. This would be in addition to Rs.1.71 lakhs already paid by the contractor. The appellant shall be entitled to recover the additional amount from the contractor. Respondent No.1 shall also be entitled to file

appropriate application before the High Court for payment of enhanced compensation to the families of other victims. [Paras 30, 31] [81-D; 81-F-H; 82-A-C]

3.3. With a view to obviate further delay in implementation of the directions contained in the first order passed by the High Court on 20.8.2008, the appellant is directed to ensure compliance of clauses (a), (b), (d), (e), (f), (g), (i), (k), (m) and (n) of paragraph 9 of the order and submit a report to the High Court. The appellant shall also ensure that these directions are complied with by the contractors engaged by it for execution of work relating to laying and maintenance of sewer system within the area of its jurisdiction. A report to this effect be also submitted to the High Court. Additionally, it is directed that in future the appellant shall ensure that the directions already given by the High Court and which may be given hereafter are made part of all agreements which may be executed with contractors/private enterprises for doing work relating to sewage system. The said directions, however, do not imply that the appellant and other agencies/instrumentalities of the State like New Delhi Municipal Council, Municipal Corporation of Delhi, Delhi State Industrial Development Corporation are not required to comply with the directions given by the High Court. Rather, they too shall have to submit similar reports. As regards the other clauses of paragraph 9 of order dated 20.8.2008, the High Court may give necessary directions so that they are complied with and implemented by the State and its agencies/instrumentalities without any delay. [Paras 32, 33, 34] [82-C-H; 83-A]

Rudul Sah v. State of Bihar **(1983) 4 SCC 141: 1983 (3) SCR 508;** *Nilabati Behera v. State of Orissa* **(1993) 2 SCC 746: 1993 (2) SCR 581;** *Paschim Banga Khet Mazdoor Samity v. State of W.B.* **(1996) 4 SCC 37: 1996 (2) Suppl. SCR 331;** *Chairman, Railway Board v. Chandrima Das*

(2000) 2 SCC 465: 2000 (1) SCR 480; *Common Cause, A Registered Society v. Union of India* **(1999) 6 SCC 667: 1999 (3) SCR 1279;** *State of Rajasthan v. Vidhyawati* **AIR 1962 SC 933: 1962 Suppl. SCR 989;** *State of Gujarat v. Memon Mahomed Haji Hasam* **AIR 1967 SC 1885: 1967 SCR 938;** *Basavva Kom Dyamangouda Patil v. State of Mysore* **(1977) 4 SCC 358;** *N. Nagendra Rao and Company v. State of A.P.* **(1994) 6 SCC 205: 1994 (3) Suppl. SCR 144;** *State of Maharasthra v. Kanchanmala Vijaysing Shirke* **(1995) 5 SCC 659: 1995 (3) Suppl. SCR 1;** *M.S. Grewal v. Deep Chand Sood* **(2001) 8 SCC 151: 2001 (2) Suppl. SCR 156;** *D.K. Basu v. State of W.B.* **(1997) 1 SCC 416: 1996 (10) Suppl. SCR 284;** *MCD v. Assn. of Victims of Uphaar Tragedy and others* **(2005) 9 SCC 586 – relied on.**

Case Law Reference:

1983 (1) SCR 456	**relied on**	**Para 16**
1979 (3) SCR 532	**relied on**	**Para 17**
1981 (1) SCR 97	**relied on**	**Para 18**
2010 (1) SCR 678	**relied on**	**Para 19**
1997 (3) Suppl. SCR 404	**relied on**	**Para 21**
1997 (6) Suppl. SCR 595	**relied on**	**Para 21,22**
2002 (3) SCR 696	**relied on**	**Para 21, 23**
1983 (3) SCR 508	**relied on**	**Para 25, 28**
1993 (2) SCR 581	**relied on**	**Para 26, 28**
1996 (2) Suppl. SCR 331	**relied on**	**Para 26**
2000 (1) SCR 480	**relied on**	**Para 27, 30**
1999 (3) SCR 1279	**relied on**	**Para 27**
1962 Suppl. SCR 989	**relied on**	**Para 27**
1967 SCR 938	**relied on**	**Para 27**

(1977) 4 SCC 358	**relied on**	**Para 27**
1994 (3) Suppl. SCR 144	**relied on**	**Para 27**
1995 (3) Suppl. SCR 1	**relied on**	**Para 27**
2001 (2) Suppl. SCR 156	**relied on**	**Para 28**
1996 (10) Suppl. SCR 284	**relied on**	**Para 28**
(2005) 9 SCC 586	**relied on**	**Para 29**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5322 of 2011.

From the Judgment & Order dated 21.4.2009 of the High Court of Delhi at New Delhi in WP No. 5232 of 2007.

Colin Gonsalves, Abhishek Kumar, Ghanshaym Yadav, Suresh Chandra Tripathy, Ritu Kumar, Jyoti Mendiratta, Asha G. Nair, Varun Sarin, Anil Katiyar, Surya Kant, Sanjiv Sen, Praveen Swarup, Anuja Chopra, Nikhil Goel, Naveen Goel, Marsook Bafaki, A. Venayagam Balan for the appearing parties.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Leave granted.

2. This appeal filed by Delhi Jal Board for setting aside an interlocutory order passed by the Division Bench of the Delhi High Court whereby it has been directed to deposit Rs.79,000/- with Delhi High Court Legal Services Committee in addition to Rs.1.71 lacs already paid to the families of the deceased worker, namely, Rajan is one of the several thousand cases filed by the State and/or its agencies/instrumentalities to challenge the orders passed by the High Courts for ensuring that the goal of justice set out in the preamble to the Constitution of India is fulfilled, at least in some measure, for the disadvantaged sections of the society who have been deprived of fundamental rights to equality, life and liberty for last more than 6 decades. The appeal is also illustrative of how the State apparatus is insensitive to the safety and well being of those who are, on

account of sheer poverty, compelled to work under most unfavourable conditions and regularly face the threat of being deprived of their life.

3. The laws enacted by Parliament and State legislatures provide for payment of compensation to the legal representatives of those killed in air, rail or motor accident. The legal representatives of a workman, who dies while on duty in a factory/industry/establishment get a certain amount of compensation. Even those who are killed in police action get compensation in the form of ex-gratia announced by the political apparatus of the State. However, neither the law makers nor those who have been entrusted with the duty of implementing the laws enacted for welfare of the unorganized workers have put in place appropriate mechanism for protection of persons employed by or through the contractors to whom services meant to benefit the public at large are outsourced by the State and/or its agencies/instrumentalities like the appellant for doing works, which are inherently hazardous and dangerous to life nor made provision for payment of reasonable compensation in the event of death.

4. Since the legal representatives of the persons who work in the sewers laid or maintained by the State and/or its agencies/instrumentalities on their own or through the contractors and who get killed due to negligence of the employer do not have the means and resources for seeking intervention of the judicial apparatus of the State, the National Campaign for Dignity and Rights of Sewerage and Allied Workers, which is engaged in the welfare of sewage workers filed Writ Petition No.5232/2007 in the Delhi High Court to highlight the plight of sewage workers many of whom died on account of contemptuous apathy shown by the public authorities and contractors engaged by them and even private individuals/enterprises in the matter of providing safety equipments to those who are required to work under extremely odd conditions. In paragraphs 4 to 6 and 8 of the petition, the petitioner made the following averments:

"4. That the Petition seeks to highlight the plight of sewage workers in Delhi. Delhi generates large quantities of sewage. At present, the total quantity of sewage generated is 2871 mld. Delhi Jal Board is responsible for treatment and disposal of wastewater through a network of about 5600 km of internal, peripheral and trunk sewers, for which approximately 5500 sewage workers are employed with Delhi Jal Board for maintenance of the sewage system and other related works. The working conditions for sewage workers are such that they are not only exposed to maximum risk against numerous toxic and harmful substances, but also they face suffocation and accidental deaths, while working. These workers suffer from high morality and morbidity due to such exposure at workplace. Hereto marked and annexed as Annexure P-1 are the photographs showing the sewage workers of Delhi as photographed by Indian Express. These photographs tell the sad story of the plight of these workers as of today.

5. Scores of sewage/manhole workers die every year doing this work in Delhi. These deaths are rarely documented. On 7.5.07 it was reported by Navbharat Times that in 2003 the following deaths of manhole workers took place:

Date	Place	Number of Deaths.
22 March	Brahmpuri	1
23 March	Shahdara	2
11 April	Shaktinagar	3
25 June	Rithala STP	5
July	Connaught Place	3
July	Okhla	1
October	Uttamnagar	4

In 2004 the following deaths took place:

Date	Place	Number of Deaths.
24 May	Vazirpur	3
25 May	Gautampuri	1
11 June	Samaypur	2
July	Vazirpur	2
October	Rohini	2
October	Padpadur	2

Hereto annexed an (Annexure P-2 is the translated copy of the news article titled 'Thekedaron Ki Laparwahi se ho rahi hain mauten' appearing in Navbharat Times on 7.05.07.

6. Even in year 2007, on 6.5.07 three sewage workers Ramemsh, Santosh and Ashish while working inside the sewer inhaled poisonous gases and died of suffocation. Hereto marked and annexed as Annexure P-3 is the news report appearing in the Times of India dated 7.5.2007. The accident took place near Madrasi Nallah in front of Vijay Enclave, Dabri (South West Delhi). The claiming work was being done in complete violation of the National Human Rights Commission guidelines. The victims worked without any helmet or gas masks, which are mandatory, as stated by NHRC, for the kind of work, they were doing. Neither there was any first aid kit with the workers nor artificial respirators and portable ladders were made available to them by the contractors. Apparently contractors violated all the rules and guidelines.

8. That, a report has been prepared by Centre for Education and Communication in collaboration with Occupational Health & Safety Management Consultancy Services on "Health & Safety Status of Sewage Workers in Delhi". The report concludes:

"...The workers are suffering from high mortality and morbidity due to exposure at workplace. 33 workers had died in last 2 years due to accidents while working on the blocked sewer lines...Fifty-nine per cent of the workers enter underground sewer manholes more than 10 times a month and half of them have to work more than 8 hours a day. While working in underground pipelines, an overwhelming majority of them have had cuts or injuries, experienced irritation of eyes and suffered from skin rash. Forty-one workers have reported syncope, and other 24 reported temporary loss of consciousness. A little over one-third of the workers had been immunized against tetanus while none of them had been vaccinated against hepatitis B.

Approximately 46 per cent of workers across all age group were found to be underweight according to Body Mass Index (BMI) calculation. 37 per cent have less hemoglobin than the normal range. More than 65 per cent have higher eosin Phil count (6 per cent) in spite of having normal leukocyte counts (91 per cent). None of the samples tested for HBsAg were tested positive. Results of urine examination pointed to irreversible damaged done to the body organ system.

More than 50 per cent of the pulmonary function tests results were abnormal. Chest X-rays results further confirmed the loss of functional capacity of the respiratory system of the workers.

None of the worker has been given any formal communication by the employer about the hazard present during the work. None has been trained to provide first aid during any miss-happening.....usage of other protective gears like gloves, mask, and shoes were bare minimum. Even supply of necessary safety gears was not adequate to meet the requirements.

All daily wagers were getting a wage of approximately 2950 rupees per months without any other benefit irrespective of service period.""

The petitioner then referred to order dated 15.6.2006 passed by the Gujarat High Court in Special Civil Application No. 8989/2001 – Kamdar Swasthya Suraksha Mandal and Special Civil Application No.11706/2004 – the Manhole Workers Union and Lok Adhikar Sangh and made various prayers including issue of a mandamus directing the respondents to provide every sewage worker with protective gears, clothing and equipments in terms of the order passed by the Gujarat High Court in the two Civil Special Applications, pay compensation of Rs.10 lacs to the families of the workers who died after entering the manhole for sewage cleaning and make provision for comprehensive medical checkup of all the sewage workers and provide them medical treatment free of cost along with full wages for the period of illness.

5. After taking cognizance of the averments contained in the writ petition, the Division Bench of the High Court issued notice to the respondents and also made a request to one of the Judges – Dr. Justice S. Muralidhar, to make an attempt to find out workable solution to the problems faced by sewage workers. The learned Judge heard the representatives of the writ petitioner, appellant and other instrumentalities of the State, examined the documents produced by them and passed order dated 5.4.2008 incorporating therein several suggestions for protection of the workers engaged in cleaning of manhole etc.. The Division Bench of the High Court, considered the suggestions made by Dr. Justice S. Muralidhar, the affidavits and documents filed by the appellant and the New Delhi Municipal Council and passed detailed order dated 20.8.2008, paragraphs 9 and 10 of which read as under:

"9. Having considered the various reports made by the concerned agencies and also the submissions made by

the concerned agencies and also the submissions made at the bar, we pass the following interim directions pending final disposal of this writ petition:

(a) The medical examination and medical treatment will be given free of charge to sewer workers and the treatment will continue for all such workers found to be suffering from an occupational disease, ailment or accident until the workman is cured or until death.

(b) The services of the sewer workers are not to be terminated, either by the respondents or the contractors engaged by them, during the period of illness and they shall be treated as if on duty and will be paid their wages.

(c) Compensation shall be paid by the respondents and recoverable from the contractors, if permissible in law, to all the workmen suffering from any occupational disease, ailment or accident in accordance with the provisions of the Workmen's Compensation Act, 1923.

(d) The respondents shall pay on the death of any worker, including any contract worker, an immediate ex-gratia solatium of Rs. One lac with liberty to recover the same from contractors, if permissible in law.

(e) The respondents shall pay / ensure payment of all statutory dues such as Provident Fund, Gratuity and Bonus to all the sewer workers, including contract workers, as applicable in law.

(f) The respondents shall provide as soon as possible modern protective equipments to all the sewer workers in consultation with the petitioner organization.

(g) The respondents shall provide soap and oil to all the workmen according to the present quota, but on monthly basis and not at the end of the year.

(h) The respondents shall provide restrooms and canteens, in accordance with the DJB model rules, including therein first-aid facilities, safe drinking water, washing facilities, latrines and urinals, shelters, crèches and canteens as set out in the model rules. There are to be provided at what is known as 'stores' which are the places where the workers assemble to give their attendance and from where they depart to their respective work sites.

(i) The respondents shall provide all workman, including contract workmen, with an accident-card-cum-wage-slip as set out in clause 8 of the C.P.W.D./PWD (DA)/Delhi Jal Board Contractors Labour Regulations (for short "Labour Regulations").

(j) The respondents shall provide all workers, including contract workers, employment cards as set out in clause 9 of the Labour Regulations and, on termination of services provide the contract workers and others with a service certificate as set out in clause 10 of the Labour Regulations.

(k) The respondents shall authenticate by signing the payment of wages register for contract workers in terms of clause 5 of the Labour Regulations.

(l) The respondents shall submit to this court and to the petitioner within four weeks from today the full list of contract workers and contractors engaged for work relating to the sewers together with the wages paid to such workmen and the number of years of employment of the workers.

(m) The DJB is directed to ensure that the ex-gratia payment in case of deaths of sewer workers has been paid to the families of deceased workmen and in case such compensation is not paid, release the same within a period of eight weeks.

(n) NDMC is directed to pay ex gratia payment of Rs. one lac each in respect of the accident of 7th December, 2003 where three persons working under the NDMC contractors died, with liberty to recover the same from the contractor, if permissible in law.

(o) The DJB and NDMC are directed to hold an inquiry into deaths of sewer workers referred to in paragraphs 15 and 16 of the written submission of the petitioner dated 22nd July, 2008 and submit a report to this Court within a period of eight weeks. If it is found that the contract workers in question were working under the contractors employed by NDMC/DJB, ex-gratia compensation of Rs. One lac shall be released forthwith to the families of the victims subject to right of recovery from contractors in accordance with law.

(p) The respondents shall place on record a map showing the areas within the NCD (1) where no sewage facilities are available (2) where modern machinery cannot enter due to narrow lanes or otherwise (3) the areas serviced by modern machinery and (4) critical area where frequent deaths, accidents and blockages occur, it shall be done within three months from today.

(q) Lastly, the respondents are directed to place on record the proposals and plans to phase out manual work and replace it with mechanized sewer cleaning, as envisaged by DJB as well as NDMC, which shall be done within three months.

10. In order to ensure the compliance of the above directions, we constitute a Committee consisting of:

(i) Mr. S.R. Shankaran, IAS retired Chief Secretary to the Government of Tripura, Chairman:

(ii) One officer each to be nominated by NDMC, DDA and DJB respectively, who shall not be less than the rank of

Under Secretary to the Government of India.

(iii) Joint Secretary of the Social Welfare Department, Government of NCT of Delhi to be nominated by the Secretary of that Department who shall be the Convener of the committee.

(iv) One representative of the petitioner organization."

6. While the Committee constituted by the High Court was examining various issues concerning the sewage workers including their health and safety, Hindustan Times (Metro Delhi State Industrial Development Corporation, it was claimed that the deceased workers were not employed by or through them. However, during the course of hearing, learned counsel appearing on behalf of the appellant and other authorities conceded that as per the FIRs., the workers had died because they were not provided with protective gears before being asked to work in the manholes.

9. After considering the affidavits filed by the State agencies and the arguments made before it, the Division Bench of the High Court passed order dated 21.4.2009 (impugned order), the relevant portions of which read as under:

"On going through the FIR, however, it is clearly seen that the affidavit filed on behalf of DJB is completely misleading. It is seen from the FIR that the victim Rajan and another workman, namely, Raj Kumar went inside the sewer through stairs. Before going down they had asked the official of the contractor for safety equipments and oxygen masks, but the official of the contractor did not pay heed to their requests. It is further seen from the FIR that they were working in the same manner for the last one week but despite repeated requests made to the contractor they were not provided with safety equipments and oxygen masks. It is further seen that they were painting the sewer and due to presence of toxic gases and lack of oxygen in the sewer, Rajan became unconscious and

ultimately declared to be dead when he was taken to the hospital. The other workman was feeling giddy and fell down and sustained injuries on his face.

Learned counsel appearing for the DJB conceded that protective equipments were not provided by the DJB in spite of the directions issued by this Court vide order dated 20th August, 2008. According to him the responsibility was of the contractor to provide safety equipments as per the contract. It is clear that the sewage workers were left at the mercy of the contractor who failed to take basic precautions resulting in death of workman Rajan.

Insofar as the death that occurred within the jurisdiction of DDA, it has been stated in its affidavit that no work of de-silting of sewage lines or otherwise was in progress in the concerned division of DDA in which the accident took place.It was stated that possibly some local residents had employed a person by the name Rakesh Kumar on their own to check the particular manhole, in which the incident took place. During the course of arguments, however, learned counsel for DDA conceded that the affidavit does not reflect the correct position. He admitted that Rakesh Kumar Saini was entrusted with the work of desilting of the sewage lines, but according to him the contract was completed in December, 2008. Further, according to him though the contract provided for a warranty period six months, the contractor could not have carried out any further work in the sewage line without prior permission of the DDA. Counsel states that the DDA had not provided protective gears and equipments as directed by this Court because under the contract it was the responsibility of the contractor to provide the protective gears and equipments.

Insofar as DSIDC is concerned, it is seen from the FIR that four workers were involved in the incident. Two

workers namely, Manpal and Ram Braj Yadav died while two others namely, Shyambir Sarvesh and Brajpal Yadav were injured. They were working under the contractor engaged by the DSIDC i.e. M/s Arun Kumar Goel. It is seen from the FIR that the workers were not provided with protective gears and safety equipments.

As already noted, two deaths occurred in Katyal Farms House, Bhaktwarpur Road, Narela. It is seen from the FIR that the workers who died while carrying out the work of cleaning the sewer were employees of the contractor by name Sunil, engaged by the Farm House owners. Learned counsel appearing for the farm house owners state that the owners have paid a sum of Rs. 1 Lac in ex-gratia to the families of each of the victims.

At the outset it must be stated that both DJB and DDA have not complied with the directions issued by this Court on 20 August, 2008, particularly directions for providing protective gears and equipment and for issuing employment cards to the contractor's workers. Let notice be issued to the CEO, DJB and the Vice Chairman, DDA to show cause as why action for contempt should not be initiated against them under the Contempt of Courts Act for violating the directions issued by this Court vide order dated 20th August, 2008. Notice shall be returnable on 27th August, 2009.

DDA and DSIDC are directed to deposit the amount of compensation of Rs.2.5 lacs per worker with the High Court Legal Services Committee (DHCLSC) for being paid to the families of the victims within four weeks. It will be open to the DDA/DSIDC to adjust/recover the amount paid from the contractor. According to the DJB, the contractor has already paid a sum of Rs.1.71 lacs to the victims' families. DJB is directed to deposit the balance amount to compensation i.e. Rs.79,000/- with the

DHCLSC within four weeks. DHCLSC will ascertain whether the amount of Rs.1.71 lacs has been received by the victims' families as stated by the DJB. The owners of Katyal Farm House shall deposit a sum of Rs.1.5 lacs per worker, i.e., in all Rs.3 lacs, with DHCLSC. DHCLSC will ascertain whether the victims' families have received the amount of Rs. 1 lac as claimed by the farm house owners.

The CEO of DJB, Vice Chairman of DDA and Managing Director of DSIDC are directed to file their respective affidavits before the Committee within four weeks confirming that their respective affidavits before the Committee within four weeks confirming that their organizations have complied with all the directions issued by this Court from time to time and if there are any shortcomings, to specify them and also to give an undertaking in writing before the Committee that all shortfalls shall be rectified within a period to be fixed by the Committee. All the three organizations are directed to file documents before the Committee indicating:

(i) That all the muster roll workers and the contract workers have been provided with protective gears.

(ii) That all the muster roll workers and the contract workers have been provided provident fund.

(iii) That all the muster roll workers have been given employment card.

(iv) That medical examination, as directed by this Court, is being conducted in respect of contract workers fee of cost and copies of the medical records may also be furnished to the petitioner union."

10. Learned counsel for the appellant, who had the tacit support of the learned counsel representing the Government of

National Capital Territory of Delhi, New Delhi Municipal Council and the Delhi Development Authority, argued that the impugned order is liable to be set aside because by entertaining the writ petition filed by respondent No.1 in the name of public interest litigation and passing orders dated 20.8.2008 and 21.4.2009, the High Court transgressed the limits of its jurisdiction under Article 226 of the Constitution and usurped the legislative power of the State. Learned counsel referred to the directions contained in the two orders and argued that the High Court does not have the jurisdiction to directly or indirectly alter the terms of agreement entered into between the appellant and the contractor – M/s. AARSELF Michigan-JV. Learned counsel further argued that the High Court committed serious error by directing the appellant to pay compensation to the family of the worker ignoring that he was employed by M/s. AARSELF Michigan-JV to whom the contract for rehabilitation of sewer in the zoo area had been awarded. Learned counsel emphasized that as per the terms of the agreement, it was the duty of the contractor to provide safety equipments to the workers engaged in sewage operations and the appellant cannot be made liable for the negligence, if any, of the contractor. Learned counsel then referred to affidavit dated 18.4.2009 filed by the contractor to show that necessary safety equipments were put in place and argued that the appellant and other public authorities cannot be held liable for the accidental deaths. Learned counsel lastly argued that even if the High Court felt that it was the responsibility of the appellant and other public authorities to compensate the victims of accident, there was no occasion for directing issue of notice to the higher functionaries of the appellant and the Delhi Development Authority to show cause against the proposed initiation of proceedings under the Contempt of Courts Act, 1971 (for short, 'the 1971 Act') on the ground of alleged violation of the directions contained in order dated 20.8.2008.

11. Shri Colin Gonsalves, learned senior counsel appearing for respondent No.1 supported the impugned order and the

directions given by the High Court for ensuring safety of the persons employed by or through the appellant and other State agencies for doing hazardous work by asserting that they cannot be absolved of their liability to compensate the victims of accidents merely because the work of laying and maintaining the sewage system has been outsourced. Learned senior counsel submitted that the appellant is really not aggrieved by the direction given for payment of compensation, but is bothered by the notice issued to its Chief Executive Officer for initiation of proceedings under the 1971 Act. He submitted that this Court should not entertain the appellant's grievance against such directions because the concerned functionary can show to the High Court that he has not committed contempt within the meaning of Section 2(b) of the 1971 Act.

12. In the light of the arguments made by the learned counsel, the following three questions arise for our consideration:

(1) Whether the High Court was justified in entertaining the writ petition filed by respondent No.1 by way of public interest litigation for compelling the respondents to take effective measures for safety of sewage workers and ordering payment of compensation to the families of the victims of accidents taking place during sewage operations,

(2) Whether the directions given by the High Court amount to usurpation of the legislative power of the State, and

(3) Whether the High Court was entitled to issue interim direction for payment of compensation to the families of deceased workers.

Re: Question No.1:

13. At the threshold, we deem it necessary to erase the impression and misgivings of some people that by entertaining petitions filed by social action groups/activists/workers and

NGOs for espousing the cause of those who, on account of poverty, illiteracy and/or ignorance and similar other handicaps, cannot seek protection and vindication of their constitutional and/or legal rights and silently suffer due to actions and/or omissions of the State apparatus and/or agencies/ instrumentalities of the State or even private individuals, the superior Courts exceed the unwritten boundaries of their jurisdictions. When the Constitution of India was adopted, the people of this country resolved to constitute India into a Sovereign Democratic Republic. They also resolved to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the nation.

14. For achieving the goals set out in the preamble, the framers of the Constitution identified and recognized certain basic rights of the citizens and individuals and pooled them in Part III, which has the title 'Fundamental Rights' and simultaneously incorporated Directive Principles of State Policy which, though not enforceable by any Court are fundamental in governance of the country and the State is under obligation to comply with the principles embodied in Part-IV in making laws. Article 38, which was renumbered as Clause (1) thereof by the Constitution (Forty-fourth Amendment) Act, 1978 declares that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. Clause (2) of this Article, which was inserted by the same Amending Act declares that State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals, but also amongst groups of people residing in different areas or engaged in different vocations. Article 39(e) mandates that the State shall, in particular, direct its policy towards securing that

the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. Article 39A which was inserted by the Constitution (Forty-second Amendment) Act, 1976 lays down that the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Article 42 enjoins the State to make provision for securing just and humane conditions of work and for maternity relief.

15. In last 63 years, Parliament and State Legislatures have enacted several laws for achieving the goals set out in the preamble but their implementation has been extremely inadequate and tardy and benefit of welfare measures enshrined in those legislations has not reached millions of poor, downtrodden and disadvantaged sections of the society and the efforts to bridge the gap between the haves and have-nots have not yield the desired result. The most unfortunate part of the scenario is that whenever one of the three constituents of the State i.e., judiciary, has issued directions for ensuring that the right to equality, life and liberty no longer remains illusory for those who suffer from the handicaps of poverty, illiteracy and ignorance and directions are given for implementation of the laws enacted by the legislature for the benefit of the have-nots, a theoretical debate is started by raising the bogey of judicial activism or judicial overreach and the orders issued for benefit of the weaker sections of the society are invariably subjected to challenge in the higher Courts. In large number of cases, the sole object of this litigative exercise is to tire out those who genuinely espouse the cause of the weak and poor.

16. This Court has time and again emphasized the importance of the petitions filed *pro bono publico* for protection

of the rights of less fortunate and vulnerable sections of the society. In *People's Union for Democratic Rights v. Union of India* (1982) 3 SCC 235, this Court said:

> "We wish to point out with all the emphasis at our command that public interest litigation which is a strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and that other opposing such claim or resisting such relief. *Public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed.* That would be destructive of the rule of law which forms one of the essential elements of public interest in any democratic form of Government. *The rule of law does not mean that the protection of the law must be available only to a fortunate few or that the law should be allowed to be prostituted by the vested interests for protecting and upholding the status quo under the guise of enforcement of their civil and political rights. The poor too have civil and political rights and the rule of law is meant for them also, though today it exists only on paper and not in reality.* If the sugar barons and the alcohol kings have the fundamental right to carry on their business and to fatten their purses by exploiting the consuming public, have the *chamars* belonging to the lowest strata of society no fundamental right to earn an honest living through their sweat and toil?

The former can approach the courts with a formidable army of distinguished lawyers paid in four or five figures per day and if their right to exploit is upheld against the Government under the label of fundamental right, the courts are praised for their boldness and courage and their independence and fearlessness are applauded and acclaimed. *But, if the fundamental right of the poor and helpless victims of injustice is sought to be enforced by public interest litigation, the so-called champions of human rights frown upon it as waste of time of the highest court in the land, which, according to them, should not engage itself in such small and trifling matters. Moreover, these self-styled human rights activists forget that civil and political rights, priceless and invaluable as they are for freedom and democracy, simply do not exist for the vast masses of our people. Large numbers of men, women and children who constitute the bulk of our population are today living a sub-human existence in conditions of abject poverty; utter grinding poverty has broken their back and sapped their moral fibre. They have no faith in the existing social and economic system.*

Public interest litigation, as we conceive it, is essentially a cooperative or collaborative effort on the part of the petitioner, the State or public authority and the court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them. The State or public authority against whom public interest litigation is brought should be as much interested in ensuring basic human rights, constitutional as well as legal, to those who are in a socially and economically disadvantaged position, as the petitioner who brings the public interest litigation before the court. The State or public authority which is arrayed as a respondent in public interest litigation should, in fact, welcome it, as it would give it an opportunity to right a wrong or to redress an injustice done

to the poor and weaker sections of the community whose welfare is and must be the prime concern of the State or the public authority.

There is a misconception in the minds of some lawyers, journalists and men in public life that public interest litigation is unnecessarily cluttering up the files of the court and adding to the already staggering arrears of cases which are pending for long years and it should not therefore be encouraged by the court. This is, to our mind, a totally perverse view smacking of elitist and status quoist approach. Those who are decrying public interest litigation do not seem to realise that courts are not meant only for the rich and the well-to-do, for the landlord and the gentry, for the business magnate and the industrial tycoon, but they exist also for the poor and the down-trodden, the have-nots and the handicapped and the half-hungry millions of our countrymen. So far the courts have been used only for the purpose of vindicating the rights of the wealthy and the affluent. It is only these privileged classes which have been able to approach the courts for protecting their vested interests. It is only the moneyed who have so far had the golden key to unlock the doors of justice. ……No State has a right to tell its citizens that because a large number of cases of the rich and the well-to-do are pending in our courts, we will not help the poor to come to the courts for seeking justice until the staggering load of cases of people who can afford, is disposed of. The time has now come when the courts must become the courts for the poor and struggling masses of this country. They must shed their character as upholders of the established order and the status quo. They must be sensitised to the need of doing justice to the large masses of people to whom justice has been denied by a cruel and heartless society for generations. The realisation must come to them that social justice is the signature tune of our Constitution and it is their solemn duty under the Constitution to enforce the

basic human rights of the poor and vulnerable sections of the community and actively help in the realisation of the constitutional goals."

(emphasis supplied)

17. In *Hussainara Khatoon (IV) v. State of Bihar* (1980) 1 SCC 98, P.N. Bhagwati, J. (as he then was) observed:

> "..... Today, unfortunately, in our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system to bring about changes in their life conditions and to deliver justice to them. The poor in their contact with the legal system have always been on the wrong side of the line. They have always come across 'law for the poor' rather than 'law of the poor'. The law is regarded by them as something mysterious and forbidding—always taking something away from them and not as a positive and constructive social device for changing the social economic order and improving their life conditions by conferring rights and benefits on them. The result is that the legal system has lost its credibility for the weaker sections of the community."

18. In *Municipal Council, Ratlam v. Vardhichan* (1980) 4 SCC 162, Krishna Iyer, J. said:

> "… The truth is that a few profound issues of processual jurisprudence of great strategic significance to our legal system face us and we must zero-in on them as they involve problems of access to justice for the people beyond the blinkered rules of 'standing' of British-Indian vintage. If the centre of gravity of justice is to shift, as the Preamble to the Constitution mandates, from the traditional individualism of locus standi to the community orientation of public interest litigation, these issues must be considered.…

xxx xxx xxx

> . … Why drive common people to public interest action? Where directive principles have found statutory expression in do's and don'ts the court will not sit idly by and allow municipal government to become a statutory mockery. The law will relentlessly be enforced and the plea of poor finance will be poor alibi when people in misery cry for justice."

19. In *State of Uttaranchal v. Balwant Singh Chaufal* (2010) 3 SCC 402), this Court examined various facets of public interest litigation in the backdrop of criticism from within and outside the system. Dalveer Bhandari, J. made lucid analysis of the concept and development of public interest litigation in the following three phases:

> "Phase I.—It deals with cases of this Court where directions and orders were passed primarily to protect fundamental rights under Article 21 of the marginalised groups and sections of the society who because of extreme poverty, illiteracy and ignorance cannot approach this Court or the High Courts.
>
> Phase II.—It deals with the cases relating to protection, preservation of ecology, environment, forests, marine life, wildlife, mountains, rivers, historical monuments, etc. etc.
>
> Phase III.—It deals with the directions issued by the Courts in maintaining the probity, transparency and integrity in governance."

While dealing with the first phase of development, the Court referred to large number of precedents and recorded its conclusion in the following words:

> **"**We would not like to overburden the judgment by multiplying these cases, but a brief resume of these cases

demonstrates that in order to preserve and protect the fundamental rights of marginalised, deprived and poor sections of the society, the courts relaxed the traditional rule of *locus standi* and broadened the definition of aggrieved persons and gave directions and orders. We would like to term cases of this period where the Court relaxed the rule of *locus standi* as the first phase of the public interest litigation. The Supreme Court and the High Courts earned great respect and acquired great credibility in the eyes of public because of their innovative efforts to protect and preserve the fundamental rights of people belonging to the poor and marginalised sections of the society."

20. These judgments are complete answer to the appellant's objection to the maintainability of the writ petition filed by respondent No.1. What the High Court has done by entertaining the writ petition and issuing directions for protection of the persons employed to do work relating to sewage operations is part of its obligation to do justice to the disadvantaged and poor sections of the society. We may add that the superior Courts will be failing in their constitutional duty if they decline to entertain petitions filed by genuine social groups, NGOs and social workers for espousing the cause of those who are deprived of the basic rights available to every human being, what to say of fundamental rights guaranteed under the Constitution. It is the duty of the judicial constituent of the State like its political and executive constituents to protect the rights of every citizen and every individual and ensure that everyone is able to live with dignity. Given the option, no one would like to enter the manhole of sewage system for cleaning purposes, but there are people who are forced to undertake such hazardous jobs with the hope that at the end of the day they will be able to make some money and feed their family. They risk their lives for the comfort of others. Unfortunately, for last few decades, a substantial segment of the urban society has become insensitive to the plight of the

poor and downtrodden including those, who, on account of sheer economic compulsions, undertake jobs/works which are inherently dangerous to life. People belonging to this segment do not want to understand why a person is made to enter manhole without safety gears and proper equipments. They look the other way when the body of a worker who dies in the manhole is taken out with the help of ropes and cranes. In this scenario, the Courts are not only entitled but are under constitutional obligation to take cognizance of the issues relating to the lives of the people who are forced to undertake jobs which are hazardous and dangerous to life. It will be a tragic and sad day when the superior Courts will shut their doors for those, who without any motive for personal gain or other extraneous reasons, come forward to seek protection and enforcement of the legal and constitutional rights of the poor, downtrodden and disadvantaged sections of the society. If the system can devote hours, days and months to hear the elitist class of eminent advocates who are engaged by those who are accused of evading payment of taxes and duties or otherwise causing loss to public exchequer or who are accused of committing heinous crimes like murder, rape, dowry death, kidnapping, abduction and even acts of terrorism or who come forward with the grievance that their fundamental right to equality has been violated by the State and/or its agencies/ instrumentalities in contractual matters, some time can always be devoted for hearing the grievance of vast majority of silent sufferers whose cause is espoused by bodies like respondent No.1.

Re: Question No.2:

21. There have been instances in which this Court has exercised its power under Article 32 read with Article 142 and issued guidelines and directions to fill the vacuum. *Vishaka v. State of Rajasthan* (1997) 6 SCC 241, *Vineet Narain v. Union of India* (1998) 1 SCC 226 and *Union of India v. Association for Democratic Reforms* (2002) 5 SCC 294 are illuminating

examples of the exercise of this Court's power under Article 32 for ensuring justice to the common man and effective exercise of fundamental rights by the citizens. In *Vishaka v. State of Rajasthan* (supra), the Court entertained the petition filed by certain social activists and NGOs for effective protection of fundamental rights of working women under Articles 14, 19 and 21. In paragraph 11 of the judgment, the Court made a note of its obligation under Article 32 of the Constitution in the following words:

> "11. The obligation of this Court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region. These principles were accepted by the Chief Justices of Asia and the Pacific at Beijing in 1995 as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The objectives of the judiciary mentioned in the Beijing Statement are:
>
> "Objectives of the Judiciary:
>
> 10. The objectives and functions of the Judiciary include the following:
>
> (a) to ensure that all persons are able to live securely under the rule of law;
>
> (b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
>
> (c) to administer the law impartially among persons and between persons and the State."

22. In *Vineet Narain v. Union of India* (supra), the Court observed:

> "The powers conferred on this Court by the Constitution are ample to remedy this defect and to ensure enforcement of the concept of equality.
>
> There are ample powers conferred by Article 32 read with Article 142 to make orders which have the effect of law by virtue of Article 141 and there is mandate to all authorities to act in aid of the orders of this Court as provided in Article 144 of the Constitution. *In a catena of decisions of this Court, this power has been recognised and exercised, if need be, by issuing necessary directions to fill the vacuum till such time the legislature steps in to cover the gap or the executive discharges its role."*
>
> (emphasis supplied)

23. In *Union of India v. Association for Democratic Reforms* (supra), this Court was called upon to examine the correctness of the directions given by the Division Bench of Delhi High Court for implementation of the recommendations made by the Law Commission in its 170th Report. While modifying the directions given by the High Court, the Court observed:

> "45. Finally, in our view this Court would have ample power to direct the Commission to fill the void, in the absence of suitable legislation covering the field and the voters are required to be well informed and educated about contesting candidates so that they can elect a proper candidate by their own assessment. It is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations to provide a solution till such time the legislature acts to perform its role by enacting proper

legislation to cover the field. The adverse impact of lack of probity in public life leading to a high degree of corruption is manifold. Therefore, if the candidate is directed to declare his/her spouse's and dependants' assets — immovable, movable and valuable articles — it would have its own effect. This Court in Vishaka v. State of Rajasthan dealt with the incident of sexual harassment of a woman at work place which resulted in violation of fundamental right of gender equality and the right to life and liberty and laid down that in the absence of legislation, it must be viewed along with the role of the judiciary envisaged in the Beijing Statement of Principles of Independence of Judiciary in the LAWASIA region. The decision has laid down the guidelines and prescribed the norms to be strictly observed in all work places until suitable legislation is enacted to occupy the field. In the present case also, there is no legislation or rules providing for giving necessary information to the voters. As stated earlier, this case was relied upon in Vineet Narain case where the Court has issued necessary guidelines to CBI and the Central Vigilance Commission (CVC) as there was no legislation covering the said field to ensure proper implementation of the rule of law."

24. In view of the principles laid down in the aforesaid judgments, we do not have any slightest hesitation to reject the argument that by issuing the directions, the High Court has assumed the legislative power of the State. What the High Court has done is nothing except to ensure that those employed/engaged for doing work which is inherently hazardous and dangerous to life are provided with life saving equipments and the employer takes care of their safety and health. The State and its agencies/instrumentalities cannot absolve themselves of the responsibility to put in place effective mechanism for ensuring safety of the workers employed for maintaining and cleaning the sewage system. The human

beings who are employed for doing the work in the sewers cannot be treated as mechanical robots, who may not be affected by poisonous gases in the manholes. The State and its agencies/instrumentalities or the contractors engaged by them are under a constitutional obligation to ensure the safety of the persons who are asked to undertake hazardous jobs. The argument of choice and contractual freedom is not available to the appellant and the like for contesting the issues raised by respondent No.1.

Re: Question No.3:

25. We shall now consider whether the High Court was justified in issuing interim directions for payment of compensation to the families of the victims. At the outset, we deprecate the attitude of a public authority like the appellant, who has used the judicial process for frustrating the effort made by respondent No.1 for getting compensation to the workers, who died due to negligence of the contractor to whom the work of maintaining sewage system was outsourced. We also express our dismay that the High Court has thought it proper to direct payment of a paltry amount of Rs.1.5 to 2.25 lakhs to the families of the victims. *Rudul Sah v. State of Bihar* (1983) 4 SCC 141 is the lead case in which the Court exercised its power under Article 32 for compensating a person who was unlawfully detained for 14 years. Paragraphs 9 and 10 of the judgment, which contain the reasons for making a departure from the old and antiquated rule that a person, who has suffered due to the negligence of a public authority, can claim damages by filing suit, are extracted below:

> "9. It is true that Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes of courts, civil and criminal. A money claim has therefore to be agitated in and adjudicated upon in a suit instituted in a Court of lowest grade competent to try it. But the

important question for our consideration is whether in the exercise of its jurisdiction under Article 32, this Court can pass an order for the payment of money if such an order is in the nature of compensation consequential upon the deprivation of a fundamental right……...

10. We cannot resist this argument. We see no effective answer to it save the stale and sterile objection that the petitioner may, if so advised, file a suit to recover damages from the State Government. Happily, the State's counsel has not raised that objection. The petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial, in the sense that a civil court may or may not have upheld his claim. But we have no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed in that suit, though it is not possible to predicate, in the absence of evidence, the precise amount which would be decreed in his favour. In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the

State as a shield. If civilisation is not to perish in this country as it has perished in some others too well known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers."

26. In *Nilabati Behera v. State of Orissa* (1993) 2 SCC 746, this Court awarded compensation to the mother of a young man who was beaten to death in police custody. The Court held that its powers to enforce fundamental rights carries with it an obligation to forge new tools for doing justice. In *Paschim Banga Khet Mazdoor Samity v. State of W.B.* (1996) 4 SCC 37, this Court examined the issue whether a victim of apathy of the staff of government hospital is entitled to compensation and answered the same in the following words:

"The Constitution envisages the establishment of a welfare State at the federal level as well as at the State level. In a welfare State the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare State. The Government discharges this obligation by running hospitals and health centres which provide medical care to the person seeking to avail of those facilities. Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The government hospitals run by the State and the medical officers employed therein are duty-bound to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21. In the present case there was breach of the said right of

Hakim Seikh guaranteed under Article 21 when he was denied treatment at the various government hospitals which were approached even though his condition was very serious at that time and he was in need of immediate medical attention. Since the said denial of the right of Hakim Seikh guaranteed under Article 21 was by officers of the State, in hospitals run by the State, the State cannot avoid its responsibility for such denial of the constitutional right of Hakim Seikh. In respect of deprivation of the constitutional rights guaranteed under Part III of the Constitution the position is well settled that adequate compensation can be awarded by the court for such violation by way of redress in proceedings under Articles 32 and 226 of the Constitution. (See: *Rudul Sah v. State of Bihar; Nilabati Behera v. State of Orissa; Consumer Education* and *Research Centre v. Union of India.*) Hakim Seikh should, therefore, be suitably compensated for the breach of his right guaranteed under Article 21 of the Constitution. Having regard to the facts and circumstances of the case, we fix the amount of such compensation at Rs 25,000. A sum of Rs 15,000 was directed to be paid to Hakim Seikh as interim compensation under the orders of this Court dated 22-4-1994. The balance amount should be paid by Respondent 1 to Hakim Seikh within one month.

It is no doubt true that financial resources are needed for providing these facilities. But at the same time it cannot be ignored that it is the constitutional obligation of the State to provide adequate medical services to the people. Whatever is necessary for this purpose has to be done. In the context of the constitutional obligation to provide free legal aid to a poor accused this Court has held that the State cannot avoid its constitutional obligation in that regard on account of financial constraints. [See: *Khatri (II) v. State of Bihar,* SCC at p. 631.] The said observations

would apply with equal, if not greater, force in the matter of discharge of constitutional obligation of the State to provide medical aid to preserve human life. In the matter of allocation of funds for medical services the said constitutional obligation of the State has to be kept in view. It is necessary that a time-bound plan for providing these services should be chalked out keeping in view the recommendations of the Committee as well as the requirements for ensuring availability of proper medical services in this regard as indicated by us and steps should be taken to implement the same. The State of West Bengal alone is a party to these proceedings. Other States, though not parties, should also take necessary steps in the light of the recommendations made by the Committee, the directions contained in the memorandum of the Government of West Bengal dated 22-8-1995 and the further directions given herein."

27. In *Chairman, Railway Board v. Chandrima Das* (2000) 2 SCC 465, this Court considered the question whether the High Court could entertain the petition filed by the respondent by way of Public Interest Litigation and award compensation of Rs.10 lakhs to Hanuffa Khatoon, a national of Bangladesh, who was sexually assaulted by the employees of Eastern Railway. While rejecting the argument of the appellant that the victim of rape could have availed remedy by filing suit in a Civil Court, the two-Judge Bench referred to the distinction made between "public law" and "private law" in *Common Cause, A Registered Society v. Union of India* (1999) 6 SCC 667 and other cases in which compensation was awarded for violation of different rights and observed:

"Having regard to what has been stated above, the contention that Smt Hanuffa Khatoon should have approached the civil court for damages and the matter should not have been considered in a petition under Article 226 of the Constitution, cannot be accepted. Where public

functionaries are involved and the matter relates to the violation of fundamental rights or the enforcement of public duties, the remedy would still be available under the public law notwithstanding that a suit could be filed for damages under private law."

The Court then referred to the fundamental rights guaranteed under Articles 20 and 21 of the Constitution and proceeded to observe:

"The word "LIFE" has also been used prominently in the Universal Declaration of Human Rights, 1948. (See Article 3 quoted above.) The fundamental rights under the Constitution are almost in consonance with the rights contained in the Universal Declaration of Human Rights as also the Declaration and the Covenants of Civil and Political Rights and the Covenants of Economic, Social and Cultural Rights, to which India is a party having ratified them, as set out by this Court in Kubic Darusz v. Union of India. That being so, since "LIFE" is also recognised as a basic human right in the Universal Declaration of Human Rights, 1948, it has to have the same meaning and interpretation as has been placed on that word by this Court in its various decisions relating to Article 21 of the Constitution. The meaning of the word "life" cannot be narrowed down. According to the tenor of the language used in Article 21, it will be available not only to every citizen of this country, but also to a "person" who may not be a citizen of the country.

Let us now consider the meaning of the word "LIFE" interpreted by this Court from time to time. In Kharak Singh v. State of U.P. it was held that the term "life" indicates something more than mere animal existence. (See also State of Maharashtra v. Chandrabhan Tale.) The inhibitions contained in Article 21 against its deprivation extend even to those faculties by which life is enjoyed. In Bandhua Mukti

Morcha v. Union of India it was held that the right to life under Article 21 means the right to live with dignity, free from exploitation. (See also *Maneka Gandhi v. Union of India* and *Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni*.)

On this principle, even those who are not citizens of this country and come here merely as tourists or in any other capacity will be entitled to the protection of their lives in accordance with the constitutional provisions. They also have a right to "life" in this country. Thus, they also have the right to live, so long as they are here, with human dignity. Just as the State is under an obligation to protect the life of every citizen in this country, so also the State is under an obligation to protect the life of the persons who are not citizens."

The question whether the Central Government can be held vicariously liable for the offence of rape committed by the employees of the Railways was answered in negative by relying upon the judgments in *State of Rajasthan v. Vidhyawati* AIR 1962 SC 933, *State of Gujarat v. Memon Mahomed Haji Hasam* AIR 1967 SC 1885, *Basavva Kom Dyamangouda Patil v. State of Mysore* (1977) 4 SCC 358, *N. Nagendra Rao and Company v. State of A.P.* (1994) 6 SCC 205 and *State of Maharasthra v. Kanchanmala Vijaysing Shirke* (1995) 5 SCC 659.

28. In *M.S. Grewal v. Deep Chand Sood* (2001) 8 SCC 151, this Court examined the question whether the High Court of Himachal Pradesh was justified in entertaining the writ petition filed by the parents of 14 children, who died due to drowning in a river when they were on picnic organised by the school authorities. While rejecting the objection to the maintainability of the writ petition, the Court referred to *Rudul Sah v. State of Bihar* (supra), *Nilabati Behera v. State of Orissa* (supra) and *D.K. Basu v. State of W.B.* (1997) 1 SCC 416 and observed:

"Next is the issue "maintainability of the writ petition" before the High Court under Article 226 of the Constitution. The appellants though initially very strongly contended that while the negligence aspect has been dealt with under penal law already, the claim for compensation cannot but be left to be adjudicated by the civil law and thus the civil court's jurisdiction ought to have been invoked rather than by way of a writ petition under Article 226 of the Constitution. This plea of non-maintainability of the writ petition though advanced at the initial stage of the submissions but subsequently the same was not pressed and as such we need not detain ourselves on that score, excepting however recording that the law courts exist for the society and they have an obligation to meet the social aspirations of citizens since law courts must also respond to the needs of the people. In this context, reference may be made to two decisions of this Court: the first in line is the decision in *Nilabati Behera v. State of Orissa* wherein this Court relying upon the decision in *Rudul Sah* (*Rudul Sah v. State of Bihar*) decried the illegality and impropriety in awarding compensation in a proceeding in which the court's power under Articles 32 and 226 of the Constitution stands invoked and thus observed that it was a clear case for award of compensation to the petitioner for custodial death of her son. It is undoubtedly true, however, that in the present context, there is no infringement of the State's obligation, unless of course the State can also be termed to be a joint tortfeasor, but since the case of the parties stands restricted and without imparting any liability on the State, we do not deem it expedient to deal with the issue any further except noting the two decisions of this Court as above and without expression of any opinion in regard thereto."

On the question of quantum of damages, the Court made the following observations:

"Be it placed on record that in assessing damages, all relevant materials should and ought always to be placed before the court so as to enable the court to come to a conclusion in the matter of affectation of pecuniary benefit by reason of the unfortunate death. Though mathematical nicety is not required but a rough and ready estimate can be had from the records claiming damages since award of damages cannot be had without any material evidence: whereas one party is to be compensated, the other party is to compensate and as such there must always be some materials available therefor. It is not a fanciful item of compensation but it is on legitimate expectation of loss of pecuniary benefits. In *Grand Trunk Rly. Co. of Canada v. Jennings* this well-accepted principle stands reiterated as below:

> "In assessing the damages, all circumstances which may be legitimately pleaded in diminution of the damages must be considered. It is not a mere guesswork neither is it the resultant effect of a compassionate attitude."

As noticed above, a large number of decisions were placed before this Court as regards the quantum of compensation varying between 50,000 to one lakh in regard to the unfortunate deaths of the young children. We do deem it fit to record that while judicial precedents undoubtedly have some relevance as regards the principles of law, but the quantum of assessment stands dependent on the fact situation of the matter before the court, than judicial precedents. As regards the quantum, no decision as such can be taken to be of binding precedent as such, since each case has to be dealt with on its own peculiar facts and thus compensation is also to be assessed on the basis thereof, though however, the same can act as a guide: placement in the society, financial status differs from person to person and as such

assessment would also differ. The whole issue is to be judged on the basis of the fact situation of the matter concerned though however, not on mathematical nicety."

29. Reference also deserves to be made to *MCD v. Assn. of Victims of Uphaar Tragedy and others* (2005) 9 SCC 586 whereby this Court entertained the appeal filed against the order passed by the Delhi High Court for payment of compensation to the families of those who died in Uphaar tragedy and directed the appellants to deposit Rs.3,01,40,000/- with a further direction that 50% of the amount shall be available for distribution to the claimants.

30. In view of the law laid down in the afore-mentioned judgments, the appellant's challenge to the interim directions given by the High Court for payment of compensation to the families of the workers deserves to be rejected. However, that is not the end of the matter. We feel that the High Court should have taken cue from the judgment in *Chairman, Railway Board v. Chandrima Das* (supra) and awarded compensation which could be treated as reasonable. Though, it is not possible to draw any parallel between the trauma suffered by a victim of rape and the family of a person who dies due to the negligence of others, but the High Court could have taken note of the fact that this Court had approved the award of compensation of Rs.10 lacs in 1998 to the victim of rape as also increase in the cost of living and done well to award compensation of atleast Rs.5 lacs to the families of those who died due to negligence of the public authority like the appellant who did not take effective measures for ensuring safety of the sewage workers. We may have remitted the case to the High Court for passing appropriate order for payment of enhanced compensation but keeping in view the fact that further delay would add to the miseries of the family of the victim, we deem it proper to exercise power under Article 142 of the Constitution and direct the appellant to pay a sum of Rs.3.29 lakhs to the family of the victim through Delhi High Court State Legal Services

Committee. This would be in addition to Rs.1.71 lakhs already paid by the contractor.

31. In the result, the appeal is dismissed subject to the aforesaid direction regarding the amount of compensation to be paid by the appellant. It is needless to say that the appellant shall be entitled to recover the additional amount from the contractor. Respondent No.1 shall also be entitled to file appropriate application before the High Court for payment of enhanced compensation to the families of other victims and we have no doubt that the High Court will entertain such request.

32. With a view to obviate further delay in implementation of the directions contained in the first order passed by the High Court on 20.8.2008, we direct the appellant to ensure compliance of clauses (a), (b), (d), (e), (f), (g), (i), (k), (m) and (n) within a period of two months from today and submit a report to the High Court. The appellant shall also ensure that these directions are complied with by the contractors engaged by it for execution of work relating to laying and maintenance of sewer system within the area of its jurisdiction. A report to this effect be also submitted to the High Court within two months. Additionally, we direct that in future the appellant shall ensure that the directions already given by the High Court and which may be given hereafter are made part of all agreements which may be executed with contractors/private enterprises for doing work relating to sewage system.

33. The directions contained in the preceding paragraph do not imply that the appellant and other agencies/ instrumentalities of the State like New Delhi Municipal Council, Municipal Corporation of Delhi, Delhi State Industrial Development Corporation are not required to comply with the directions given by the High Court. Rather, they too shall have to submit similar reports.

34. As regards the other clauses of paragraph 9 of order dated 20.8.2008, the High Court may give necessary directions

so that they are complied with and implemented by the State and its agencies/instrumentalities without any delay.

35. The case be listed before the Division Bench of the High Court in the third week of September, 2011 for further orders.

B.B.B. Appeal dismissed.

NARMADA BACHAO ANDOLAN

v.

STATE OF MADHYA PRADESH

(Civil Appeal No.3726 of 2011)

JULY 26, 2011

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

Land Acquisition – Construction of dam in the State of M.P. – Re-settlement and Rehabilitation policy for oustees – Entitlement of oustee to claim land or compensation in lieu of the land acquired – Order dated 7-6-1991 passed by Narmada Valley Development Department (NVDD) amending Clause 5.1 of the Re-settlement and Rehabilitation Policy, 1991 (R & R Policy) – Challenge to – Held: The chronological development of amendment of R & R Policy reveals that Clause 3 of the R & R Policy provided for entitlement of oustees to get land in lieu of the land acquired – Clause 5 prescribed only the procedure for allotment of land under Clause 3 of the R & R Policy – Amendment of R & R Policy on 7-6-1991 only facilitated those oustees who were not willing to take the land in lieu of the land acquired – Such amendment was brought on demand of the oustees as an alternative – However, it did not take away the right of the oustees to claim land in lieu of the land acquired, for the simple reason that there was no amendment in year 1991 to Clause 3.2 of the R & R Policy and amendment to the said Clause 3.2 incorporated on 27.4.2002 is not under challenge – The amendment under challenge simply facilitated an oustee to claim compensation instead of land – This may be for the reason that oustee may be willing to settle in another State or in urban area or want to adopt any other vocation/ profession or want to start any other business – However, it did not take away the right of any oustee to claim land in lieu of the land acquired.

Land acquisition – Construction of dam in the State of M.P. – Re-settlement and Rehabilitation policy for oustees – Entitlement of landless labourers to agricultural land – Held: The Re-settlement and Rehabilitation Policy, 1991 (R & R Policy) made it clear that there was no provision for allotment of agricultural land to the landless labourers – The appellant mistakenly relied on the clearance letter by the Ministry of Welfare to say that granting land to landless labourers was a precondition for granting clearance to the project – Even if allotment of land to landless labourers is regarded as a condition, the Government of M.P. did not accept such a condition – The Ministry of Welfare's clearance was not statutory, like any other statutory clearance e.g. clearance granted by Environment and Forest Ministry – The Authorities also treated the same as non-statutory – Thus, the submission made by the appellant that landless labourers were entitled for allotment of agricultural land to the extent of two hectares is devoid of any merit – Even otherwise, it does not appeal to this Court that a landless labourer could be entitled for allotment of agricultural land admeasuring two hectares – Neither it had ever been contemplated nor it is compatible with R & R Policy – Nor such land had ever been allotted to this class of persons.

Administrative Law – Policy and Procedure – Procedure for amendment of policy – Rules of business framed under Article 166 of the Constitution – Rule 7 of the Business Rules, Part II – Cases to be brought before the State Council of Ministers – Issue as to whether the Council of Ministers was permitted to delegate the power to amend its decision to a Committee of Ministers consisting of the Ministers-in-charge of the Departments concerned and the Chief Minister, and whether such amendment needed to be consistent with the Rules of Business framed under Article 166 of the Constitution – Held: Rules of Business were directory in nature – Delegation of power was permissible – Constitution of India, 1950 – Article 166.

In the year 1972, the State of Madhya Pradesh conceived a dam to provide irrigation facilities to farmers. In 1992, a detailed Project Report was prepared and submitted to the State Government and the Final Project Report was approved by Technical Committee of Central Water Commission in 1997. Clearance to the project was given by the Government of India. In 2002 the project was accorded Environmental and Forest clearance. The Cabinet of Ministers in its meeting approved payment of Special Rehabilitation Grant (SRG) to be paid to oustees, who would not ask for land in lieu of the land acquired. As a consequence thereof, order was issued to the same effect in the name of the Governor of the State of Madhya Pradesh. Construction of dam site commenced and was completed upto crest level in the year 2008; only gates were required to be installed so as to achieve full reservoir level of 317 metres, when Notification was issued regarding submergence of four villages.

Appellant filed writ petition before High Court claiming various reliefs, inter-alia, to stop further construction which may cause submergence so that displaced families are resettled and rehabilitated in 6 months before the submergence; to direct State Government to provide irrigated agricultural land to eligible oustees including encroachers and landless labourers; and to declare the order dated 7.6.1991 passed by Narmada Valley Development Department (NVDD) amending para 5.1 of the Re-settlement and Rehabilitation Policy, 1991 (R & R Policy) to be ultra vires and unconstitutional, being arbitrary and malafides.

The State Authorities opposed the writ petition contending that the validity of the R & R Policy had already been upheld by the courts; that landless labourers were not entitled for allotment of agricultural land; that the writ petition was filed at much belated stage,

i.e. after completion of the dam; that appellant had an alternative efficacious remedy before the Grievance Redressal Authority (GRA); that amendment in para 5.1 of the R & R Policy was only procedural, and carried out legally and was thus valid; and that even otherwise the amendment to para 5.1 was inconsequential because the allotment of land for the oustees is provided under Clause 3 of the R & R Policy and amendment carried out in Clause 3 of the Policy at subsequent stage had not been challenged by the appellant.

The High Court held that challenge to the validity of the amendment dated 7.6.1991 was belated and could not be entertained; that the alternative remedy before the GRA was efficacious and no extraordinary situation prevailed warranting the High Court to interfere at such a stage; that the landless labourers were not entitled for allotment of agricultural land; that the oustees had been offered grant; that the value of their land had also been assessed under the Land Acquisition Act, 1894 and that person aggrieved, if any, can approach the GRA if he is not satisfied with the reliefs granted to him in terms of the R & R Policy.

In the instant appeal, the appellant raised all the issues which had been agitated before the High Court, including the right of oustees for allotment of land in lieu of land acquired and non-compliance of R&R Policy was violative of fundamental rights of the oustees enshrined in Article 21 of the Constitution. The appellant further submitted that the amendment in Clause 5.1 of the R & R Policy was null and void as it was not carried out in accordance with the procedure prescribed under Section 21 of the General Clauses Act, 1897 as well as the provisions of Article 166(2) and (3) of the Constitution; that Clause 5.1 of the R & R Policy could not be amended in violation of Rule 7(viii) of Part II of the Business Rules

and that since the Ministry of Welfare, Government of India, had accorded clearance to the project with a clear understanding that landless labourers would also be allotted agricultural land and as the same had not been complied with, the High Court's judgment required interference.

The appellant submitted that as the High Court did not consider the issue of amendment of Clause 5.1 of the R & R Policy and the effect of non-compliance of the condition imposed by the Ministry of Welfare while granting the clearance for the project, this court must examine the said issues. According to the appellant, while making the amendment the procedure prescribed under Article 166 of the Constitution was not followed and while granting the clearance, the Ministry of Welfare added the clause that families of the landless labourers would be given agricultural land to the extent of 2 hectares which was not given.

Dismissing the appeal, the Court

HELD:

<u>Amendment to Clause 5.1 of the R & R Policy:</u>

1.1. The chronological development of amendment of R & R Policy reveals that Clause 3 of the R & R Policy provided for entitlement of oustees to get land in lieu of the land acquired. Clause 5 prescribed only the procedure for allotment of land under Clause 3 of the R & R Policy. The amendment of R & R Policy on 7.6.1991 which is under challenge by the appellant only facilitates those oustees who were not willing to take the land in lieu of the land acquired. Such an amendment was brought on demand of the oustees as an alternative. However, it does not take away the right of the oustees to claim land in lieu of the land acquired, for the simple reason that

there was no amendment in year 1991 to Clause 3.2 of the R & R Policy and the amendment to the said Clause 3.2 incorporated on 27.4.2002 is not under challenge. The amendment under challenge simply facilitated an oustee to claim compensation instead of land. This may be for the reason that oustee may be willing to settle in another State or in urban area or wants to adopt any other vocation/profession or wants to start any other business. However, it does not take away the right of any oustee to claim the land in lieu of the land acquired. Therefore, amendment to Clause 5.1 remains inconsequential so far as the right of an oustee to claim land in lieu of the land acquired is concerned. The appellant could not explain that in case the amendment to Clause 5.1 dated 7.6.1991 stood struck down, what benefit could an oustee derive from the same. [Para 12] [100-F-H; 101-A-C]

1.2. Since amendment to clause 5.1 of the R & R Policy was inconsequential so far as entitlement of allotment of agricultural land in lieu of land acquired was concerned, grievance of the appellant that procedure adopted for its amendment was not in conformity with the Statutory/Constitutional requirement becomes purely an academic issue, not required to be determined as the appellant could not point out as what prejudice the said amendment could cause to an oustee. However, as the issue has been heard at length, it is desirable to decide the same also. [Para 13] [101-D-F]

Procedure adopted for amendment:

2.1. Rule 7 of the Business Rules, Part II provided for the cases to be brought before the Council of Ministers. Even function or duties which are vested in a State Government by a statute may be allocated to ministers by the Rules of Business framed under Article 166(3) of the Constitution. The decision of any minister or officer under the Rules of Business made under Articles 77(3)

and 166(3) of the Constitution is the decision of the President or the Governor respectively and these Articles do not provide for 'delegation'. That is to say, that decisions made and actions taken by the minister or officer under the Rules of Business cannot be treated as exercise of delegated power in real sense, but are deemed to be the actions of the President or Governor, as the case may be, that are taken or done by them on the aid and advice of the Council of Ministers. Whether there can be further delegation by the minister to the officer subordinate to him depends on the provisions of the Rules of Business. [Paras 14, 18, 20, 21] [101-G-H; 103-B-C; 104-E-F; 106-A]

2.2. The issue here is whether the Council of Ministers is permitted to delegate the power to amend its decision to a Committee of Ministers consisting of the Ministers-in-charge of the Departments concerned and the Chief Minister, and whether such amendment needs to be consistent with the Rules of Business framed under Article 166 of the Constitution of India. The case law provides that delegation is permissible and that Rules of Business are directory in nature. In view of the above, delegation of power is permissible. [Para 30] [109-B-D]

MRF Ltd. v. Manohar Parrikar & Ors. **(2010) 11 SCC 374 – distinguished.**

R. Chitralekha v. State of Mysore & Ors. **AIR 1964 SC 1823: 1964 SCR 368 – followed.**

Sampat Prakash v. The State of Jammu & Kashmir & Anr. **AIR 1970 SC 1118: 1970 SCR 365;** *The State of Bihar v. Rani Sonabati Kumari* **AIR 1961 SC 221: 1961 SCR 728;** *State of U.P. & Ors. v. Pradhan Sangh Kshettra Samiti & Ors.* **AIR 1995 SC 1512: 1995 (2) SCR 1015;** *Samsher Singh v. State of Punjab & Anr.* **AIR 1974 SC 2192: 1975 (1) SCR 814;** *King Emperor v. Sibnath Banerjee & Ors.,* **AIR**

1945 PC 156; *Smt. Godavari Shamrao Parulekar v. The State of Maharashtra & Ors.* **AIR 1964 SC 1128: 1964 SCR 446;** *State of Uttar Pradesh v. Om Prakash Gupta,* **AIR 1970 SC 679: 1969 (3) SCC 775;** *Bannari Amman Sugars Ltd. v. Commercial Tax Officer & Ors.,* **(2005) 1 SCC 625: 2004 (6) Suppl. SCR 264;** *Dattatraya Moreshwar v. The State of Bombay & Ors.* **AIR 1952 SC 181: 1952 SCR 612;** *M/s. Crawford Bayley & Co. & Ors. v. Union of India & Ors.* **AIR 2006 SC 2544: 2006 (3) Suppl. SCR 240 – referred to.**

Land to landless labourers:

3.1. The issue of non-compliance of the clearance of the terms incorporated by the Ministry of Welfare has been elaborately dealt in the earlier judgment in Narmada Bachao Andolan III. So far as the present appeal in respect of Upper Beda Project is concerned, the rehabilitation policy for the oustees provided that the displaced families would be rehabilitated maintaining existing structure of social groups as far as possible, in the command area or near the periphery of the affected areas in accordance with their preferences. [Paras 31, 32] [109-E-G]

3.2. The R & R Policy policy makes it clear that there was no provision for allotment of agricultural land to the landless labourers. The appellant mistakenly relied on the clearance letter by the Ministry of Welfare to say that granting land to landless labourers was in and by itself a precondition for granting clearance to the project. It is impermissible in law to read a part of the document in isolation. The document is to be read as a whole. The letter of approval mentions "allotting a minimum of 2 hectares of land for all landless labourers" and says that unmarried major daughters would be treated as separate entities for that particular purpose, i.e. of allotting 2 hectares of land. The appellant never pleaded the cause of unmarried major daughters to be treated as separate entities for allotment of land. The issue of entitlement of

major sons and daughters of oustees for allotment of land has been already dealt with and answered in negative in Narmada Bachao Andolan III. [Paras 33, 36] [111-D-E; 113-A-C]

3.3. Moreover, even if the allotment of land to landless labourers is regarded as a condition, the Government of M.P. did not accept such a condition. The Ministry of Welfare's clearance was not statutory, like any other statutory clearance e.g. clearance granted by Environment and Forest Ministry. There is nothing in that clearance as to what would be the consequence for non-compliance with those conditions. More so, subsequent thereto, it is evident from the record that representations had been filed on behalf of the oustees before the Ministry of Welfare. However, no action had ever been taken by the Ministry of Welfare that the terms incorporated by it while granting clearance were not being adhered to and in spite of writing several letters, the Ministry of Welfare did not consider it proper to take any action or even to refer those letters to the State Government or to the NVDD. Thus, the said Authorities also treated the same as non-statutory. [Para 37] [113-D-G]

3.4. In view of the above, the submission made by the appellant that landless labourers are entitled for allotment of agricultural land to the extent of 2 hectares is devoid of any merit. Even otherwise, it does not appeal to this Court that a landless labourer could be entitled for allotment of agricultural land admeasuring two hectares. Neither it had ever been contemplated nor it is compatible with R & R Policy. Nor such land had ever been allotted to this class of persons. [Para 37] [113-G-H; 114-A-B]

Narmada Bachao Andolan v. State of M.P. **AIR 2011 SC 1989: 2011 (7) SCC 639 – referred to.**

Case Law Reference:

2011 (7) SCC 639	**referred to**	**Paras 4,6,6, 31, 36**
1970 SCR 365	**referred to**	**Para 15**
1961 SCR 728	**referred to**	**Para 18**
1964 SCR 368	**followed**	**Paras 19,25, 26, 30**
1995 (2) SCR 1015	**referred to**	**Para 20**
1975 (1) SCR 814	**referred to**	**Para 20**
1964 SCR 446	**referred to**	**Para 23**
1969 (3) SCC 775	**referred to**	**Para 24**
2004 (6) Suppl. SCR 264	**referred to**	**Para 26**
1952 SCR 612	**referred to**	**Para 27**
2010 (11) SCC 374	**distinguished**	**Paras 28, 30**
2006 (3) Suppl. SCR 240	**referred to**	**Para 29**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3726 of 2011.

From the Judgment & Order dated 16.12.2010 of the High Court of Madhya Pradesh Bench at Jabalpur in W.P. No. 1360 of 2009.

Gourab Banerji, ASG, P.S. Patwalia, Chittroopa (Appallant—In—Person), Sahil Tagotra, Arjun Krishnan, C.D. Singh, Sunny Choudhary, Ajay Singh for the appearing parties.

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 16.12.2010

passed by the Madhya Pradesh High Court, Jabalpur in Writ Petition No. 1360 of 2009.

2. Facts and circumstances giving rise to this appeal are as under:

A. In the year 1972, the State of Madhya Pradesh conceived a dam to provide irrigation facilities to farmers of Khargone district. The dam, on filling upto full, would cause submergence of 1258.59 hectares of land, out of which 1037.715 is private and 206.635 is government and 14.24 hectares is forest land.

B. On 10.1.1992, a detailed Project Report was prepared and submitted to the State Government and the Final Project Report was approved by Technical Committee of Central Water Commission vide order dated 6.5.1997. Clearance to the project was given by the Government of India. It was on 10.10.2002 that the project was accorded Environmental and Forest clearance.

C. The Cabinet of Ministers in its meeting dated 4.10.2002 approved payment of Special Rehabilitation Grant (hereinafter called SRG) to be paid to oustees, who would not ask for land in lieu of land acquired. As a consequence thereof, order dated 28.12.2002 was issued to the same effect in the name of the Governor of the State of Madhya Pradesh.

D. On 23.5.2004, construction of dam site commenced and was completed upto crest level in the year 2008; only gates were required to be installed so as to achieve full reservoir level of 317 metres. Subsequent thereto, Notification dated 5.3.2008 was issued regarding submergence of four villages, namely, Sonud, Nimit, Bedhaniya and Khamid.

E. Appellant approached the High Court by filing writ petition No. 1360 of 2009 claiming various reliefs, inter-alia, to stop further construction which may cause submergence so that

displaced families are resettled and rehabilitated in 6 months before the submergence; to direct State Government to provide irrigated agricultural land to eligible oustees including encroachers and landless labourers; to declare the order dated 7.6.1991 passed by Narmada Valley Development Department (hereinafter called NVDD) amending para 5.1 of the Re-settlement and Rehabilitation Policy, 1991 (hereinafter called R & R Policy) to be ultra vires and unconstitutional, being arbitrary and mala fides.

F. The State Authorities opposed the writ petition contending that the validity of the R & R Policy had already been upheld by the courts; landless labourers were not entitled for allotment of agricultural land; the writ petition was filed at much belated stage, i.e. after completion of the dam; appellant had an alternative efficacious remedy before the Grievance Redressal Authority (hereinafter called GRA); amendment in para 5.1 of the R & R Policy was only procedural, and carried out legally and was thus valid; even otherwise the amendment to para 5.1 was inconsequential because the allotment of land for the oustees is provided under Clause 3 of the R & R Policy and amendment carried out in Clause 3 of the Policy at subsequent stage had not been challenged by the appellant.

G. The High Court considered the rival submissions advanced on behalf of the parties and held that challenge to the validity of the amendment dated 7.6.1991 was belated and could not be entertained. The alternative remedy before the GRA was efficacious and no extraordinary situation prevailed warranting the High Court to interfere at such a stage. The landless labourers were not entitled for allotment of agricultural land. The oustees had been offered grant; the value of their land had also been assessed under the Land Acquisition Act, 1894 (hereinafter called `the Act 1894'). Person aggrieved, if any, can approach the GRA if he is not satisfied with the reliefs granted to him in terms of the R & R Policy. After taking the aforesaid view, the High Court issued various directions

including: to install radial gates, block sluice gates and to fill up dam upto 310 metres; when canal network is ready, the Government could approach the Court to fill up the dam to 317 metres; the Government would ensure that land oustees were given benefits to which they are entitled under the R & R Policy within four weeks; and that persons aggrieved, if any, were at liberty to agitate the grievances in respect of reliefs before the GRA.

Hence, this appeal.

3. Ms. Chittaroopa Palit, representative of the appellant, has raised before us all the issues which had been agitated before the High Court, including the right of oustees for allotment of land in lieu of land acquired and non-compliance of R&R Policy is violative of fundamental rights of the oustees enshrined in Article 21 of the Constitution. It has further been submitted by her that the amendment in Clause 5.1 of the R & R Policy was null and void as it has not been carried out in accordance with the procedure prescribed under Section 21 of the General Clauses Act, 1897 as well as the provisions of Article 166(2) and (3) of the Constitution of India. Clause 5.1 of the R & R Policy could not be amended in violation of Rule 7(viii) of Part II of the Business Rules. And that since the Ministry of Welfare, Government of India, has accorded clearance to the project with a clear understanding that landless labourers would also be allotted agricultural land and as the same has not been complied with, the High Court's judgment requires interference.

4. On the contrary, Mr. P.S. Patwalia, learned senior counsel appearing for the respondents has vehemently opposed the appeal contending that Clause 5.1 of the R & R Policy deals with procedure only. Entitlement for allotment of land is provided under Clause 3.2 of the R & R Policy and as the amendment to the said clause was not challenged, amendment to Clause 5.1 remains inconsequential. Dam

construction started in year 2004 and compensation for land acquired had been determined much ago. By December 2002, the benefit of SRG had also been given to the oustees. The writ petition was filed in year 2008 after the dam stood fully constructed. At the time of filing the writ petition there was no challenge to Clause 5.1 of the R & R Policy, rather it was challenged seeking amendment by filing an application dated 11.5.2010. Amendment to Clause 5.1 of R & R Policy has been in conformity with the Business Rules of the Government and all the orders in this respect had been passed in the name of the Governor. The Council of Ministers had delegated the power to the NVDD and to the Hon'ble Minister for Rehabilitation and in case there was any difference between the said two Hon'ble Ministers, the matter would be referred to the Hon'ble Chief Minister. The law permits delegation of power to make routine changes in subordinate legislation. Therefore, no fault can be found with the procedure adopted for amendment of Clause 5.1 of the R & R Policy.

Mr. Patwalia further asserts that so far as the entitlement of relief in favour of landless labourers etc. is concerned, this Court has dealt with the issue in *Narmada Bachao Andolan v. State of M.P.,* AIR 2011 SC 1989 (hereinafter called "Narmada Bachao Andolan III") and all the issues agitated in this appeal have been answered in the said judgment. The appeal lacks merit and is liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

6. This Court in *Narmada Bachao Andolan III* (supra) has dealt elaborately with most of the issues agitated in this appeal, particularly, the issues of delay and laches, availability of alternative remedy, entitlement of major sons and daughters of oustees/as well as the landless labourers for allotment of agricultural land. The issues of land acquisition, rehabilitation and resettlement of oustees considering their fundamental and constitutional rights under Articles 21 and 300-A of the

Constitution of India have been dealt with elaborately therein. This Court held:-

> "These cases are to be decided giving strict adherence to the R & R Policy, as amended on 3.7.2002, further considering that special care is to be taken where persons are oppressed and uprooted so that they are better off. Our Constitution requires removal of economic inequalities and provides for provision of facilities and opportunities for a decent standard of living and protection of economic interests of the weaker segments of the society and in particular Scheduled Castes and Scheduled Tribes. Every human being has a right to improve his standard of living. Ensuring people are better off is the principle of socio-economic justice which every State is under obligation to fulfil, in view of the provisions contained in Articles 37, 38, 39(a), (b), (e), (f), 41, 43, 46 and 47 of the Constitution of India."

Thus, the case in fact requires to be disposed of in terms of the said judgment.

7. Ms. Palit has submitted that as the High Court did not consider the issue of amendment of Clause 5.1 of the R & R Policy and the effect of non-compliance of the condition imposed by the Ministry of Welfare while granting the clearance for the project, this court must examine the said issues.

According to Ms. Palit, while making the amendment the procedure prescribed under Article 166 of the Constitution has not been followed and while granting the clearance, the Ministry of Welfare has added the clause that families of the landless labourers would be given agricultural land to the extent of 2 hectares which has not been given.

Thus, this appeal is being considered to be restricted to these two issues.

Amendment to Clause 5.1 of the R & R Policy:

8. The NVDD vide Resolution dated 18.11.1987 proposed liberal amended policy for the oustees of the Narmada Projects and submitted the same for approval to the Cabinet of Ministers, Government of Madhya Pradesh. The said proposal was approved by the Cabinet of Ministers, Government of M.P. on 25.11.1987. Subsequently, the NVDD vide Resolution dated 28.8.1989 proposed certain modifications in the rehabilitation policy and the summary of the same was submitted for the approval to the Cabinet of Ministers, Government of M.P. The said proposal specifically provided for delegation of power to the NVDD and Rehabilitation Department to make routine/ general amendment in R & R Policy with the permission of the Ministers-in-charge of the said two departments. The Council of Ministers vide resolution dated 1.9.1989 approved the said proposal.

9. Certain amendments were sought in R & R Policy vide resolution dated 5.9.1989. The NVDD, in consultation with the Rehabilitation Department and after seeking approval of the Ministers-in-charge of both the said Departments, amended Clauses 4.1, 5.1 and 8.3 of the R & R Policy and issued the amended policy on 7.6.1991 in the name of the Governor of the State. The copy of the said amendment order was issued to 44 officers concerned as is evident from the record. Clause 4.1 of the R & R Policy was amended to facilitate the tenure holders, who were voluntarily willing to sell their lands, "as far as possible" to alienate the same and further providing for procedure for determination of reasonable price of such lands. Clause 5.1 was amended to the effect that if an oustee family does not wish to obtain land in lieu of the submerged land and wishes full payment of the amount of compensation, it can do so by submitting an application to this effect in writing to the concerned Land Acquisition Officer. In such cases, the oustee families would have no entitlement over allotment of land and would be paid full amount of compensation. An option once

exercised under this provision would be final, and no claim for allotment of land, in lieu of the land, acquired could be made afterwards. If any oustee family belonging to the Scheduled Tribes submits such an application, it will be essential to obtain orders from the Collector, who would after necessary enquiry certify that it would not adversely affect the interests of the oustee family. Such applications of the Scheduled Tribes oustee families could be accepted only after the said certification by the Collector. Clause 8.3 was also amended changing the size of plots to be allotted to the oustees etc.

10. Subsequently on 24.10.2002, NVDD submitted the summary to Council of Ministers for approval of SRG for oustees of Narmada Projects, particularly in respect of those oustees who were not claiming land in lieu of the land acquired, and the said proposal was approved by the Cabinet of Ministers. As a consequence, the order dated 28.12.2002 was issued giving effect to the said amendment in the name of the Governor of the State of Madhya Pradesh.

11. On 27.4.2002, the amendment was made in Clause 3.2 of the R & R Policy putting the words "as far as possible" for allotment of agricultural land to the oustees in lieu of the land acquired.

12. The aforesaid chronological development of amendment of R & R Policy reveals that Clause 3 of the R & R Policy provided for entitlement of oustees to get land in lieu of the land acquired. Clause 5 prescribed only the procedure for allotment of land under Clause 3 of the R & R Policy. The amendment of R & R Policy on 7.6.1991 which is under challenge by the appellant only facilitates those oustees who were not willing to take the land in lieu of the land acquired. Such an amendment was brought on demand of the oustees as an alternative. However, it does not take away the right of the oustees to claim land in lieu of the land acquired, for the simple reason that there was no amendment in year 1991 to Clause 3.2 of the R & R Policy and the amendment to the said Clause

3.2 incorporated on 27.4.2002 is not under challenge. The amendment under challenge simply facilitated an oustee to claim compensation instead of land. This may be for the reason that oustee may be willing to settle in another State or in urban area or wants to adopt any other vocation/profession or wants to start any other business. However, it does not take away the right of any oustee to claim the land in lieu of the land acquired. Therefore, in our opinion, amendment to Clause 5.1 remains inconsequential so far as the right of an oustee to claim land in lieu of the land acquired is concerned. Ms. Palit could not explain that in case her averment was accepted and the amendment to Clause 5.1 dated 7.6.1991 stood struck down, what benefit could an oustee derive from the same. In view of the above, we do not find any force in the submissions made on behalf of the appellant on this count.

13. In view of our conclusion reached herein that amendment to clause 5.1 of the R & R Policy was inconsequential so far as entitlement of allotment of agricultural land in lieu of land acquired was concerned, grievance of the appellant that procedure adopted for its amendment was not in conformity with the Statutory/Constitutional requirement becomes purely an academic issue, not required to be determined as Ms. Palit could not point out as what prejudice the said amendment could cause to an oustee. However, as we have heard the issue at length, it is desirable to decide the same also.

Procedure adopted for amendment:

14. Ms. Palit has submitted that the procedure adopted for amendment of Clause 5.1 of the R & R Policy is not in consonance with the provisions of Section 21 of the General Clauses Act, 1897 and Article 166 (2) and (3) of the Constitution. Rule 7 of the Business Rules, Part II provided for the cases to be brought before the Council of Ministers. Clause (viii) thereof reads:-

> "Proposals to vary or reverse a decision previously taken at meeting of the Council".

15. In *Sampat Prakash v. The State of Jammu & Kashmir & Anr.,* AIR 1970 SC 1118, this Court held:-

> "This provision (S.21) is clearly a rule of interpretation which has been made applicable to the Constitution in the same manner as it applies to any Central Act or Regulation…… As an example, under Article 77(3), the President, and, under Article 166(3) the Governor of a State are empowered to make rules for the more convenient transaction of the business of the Government of India or the Government of the State, as the case may be, and for the allocation among Ministers of the said business. If, for the interpretation of these provisions, Section 21 of the General Clauses Act is not applied, the result would be that the rules once made by the President or a Governor would become inflexible and the allocation of the business among the Ministers would forever remain as laid down in the first rules. Clearly, the power of amending these rules from time to time to suit changing situations must be held to exist and that power can only be found in these articles by applying Section 21 of the General Clauses Act".

16. As the issue raised is of great public importance and Ms. Palit was not able to render proper legal assistance, we requested Mr. Gourab Banerjee, learned Additional Solicitor General who was present in the court to assist the court on two issues, namely:

(1) Whether the State Council of Ministers is, as a matter of law, permitted to delegate its power to a subordinate authority to amend its own decision.

(2) Whether such amendment is to be consistent with the Rules of Business framed under Article 166 of the Constitution of India.

17. Mr. Banerjee has made the submissions citing large number of judgments of this Court and contended that law permits the delegation of power for amending the subordinate legislation in view of the provisions of Articles 77 and 166 of the Constitution.

18. Even function or duties which are vested in a State Government by a statute may be allocated to ministers by the Rules of Business framed under Article 166(3). In the case of *The State of Bihar v. Rani Sonabati Kumari,* AIR 1961 SC 221, it was held as under:

> "Section 3(1) of the Act confers the power of issuing notifications under it, not on any officer but on the State Government as such though the exercise of that power would be governed by the rules of business framed by the Governor under Art. 166(3) of the Constitution. But this does not afford any assistance to the appellant. The order of Government in the present case in expressed to be made "in the name of the Governor" and is authenticated as prescribed by Art. 166(2), and consequently "the validity of the order or instrument cannot be called in question on the ground that it is not an order or instrument made or executed by the Governor."

19. In the said judgment, it was also observed that the Governor remains responsible for actions of subordinates taken in his name:

> "The only point canvassed is whether it was an order made by the Governor or by some one duly authorised by him in that behalf within Art.154(1). Even assuming that the order did not originate from the Governor personally, it avails the State nothing because the Governor remains responsible for the action of his subordinates taken in his name. In *King Emperor v. Sibnath Banerjee & Ors.,* AIR 1945 PC 156 already referred to, Lord Thankerton pointing out the distinction between delegation by virtue of statutory power

> there and the case of the exercise of the Governor's power by authorised subordinates under the terms of S. 49(1) of the Government of India Act, 1935 corresponding to Art. 154(1), said:
>
> "Sub-section 5 of S. 2 (of the Defence of India Act, 1939) provides a means of delegation in the strict sense of the word, namely, a transfer of the power or duty to the officer or authority defined in the sub-section, with a corresponding divestiture of the Governor of any responsibility in the matter, whereas under S. 49(1) of the Act of 1935, the Governor remains responsible for the action of his subordinates taken in his name.
>
> This last point is therefore without force and has to be rejected."
>
> (See also the decision of the Constitution Bench in *R. Chitralekha v. State of Mysore & Ors.,* AIR 1964 SC 1823).

20. The decision of any minister or officer under the Rules of Business made under Articles 77(3) and 166(3) of the Constitution is the decision of the President or the Governor respectively and these Articles do not provide for 'delegation'. That is to say, that decisions made and actions taken by the minister or officer under the Rules of Business cannot be treated as exercise of delegated power in real sense, but are deemed to be the actions of the President or Governor, as the case may be, that are taken or done by them on the aid and advice of the Council of Ministers. In *State of U.P. & Ors. v. Pradhan Sangh Kshettra Samiti & Ors.,* AIR 1995 SC 1512, this Court relied on the decision of the Seven-Judge Bench in *Samsher Singh v. State of Punjab & Anr.,* AIR 1974 SC 2192 and held as under:

> "….Any action taken in the exercise of the executive power of the State vested in the Governor under Article 154(1)

is taken by the Government of the State in the name of the Governor as will appear in Article 166(1). There are two significant features in regard to the executive action taken in the name of the Governor. First, Article 300 states, among other things, that the Governor may sue or be sued in the name of the State. Second, Article 361 states that proceedings may be brought against the Government of the State but not against the Governor. The reason is that the Governor does not exercise the executive functions individually or personally. Executive action taken in the name of the Governor is the executive action of the State. Para 48 of the said judgment explains the position of law in that behalf succinctly as follows:

"The President as well as the Governor is the constitutional or formal head. The President as well as the Governor exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise by the President or the Governor of any power or function, the satisfaction required by the Constitution is not the personal satisfaction of the President or Governor but the satisfaction of the President or Governor in the constitutional sense in the Cabinet system of Government, that is, satisfaction of his Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. The decision of any Minister or officer under Rules of Business made under any of these two Articles 77(3) and 166(3) is the decision of the President or the Governor respectively. These articles did not provide for any delegation. Therefore, the decision of a Minister or officer under the Rules of Business is the decision of the President or the Governor."

21. Whether there can be further delegation by the minister to the officer subordinate to him depends on the provisions of the Rules of Business.

22. Rules of Business operate even when a statute does not authorise sub-delegation. In *King Emperor v. Sibnath Banerjee & Ors.* (supra), the law was crystallised by the Privy Council holding that a provision permitting sub-delegation is merely supplementary and can be no ground for excluding the ordinary method by which the Government's executive business was carried on.

23. The requirement of the Rules of Business must be complied with in order to give validity to the action or decision taken. In Smt. Godavari Shamrao Parulekar v. The State of Maharashtra & Ors., AIR 1964 SC 1128, a Constitution Bench of this Court considered whether an order of preventive detention under the Defence of India Ordinance could have been passed in terms of the Rules of Business. While upholding the order of detention, the court held that the preventive detention could only be ordered by the minister who had been allocated the relevant subject which was the basis of the detention order.

24. Earlier cases of this Court suggest that the Rules of Business are to be construed as directory so that substantial compliance with them would suffice to uphold the validity of the relevant order of the Government. (See: *State of Uttar Pradesh v. Om Prakash Gupta,* AIR 1970 SC 679)

25. Similarly, in *R. Chitralekha* (Supra), a Constitution Bench of this Court had observed that it is settled law that the provisions of Article 166 of the Constitution are only directory and not mandatory in character. In paragraph 4 it was held as under:

"…..This view has been reaffirmed by this Court in subsequent decisions: see *Ghaio Mal & Sons v.The State*

of Delhi & Ors., AIR 1959 SC 65 and it is, therefore, settled law that provisions of Art. 166 of the Constitution are only directory and not mandatory in character and, if they are not complied with, it can be established as a question of fact that the impugned order was issued in fact by the State Government or the Governor."

(Emphasis added)

26. The judgment in *R. Chitralekha* (supra) has been subsequently cited for this proposition in *Bannari Amman Sugars Ltd. v. Commercial Tax Officer & Ors.,* (2005) 1 SCC 625.

27. In *Dattatraya Moreshwar v. The State of Bombay & Ors.,* AIR 1952 SC 181, a Constitution Bench of this Court held that an omission to make and authenticate an executive decision in the form mentioned in Article 166 does not make the decision itself illegal, on the basis that its provisions were directory and not mandatory.

28. However, in the recent decision of *MRF Ltd. v. Manohar Parrikar & Ors.,* (2010) 11 SCC 374, a two-Judge Bench of this Court has sought to distinguish the above mentioned judgments and taken the view that in case there is non-compliance of Business Rules framed under Article 166(3) of the Constitution, the notification issued in violation of Business Rules is void ab initio and all actions consequent thereto are null and void. The court held:

"Thus, from the foregoing, it is clear that a decision to be the decision of the Government must satisfy the requirements of the Business Rules framed by the State Government under the provisions of Article 166(3) of the Constitution of India. In the case on hand, as has been noticed by us and the High Court, the decisions leading to the notifications do not comply with the requirements of the Business Rules framed by the Government of Goa

under the provisions of Article 166(3) of the Constitution and the notifications are the result of the decision taken by the Power Minister at his level. The decision of the individual Minister cannot be treated as the decision of the State Government and the notifications issued as a result of the decision of the individual Minister which are in violation of the Business Rules are void ab initio and all actions consequent thereto are null and void."

29. On the other hand, in *M/s. Crawford Bayley & Co. & Ors. v. Union of India & Ors.,* AIR 2006 SC 2544, a two-Judge Bench has accepted that the Rules of Business framed under Article 77 of the Constitution, which is analogous to Article 166, are directory and not mandatory, with the following observations:

"It was next contended with reference to the Allocation of Business Rules that the Central Government in the Urban Department can appoint an Estate Officer but in the present case, the Finance Department has appointed an Estate Officer which is in violation of the Allocation of Business Rules, 1961. Though the Division Bench dealt with this aspect exhaustively in its judgment and held that the provisions of the Business Rules are not mandatory and will not vitiate the appointment, we fully agree that the Rules of Business are administrative in nature for governance of its business of the Government of India framed under Article 77 of the Constitution of India. In this connection, the Division Bench referred to the decision of this Court in *Dattatraya Moreshwar Pangarkar v. The State of Bombay,* (1952) SCR 612. There analogous Rules of Business framed by the State under Article 166 of the Constitution of India came up for consideration and it was observed that they are directive and no order will be invalidated, if there is a breach thereof….".

30. We have considered the larger Bench judgment of this

Court in *R. Chitralekha* (supra) and taken note of the fact that *MRF Ltd.* (supra) is distinguishable from the case at hand since that case dealt with rules pertaining to financial implications for which there were no provisions in the Appropriation Act, and so the rules required mandatory compliance. Here, there is no issue of financial repercussions. The issue here is whether the Council of Ministers is permitted to delegate the power to amend its decision to a Committee of Ministers consisting of the Ministers-in-charge of the Departments concerned and the Chief Minister, and whether such amendment needs to be consistent with the Rules of Business framed under Article 166 of the Constitution of India. The case law provides that delegation is permissible and that Rules of Business are directory in nature. In view of the above, we find that delegation of power is permissible. Submissions so made on behalf of the appellant in this regard are preposterous.

Land to landless labourers:

31. So far as the issue of non-compliance of the clearance of the terms incorporated by the Ministry of Welfare is concerned, the issue has been elaborately dealt with by us in earlier judgment in *Narmada Bachao Andolan III* (Supra). However, Ms. Palit has submitted that certain issues could not be agitated in that case as the terms and conditions were incorporated by the Ministry of Welfare (Government of India), while granting the clearance dated 6.5.1997.

32. So far as the present appeal in respect of Upper Beda Project is concerned, the rehabilitation policy for the oustees provided that the displaced families would be rehabilitated maintaining existing structure of social groups as far as possible, in the command area or near the periphery of the affected areas in accordance with their preferences.

Relevant provisions of the R & R Policy read as under:

"3.1 xx xx xx

3.2 (a) Every displaced family from whom more than 25 per cent of its land is acquired in revenue villages or forest villages shall be entitled to and be allotted land to the extent of land acquired from it, subject to provision in 3.2(b) below.

(b) A minimum area of 2 hectares of land would be allotted to all the families whose lands would be acquired irrespective of whether government land is offered or private land is purchased for allotment.

Where more than 2 hectares of land is acquired from a family, it will be allotted equal land, subject to a ceiling of 8 hectares.

xx xx xx

xx xx xx

9.1 Special efforts will be made for the effective rehabilitation of *landless displaced families.* Adequate arrangements will be made by the Narmada Valley Development Authority for the up-gradation of existing skills or impartment of new skills so as to promote full occupational rehabilitation. In this regard, new opportunities emerging as a result of the project will be fully used for the benefit of the displaced families. Suitable provisions will be incorporated in the tender document of Local Competitive Bidding (LCB) and other forms to ensure the employment of displaced persons. The Narmada Valley Development Authority will ensure appropriate arrangement for discharge of these responsibilities within a stipulated time frame. In the interim time, special financial assistance will be given to *supplement the income of the landless agricultural labourers and the landless scheduled castes and scheduled tribes oustee families for 3 years in descending order, which shall be in addition to the grant-in-aid mentioned in para 6.1. This*

period of 3 years will be calculated from the payment year of the grant-in-aid under para 6.1. Thus, a landless oustee family will get a special income support amount of Rs. 2,250/-, Rs.5,500/- and Rs.2,750/- in the second, third and fourth year of displacement, respectively. In addition, a further sum of Rs.12,500/- shall be kept in reserve for every landless oustee family and for earning livelihood or for purchase of productive assets. The above poverty line and the amount to be kept in reserve is also linked with special support amount and the reserve shall also be proportionately increased accordingly. For other landless families special financial assistance of Rs.19,500/- will be given for the purchase of productive assets."

(Emphasis added)

33. The policy makes it clear that there was no provision for allotment of agricultural land to the landless labourers. However, when the project was placed before the Ministry of Welfare, Government of India, it granted clearance on 6.5.1997 providing for allotment of minimum 2 hectares of land for all landless labourers.

34. Before the High Court the issue was raised and the State Authorities while filing the counter affidavit replied as under:

"**Reply to para 5.4**: While the approval and sanction as mentioned in the para under reply are not disputed, it is submitted that in so far as the said clearance (Annexure P-3) proceeds on the basis that 2 hectares of land would be given to even a landless labour, the same was represented against by the State Government by its letter dated 5.4.1997…….. A bare perusal of the said letter would show *that the issue regarding the grant of minimum 2 hectares of land to all landless labourers was denied and it was pointed out that*

the State has no such policy. It was also pointed out that such a policy was the prerogative of the State Government as "land" and "water" are State subjects appearing in entries 17 and 18 respectively of the State list of the VIIth Schedule of the Constitution of India. Thus, the State has the exclusive power to frame R&R policies. It is also pertinent to mention here that the said provision of allotment of 2 hectares of land to all the landless labourers neither finds mention in the R&R policy of the State nor in the NWDT Award nor even in the National Resettlement and Rehabilitation Policy, 2007. Thus, the petitioner's reliance on the letter dated 6.5.1997 is baseless and misconceived."

(Emphasis added)

35. Further vide letter dated 5.4.1997, the NVDD wrote to the Ministry of Welfare informing it that landless labourers had been proposed for giving them minimum 2 hectares of land as per its clearance but action in this respect *would be taken as per decision of the Government*.

36. We have also gone through the clearance letter dated 6.5.1997 issued by the Ministry of Welfare. The relevant part of the said letter on which Ms. Palit has placed strong reliance reads:

"In view of the fact that R&R Action Plan prepared is based on the R&R guidelines of N.V.D.A projects and since the R&R Action Plan has been modified *to treat unmarried major daughters as separate entities for all R&R packages and for allotting a minimum of 2 hectares of land for all landless labourers,* I am directed to initiate the clearance for the R&R Action Plan of this project by this ministry"

(Emphasis added)

It is impermissible in law to read a part of the document in isolation. The document is to be read as a whole. The letter of approval mentions *"allotting a minimum of 2 hectares of land for all landless labourers"* and says that unmarried major daughters would be treated as separate entities for that particular purpose, i.e. of allotting 2 hectares of land. Ms. Palit never pleaded the cause of unmarried major daughters to be treated as separate entities for allotment of land. As noted earlier, we have already dealt with and answered the issue of entitlement of major sons and daughters of oustees for allotment of land in negative in *Narmada Bachao Andolan III* (supra). Thereby, Ms. Palit mistakenly relied on the clearance letter by the Ministry of Welfare to say that granting land to landless labourers was in and by itself a precondition for granting clearance to the project.

37. Moreover, even if we regard the allotment of land to landless labourers as a condition, the Government of M.P. did not accept such a condition. The Ministry of Welfare's clearance was not statutory, like any other statutory clearance e.g. clearance granted by Environment and Forest Ministry. There is nothing in that clearance as to what would be the consequence for non-compliance with those conditions. More so, subsequent thereto, it is evident from the record that representations had been filed on behalf of the oustees before the Ministry of Welfare. However, no action had ever been taken by the Ministry of Welfare that the terms incorporated by it while granting clearance were not being adhered to and in spite of writing several letters, the Ministry of Welfare did not consider it proper to take any action or even to refer those letters to the State Government or to the NVDD. Thus, the said Authorities also treated the same as non-statutory.

In view of the above, we do not find any cogent reason to accept the submission made by Ms. Palit that landless labourers are entitled for allotment of agricultural land to the extent of 2 hectares. The said contention is devoid of any merit.

Even otherwise, it does not appeal to us that landless labourer could be entitled for allotment of agricultural land admeasuring two hectares. Neither it had ever been contemplated nor it is compatible with R & R Policy. Nor such land had ever been allotted to this class of persons. The contention is hereby rejected.

38. In view of the above, appeal lacks merit and is accordingly dismissed. No order as to costs.

Before parting with the case, we record our deep sense of appreciation and thanks to Mr. Gourab Banerjee, learned Additional Solicitor General for India, for rendering assistance to the Court on our request.

B.B.B. Appeal dismissed.

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

and directed the respondents to execute the sale deed in favour of the appellant and granted three months time to the appellant to pay the balance of the sale consideration. The Division Bench of the High Court allowed the appeal. The instant appeal was filed challenging the order of the High Court.

Dismissing the appeal, the Court

HELD: 1. In the Agreement for Sale dated 28.08.1981, in the beginning, the Vendor-Respondents specifically asserted that they were the sole and absolute owner and in exclusive possession and enjoyment of all the land mentioned in the Schedule together with a multi-storey building, sheds, garages, outhouses, fixtures and fittings. The Agreement clearly stipulated that the Vendor required substantial cash for meeting its business purposes and, therefore, decided to sell the said property. It is apparent from the various clauses of the Agreement for Sale that the Vendor-Respondent Company was in need of money for meeting its business purposes. Clauses 3 and 4 of the Agreement mandated the Vendor to produce all the documents of title in their possession and hand over the same to the Purchaser for investigation by the Purchaser. It also made it clear that all those documents would be placed before the advocate of the Purchaser for scrutiny and approval and, thereafter, the Vendor at its own costs and expenses would clear all defects in title and encumbrances and claims on or to the said property. It is clear from Clause 6 that the sale shall be completed on or before 05.09.1981 or within a period of one week from the date of furnishing a Certificate under Section 230-A of the Income-tax Act, 1981 by the vendor and on the date of the Registration of the Sale Deed, the Purchaser would pay Rs. 48 lakhs out of the amount of Rs. 82 lakhs. The balance of Rs. 10 lakhs was payable on or before 07.10.1981, Rs. 11 lakhs on or before

07.11.1981, Rs. 11 lakhs on or before 07.12.1981 and the balance of Rs. 32 lakhs payable in 3 instalments would not carry any interest. When there was a specific understanding between the parties within which period the sale was to be completed, it has to be construed that the intention of the parties was to treat the time as essence of the contract. Though the respondents had agreed to receive the balance of Rs. 32 lakhs in instalments for a period of 3 months after the registration of the sale deed which also made it clear that both parties had agreed to complete the entire transaction as early as possible which proved that time is essence of the contract. Though the appellant-Company relying on Clauses 3 and 4 of the Agreement contended that the respondents failed to produce all the required documents including the documents pertaining to title and encumbrances and claims on or to the property, there was no basis for such a claim. [Paras 5, 7, 8] [126-D-F; 129-A-C; 129-D-H; 130-A-C]

2. In terms of Section 16(c) of the Specific Relief Act, 1963, 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. Explanation appended to this sub-section (c) makes it clear that if a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court. However, the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. It is seen from the pleadings that necessary averments have been made in terms of sub-section (c) of Section 16. PW-1 explained the urgency and the need to sell the property. He also explained that the company had a cash crunch problem and was in dire need of money for their

commercial transactions and decided to sell the property in question, particularly, to meet the immediate need of their creditors. A payment of Rs. 2 lakhs was made as advance on the date of execution of the agreement dated 28.08.1981. On 21.09.1981, a further sum of Rs. 5 lakhs was paid and by mutual consent, the time was extended to 30.09.1981. On 06.10.1981, another sum of Rs. 5 lakhs was advanced by the appellant-Company and the time for completion of the Sale Agreement was extended up to 14.10.1981. Again, for the third time, that is on 19.12.1981, time was extended for the completion of the transaction up to 31.12.1981 on payment of Rs.1,10,000/-. 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. Inasmuch as the Vendor was in dire need of money at every occasion and the need for such short term extension clearly showed that the parties intended to treat the time as essence of the contract. In terms of Clause 7 of the Agreement at any time of registration of the sale deed, the appellant was required to pay a sum of Rs.50 lakhs, after deducting the advance amounts already paid and the balance of Rs.32 lakhs was payable after registration of the sale deed in three installments. This would also reveal the intention of the parties to treat the time as essence of the contract. The various clauses in the Agreement for Sale, pleadings, evidence and the conduct of the parties showed that parties have agreed that the time was essence of the contract and the same was to be adhered to strictly. [Para 9] [130-D-G; 131-A-H]

3. It is true that in the Agreement, it was stated that Vendor was required to produce all the documents of title in their possession relating to the property to the Purchaser for investigation relating to title. In Clause 10,

there was a specific reference to the production of clearance certificate under Section 230-A of the Income-tax Act and obtain permission or sanction from any authorities that may be necessary for the purpose of sale of the property. When the appellant-Company being a Purchaser was investing a huge sum of Rs. 82 lakhs, they were entitled to clear all their doubts in respect of the title. In terms of Clause 6 of the Agreement, sale was to be completed on or before 05.09.1981 or within one week from the date of furnishing the certificate under Section 230-A of the Income-tax Act whichever was later and upon payment of Rs. 48 lakhs out of the agreed amount of Rs. 82 lakhs to the Vendor. Admittedly, the respondents produced Income-tax Clearance Certificate even on 09.09.1981. Only after production of I.T. Clearance, the appellant-Company sought further particulars relating to mortgage on the Bank of India, arrears of urban land tax, property tax, exemption certificate from the urban land ceiling authorities, encumbrance certificate, latest audited balance-sheet, list of creditors, solvency certificate, details of attachment and particulars about winding up proceedings alleging that they have not received the same to be forwarded to their advocates. The respondents sent a reply specifically stating that after being fully satisfied about the title, the appellant-Company prepared the draft sale deed and after a combined discussion at their office on 07.09.1981, the same was approved and thereafter, the respondents obtained necessary certificate under Section 230-A of the Income-tax Act and the same was also intimated to them. In the same letter, it was pointed out that as per the Agreement of Sale and consensus arrived at between the parties, the appellant-Company was required to complete the sale within one week from 09.09.1981. It was also pointed out that in spite of several promises and assurances, the appellant-Company could not fulfill their promise and also that because of this

delay, they were suffering heavy loss and the very object of sale was being defeated. It was also pointed out that so far they had spent heavy sums and satisfied all their requirements and finally requested to do the needful immediately for completion of the sale transaction. [Para 10] [130-B-H; 132-A-D]

4. It is not in dispute, more particularly, from the evidence of PW-1 that the legal advisor of the appellant-Company scrutinized the title deeds before entering into Agreement. They also visited the site along with their lawyers and finally after satisfying all the materials, their lawyers gave opinion with regard to the clear title of the property and only after getting their clearance, draft sale deed was prepared to enable the respondents to get certificate under Section 230-A of the Income-tax Act. Curiously, in his evidence, P.W.1 has stated that the matter got delayed only due to the non-production of exemption certificate from urban land ceiling authorities. It is true that as per Clause 3 of the Agreement, respondents have to produce all the documents pertaining to the title of the suit property. It is further seen that after payment of Rs. 2 lakhs as advance on the date of execution of the Agreement, monies to the extent of Rs. 11,10,000/- were paid on various dates in order to satisfy and comply with all statutory requirements. In the Agreement that 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. From the materials placed, the appellant-Company was not justified in calling for several documents when admittedly, their lawyers 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. In other words, production of clearance certificate from the competent authority under the Urban Land Ceiling Act was not specifically intended at any

point of time. The information sought for by the appellant-Company was only to delay the transaction and it was not always ready and willing to perform in terms of Section 16(c) of the Specific Relief Act, 1963. [Paras 11, 12] [133-E-H; 133-A-D]

5. The proviso to Section 3(2) of the Urban Land (Ceiling and Regulation) Ordinance, 1976 defining "land appurtenant" states that in the case of multi-storeyed building, the extent of land contiguous to the land occupied by such multi-storeyed building permitted according to the plan approved by the appropriate authority shall be deemed to be the land appurtenant. In view of the same, the entirety of the land in and around the five-storeyed building would come outside the vacant land under Section 3 (p) of the Act. It is clear that in the case of multi-storeyed building which was under construction at the date of commencement of the Act with building plans duly approved, no part of the land attached to the building would come within the scope of the Act. By refusing to pay the balance consideration to purchase the property by getting the sale deed registered, the appellant-Company has not only committed a breach of the Agreement but also showed that it was not ready and willing to complete the Agreement. In those circumstances, the argument assailing the judgment of the Division Bench of the High Court is liable to be rejected. [Para 14] [135-E-F; 136-B-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7021 of 2003.

From the Judgment & Order dated 17.02.2003 of the High Court of Judicature at Madras in O.S.A. No. 163 of 1994.

K.V. Viswanathan, V. Mohana, Abhishek K., Sakati for the Appellant.

K.K. Venogopal, V. Giri, K.V. Mohan, T.N. Unmi Nambiar, Md. Sadique, K.V. Balakrishnan for the Respondents.

The Judgment of the Court was delivered by

P.SATHASIVAM,J. 1. This appeal is directed against the final judgment and decree dated 17.02.2003 passed by the Division Bench of the High Court of Judicature at Madras in O.S.A. No. 163 of 1994 whereby the appeal filed by the respondents herein was allowed.

2. **Brief facts:**

(a) The appellant is a Private Limited Company (hereinafter referred to as "the appellant-Company) registered under the Companies Act, 1956 and is carrying on the business of manufacturing, selling, exporting, trading in and distribution of Pesticides, Chemicals and Agro Chemicals. Respondent No. 1 is also a Private Limited Company (hereinafter referred to as "the respondent-Company") registered under the Companies Act, 1956 in which Mr. T.P. Narayanan – respondent No.2 is the Chairman and Director and appeal against him stood dismissed vide this Court's order dated 19.07.2004. Mr. T.K. Gopinath (since died) was the Managing Director – respondent No.3 and his legal representatives are on record. In the year 1981, the appellant-Company required a property around Mount Road Area near Mylapore, Madras for establishing a Research and Development Centre. Respondent-Company, on coming to know about the said requirement, offered its property measuring 12 grounds 33 sq. ft. with buildings at Door No. 46, Cathedral Road, Madras. The officials of the appellant-Company inspected the property and after getting it evaluated by an Authorized Valuer offered a price of Rs.82 lakhs for the entire property and the Respondent Nos. 2 & 3 herein accepted the same. Thereafter, an Agreement for Sale was executed between the parties on 28.08.1981 and a sum of Rs. 2 lakhs was paid by way of cheque as advance.

(b) Pending investigation of title of the respondent-Company to the suit property, the appellant-Company entered into the said agreement since the respondents desired a firm commitment to be made. Clauses 3 and 4 of the said Agreement put the vendor under an obligation to produce all documents of title in its possession or control relating to the suit property for the investigation and approval of the appellant-Company. Besides, getting other necessary clearances, the respondents were also required to get the Income Tax Clearance Certificate as specified under Section 230-A of the Income Tax Act, 1961.

(c) In accordance with the above, the appellant-Company 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 and other necessary clearances to complete the sale. On 09.09.1981, the respondents furnished the Income Tax Clearance Certificate dated 07.09.1981 and promised to furnish the other required documents very soon. They also demanded a further payment of Rs. 10 lakhs as advance pending finalization of the sale to which the appellant-Company did not agree.

(d) As the respondents did not furnish the required documents, the appellant-Company issued a letter dated 14.09.1981 calling upon them to furnish the required documents. Instead of furnishing all the required documents, as sought for, the respondents, vide letter dated 15.09.1981, called upon the appellant-Company to expedite the sale. Thereafter, on 19.09.1981, the appellant-Company again requested the respondents to furnish the solvency certificate. In response to the above-said letters, the respondents orally apologized for the delay and promised to furnish the required details at the earliest and respondent No.2 also requested for a further payment of Rs.10 lakhs as advance to enable them to discharge the mortgage subsisting in favour of Bank of India. The appellant-Company paid Rs. 5 lakhs to respondent No.2 on 21.09.1981

on the undertaking that the documents called for would be sent by 30.09.1981. Again on the request of respondent No.2, the appellant-Company paid a further sum of Rs. 5 lakhs to meet the Urban Land Ceiling Clearance. A total sum of Rs. 12 lakhs was paid to the respondents. On 19.10.1981, respondent No.2 again requested a sum of Rs. 2 lakhs to meet certain statutory compliance which was a charge on the property. Taking full details of such liabilities, the appellant-Company paid a sum of Rs.1,10,000/-. As the respondents did not furnish the required documents till the end of 1981, the appellant-Company sent a notice dated 19.01.1982 calling upon them to perform their obligation under the agreement dated 28.08.1981 as also to fulfil their personal undertakings. Notice was served only on respondent No.2 but the notice on respondent Nos. 1 and 3 were returned back with the remarks "unserved". In reply to the said notice, respondent No.2 said that he is not personally liable for the payment made by the appellant-Company.

(e) In the said circumstances, the appellant-Company was compelled to file a suit for specific performance on 10.05.1982 in the High Court of Judicature at Madras and the same was numbered as C.S. No. 287 of 1982. The learned single Judge of the High court by judgment dated 01.06.1993 decreed the suit and directed the respondents herein to execute the sale deed in favour of the appellant-Company and granted three months' time to the appellant-Company to pay the balance of the sale consideration.

(f) Challenging the judgment of the learned single Judge, the respondents preferred O.S.A. No. 163 of 1994 before the High Court. By impugned judgment dated 17.02.2003, the Division Bench of the High Court allowed the appeal. Aggrieved by the said judgment of the Division Bench, the appellant-Company preferred this appeal by way of special leave petition before this Court.

3. Heard Mr. K.V. Viswanathan, learned senior counsel for the appellant-Company and Mr. K.K. Venugopal, learned senior

counsel for respondent No.1 and Mr. V. Giri, learned senior counsel for LRs of respondent No.3.

Points for consideration:

4. The only question for consideration is whether the decree granted by the learned single Judge of the High Court for specific performance based on the Agreement for Sale dated 28.08.1981 is sustainable, or the Division Bench is justified in concluding that the appellant-plaintiff has not made out a case for a decree of specific performance in allowing the appeal and setting aside the decree passed by the trial Court by dismissing the suit.

Discussion as to Agreement for Sale

5. In order to consider the rival claims, it is desirable to verify the relevant clauses from the Agreement for Sale dated 28.08.1981. In the beginning, the Vendor-Respondents herein, specifically asserted that they are the sole and absolute owner and in exclusive possession and enjoyment of all the land mentioned in the Schedule together with a multi-storey building, sheds, garages, outhouses, fixtures and fittings thereon situated at Cathedral Road, Teynampet, Madras bearing present Door No. 46, Old No. 31, T.S. No. 1238/1A, R.S. No. 1233/1 and 1233/5 measuring 12 grounds 33 sq. ft. The Agreement clearly stipulates that the Vendor requires substantial cash for meeting its business purposes and, therefore, decided to sell the said property. It makes it clear that by resolution dated 16.07.1981, the Board of Directors of the Vendor have authorized Shri K.S. Hari, General Manager, to negotiate and sell the said property and to execute the sale deed. It also makes it clear that the Vendor has agreed to sell and the purchaser has agreed to purchase the said property at a price consideration of Rs. 82 lakhs free from all encumbrances and claims whatsoever on the terms and conditions set out in the agreement.

6. Among the various clauses, we are concerned with the following clauses in the Agreement for Sale. They are:

"3. The Vendors shall produce or cause to be produced to the purchaser all the documents of title in their possession or control or relating to the said property for the investigation of the Vendor's title thereto.

4. The sale shall be subject to the approval of the title of the vendor to the said property agreed to be sold herein by the advocate for the Purchaser and the Vendor shall at its own costs and expenses get in all outstanding estates and clear all defects in title and encumbrance and claims on or to the said property.

6. The sale shall be completed on or before 05.09.1981 or within one week from date of furnishing a Certificate under section 230-A of the Income Tax Act of 1981 by the Vendor whichever is later, upon the payment of Rs. 48 lakhs out of the said purchase money by the purchaser to the Vendor, the balance being payable as hereinafter provided, the vendor and all other necessary parties if any shall execute a proper conveyance of the said property in one piece of in several portions in favour of the purchaser or such other person or persons the Purchaser shall nominate.

7. The Purchaser shall pay at any time of the Registration of the sale deed a sum of Rs. 48 Lakhs out of the said price and the balance in the following manner:-

1. Rs. 10 lakhs on or before 07.10.1981

2. Rs. 11 lakhs on or before 07.11.1981

3. Rs. 11 lakhs on or before 07.12.1981

The said balance of Rs. 32 lakhs payable in three installments as aforementioned shall not carry any interest.

If the purchaser fails to pay the amounts as stipulated above, the balance amount shall carry interest at 18% per annum till date payment.

10. The Vendor shall at its cost obtain the required clearance certificate under Section 230-A of the Income Tax Act and obtain requisite permission or sanctions from any authorities as may be necessary for the purpose of effectual competition of the sale of the property."

The above Agreement to Sell entered into on 28.08.1981 has certain important provisions which provide a clear understanding of motivation of both the parties. Clause 3 extracted above provides that the Vendor/respondents shall produce or cause to be produced all the documents relating to title of the property to the purchaser. Clause 4 provides that the sale shall be subject to the approval of the purchaser's advocate. Clause 6 makes the completion of sale incumbent on the date of furnishing the Income-tax Certificate by the Vendor and payment of Rs. 48 lakhs by the purchaser. Clause 10 makes it clear that it is the responsibility of the Vendor to obtain the required clearance certificate under Section 230-A of the Income-tax Act and also obtain requisite permission or sanction from other authorities, as may be necessary, for the purpose of completion of the sale of the property. Clause 13 provides that if the title of the Vendor is not approved by the Purchaser's advocate, the Purchaser would be entitled to cancel the Agreement. Clause 14 entitles the Purchaser for a suit for specific performance in the event of breach of any of the terms of the Agreement by the Vendor or the return of the amount taken as advance by the Vendor together with a sum of Rs. 1 lakh as liquidated damages. Clause 15 ensures that the Agreement shall come to an end if there is a breach by the Purchaser. With these clauses and understanding by both the parties, we have to analyze their claim and decide the case one way or the other.

Whether time is essence of the contract:

7. If we verify the various clauses from the Agreement for Sale, it is clear that the Vendor-Respondent Company herein was in need of money for meeting its business purposes. The appellant-Company has very much relied on Clauses 3 and 4 of the Agreement which we have already extracted. Those clauses mandate the Vendor to produce all the documents of title in their possession and hand over the same to the Purchaser for investigation by the Purchaser. It also makes it clear that all those documents be placed before the advocate of the Purchaser for scrutiny and approval and, thereafter, the Vendor at its own costs and expenses clear all defects in title and encumbrances and claims on or to the said property.

8. In order to strengthen their claim that time is essence of the contract, the respondents have heavily relied on Clauses 6 and 7 which are extracted in the paragraphs supra. It is clear from Clause 6 that the sale shall be completed on or before 05.09.1981 or within a period of one week from the date of furnishing a Certificate under Section 230-A of the Income-tax Act, 1981 by the Vendor. It is clear from Clause 7 that on the date of the Registration of the Sale Deed, the Purchaser has to pay Rs. 48 lakhs out of the amount of Rs. 82 lakhs. According to the vendor, the balance being payable in the following manner:

1. Rs. 10 lakhs on or before 07.10.1981

2. Rs. 11 lakhs on or before 07.11.1981

3. Rs. 11 lakhs on or before 07.12.1981

It is also clear from Clause 7 that the balance of Rs. 32 lakhs payable in 3 instalments shall not carry any interest. However, if the Purchaser fails to pay the amounts as stipulated above, the balance amount shall carry interest @ 18% p.a. till date of payment. It is clear that when there was a specific

understanding between the parties as reflected in the above-mentioned clauses in the Agreement within which period the sale was to be completed, it has to be construed that the intention of the parties was to treat the time as essence of the contract. Though the respondents had agreed to receive the balance of Rs. 32 lakhs in instalments for a period of 3 months after the registration of the sale deed which also makes it clear that both parties have agreed to complete the entire transaction as early as possible which prove that time is essence of the contract. Though the appellant-Company relying on Clauses 3 and 4 of the Agreement contended that the respondents failed to produce all the required documents including the documents pertaining to title and encumbrances and claims on or to the property, there is no basis for such a claim.

9. It is also relevant to point out the stand of the parties as reflected in their pleadings and evidence. In terms of Section 16(c) of the Specific Relief Act, 1963, 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. Explanation appended to this sub-section (c) makes it clear that if a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court. However, the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. It is seen from the pleadings that necessary averments have been made in terms of sub-section (c) of Section 16. On the side of the plaintiff, James Fadric was examined as PW-1. He explained the urgency and the need to sell the property. He also explained that the company had a cash crunch problem. No doubt, he also referred that the company was facing liquidity proceedings before the High Court of Bombay and necessary application had been filed before the Company Court at Bombay for settlement of the scheme to avoid liquidation which we are not

concerned. The fact remains that at the relevant time, Vendor/ Respondent-Company was in dire need of money for their commercial transactions and decided to sell the property in question, particularly, to meet the immediate need of their creditors. We have already adverted to the payment of Rs. 2 lakhs as advance on the date of execution of the agreement dated 28.08.1981. On 21.09.1981, a further sum of Rs. 5 lakhs was paid and by mutual consent, the time was extended to 30.09.1981. On 06.10.1981, another sum of Rs. 5 lakhs was advanced by the appellant-Company and the time for completion of the Sale Agreement was extended up to 14.10.1981. Again, for the third time, that is on 19.12.1981, time was extended for the completion of the transaction up to 31.12.1981 on payment of Rs.1,10,000/-. As rightly pointed out by Shri K.K. Venugopal and Shri V. Giri, learned senior counsel appearing for the respondents, the payment of money in short intervals and also the extension of time for completion of the transaction within the prescribed period clearly show that both the parties wanted to complete the transaction as early as possible without further extension. Inasmuch as the Vendor was in dire need of money at every occasion and the need for such short term extension clearly shows that the parties intended to treat the time as essence of the contract. It is also relevant to point out that Clause 7 of the Agreement, which we have already extracted, makes it clear that at any time of registration of the sale deed, the appellant shall pay a sum of Rs. 50 lakhs, after deducting the advance amounts already paid and the balance of Rs. 32 lakhs is to be paid after registration of the sale deed in three installments as mentioned above. This would also reveal the intention of the parties to treat the time as essence of the contract. From the various clauses in the Agreement for Sale which we have referred to, pleadings, evidence and the conduct of the parties, we hold that parties have agreed that the time is essence of the contract and the same has to be adhered to strictly.

Readiness and willingness:

10. Learned counsel for the respondents urged that several requests by the appellant-Company for various documents which are not provided in the terms of the Agreement show their intention that they wanted to delay the proceedings. On the other hand, learned counsel appearing for the appellant-Company submitted that they were justified in asking for those documents in order to satisfy the title of the property. It is true that in the Agreement, it is stated that Vendor has to produce all the documents of title in their possession relating to the property to the Purchaser for investigation relating to title. In Clause 10, there is a specific reference to the production of clearance certificate under Section 230-A of the Income-tax Act and obtain permission or sanction from any authorities that may be necessary for the purpose of sale of the property. It is true that when the appellant-Company being a Purchaser investing a huge sum of Rs. 82 lakhs, they are entitled to clear all their doubts in respect of the title. In terms of Clause 6 of the Agreement, sale has to be completed on or before 05.09.1981 or within one week from the date of furnishing the certificate under Section 230-A of the Income-tax Act whichever is later and upon payment of Rs. 48 lakhs out of the agreed amount of Rs. 82 lakhs to the Vendor. Admittedly, the respondents produced Income-tax Clearance Certificate even on 09.09.1981. It is to be noted that only after production of I.T. Clearance, the appellant-Company, vide letter dated 14.09.1981, addressed to Mr. K. S. Hari, General Manager of the Respondent-Company sought further particulars relating to mortgage on the Bank of India, arrears of urban land tax, property tax, exemption certificate from the urban land ceiling authorities, encumbrance certificate, latest audited balance-sheet, list of creditors, solvency certificate, details of attachment and particulars about winding up proceedings alleging that they have not received the same to be forwarded to their advocates. The said letter is available as Annexure-P2. In pursuance of the said letter, the respondents sent a reply on 15.09.1981 “by

hand delivery" to the appellant–Company specifically stating that after being fully satisfied about the title, the appellant-Company prepared the draft sale deed and after a combined discussion at their office on 07.09.1981, the same was approved and thereafter, the respondents obtained necessary certificate dated 09.09.1981 under Section 230-A of the Income-tax Act and the same was also intimated to them. In the same letter, it was pointed out that as per the Agreement of Sale and consensus arrived at between the parties, the appellant-Company has to complete the sale within one week from 09.09.1981. It was also pointed out that in spite of several promises and assurances, the appellant-Company could not fulfill their promise and also that because of this delay, they are suffering heavy loss and the very object of sale is being defeated. It was also pointed out that so far they have spent heavy sums and satisfied all their requirements and finally requested to do the needful immediately for completion of the sale transaction. The said letter is marked as Annexure-P3.

11. It is not in dispute, more particularly, from the evidence of PW-1 that the legal advisor of the appellant-Company scrutinized the title deeds before entering into Agreement. They also visited the site along with their lawyers and finally after satisfying all the materials, their lawyers gave opinion with regard to the clear title of the property. As stated earlier, only after getting their clearance, draft sale deed was prepared to enable the respondents to get certificate under Section 230-A of the Income-tax Act. Curiously, in his evidence, P.W.1 has stated that the matter got delayed only due to the non-production of exemption certificate from urban land ceiling authorities. It is true that as per Clause 3 of the Agreement, respondents have to produce all the documents pertaining to the title of the suit property. We have already extracted Clause 4 of the Agreement which speaks about the approval of title by the appellant's advocate.

12. It is further seen that after payment of Rs. 2 lakhs as

advance on the date of execution of the Agreement, monies to the extent of Rs. 11,10,000/- were paid on various dates in order to satisfy and comply with all statutory requirements. It is relevant to point out in the Agreement that there is no specific reference to the production of an order from the competent authority under the Urban Land Ceiling Act with regard to exemption. From the materials placed, we are satisfied that the appellant-Company was not justified in calling for several documents when admittedly, their lawyers 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. In other words, production of clearance certificate from the competent authority under the Urban Land Ceiling Act was not specifically intended at any point of time. We are satisfied that as rightly argued by learned senior counsel for the respondents that the information sought for by the appellant-Company was only to delay the transaction and it was not always ready and willing to perform in terms of Section 16(c) of the Specific Relief Act, 1963.

Conduct of the parties:

13. We have already stated that the Agreement for Sale includes land and building. The building stands on more than 500 sq. mts. of land in addition to the plinth area. The building is a five-storeyed one for which building permission had been obtained as per the provisions of Town Planning Authority and as per the orders of the Corporation of Madras. It is also seen that the building was under construction at the time the Urban Land (Ceiling and Regulation) Ordinance, 1976 was passed. Section 3(h) of the Act defines "land appurtenant" which reads thus:

> "(h) "land appurtenant", in relation to any building means an extent of five hundred square metres contiguous to the land occupied by such building and includes,-
>
> (i) in the case of any building constructed before or under

construction on the commencement of this Act with a dwelling unit therein, or

(ii) in the case of any building proposed to be constructed with a dwelling unit therein and in respect of which the plan for such building has been approved by the appropriate authority before the commencement of this Act,

an additional extent not exceeding five hundred square metres of land, if any, contiguous to the said extent of five hundred square metres of land:

Provided that in relation to a multi-storeyed building, the extent of land contiguous to the land occupied by such multi-storeyed building permitted according to the plan approved by the appropriate authority shall be deemed to be the land appurtenant;"

It is not in dispute that the plan had been approved by the Competent Authority.

14. As rightly pointed out by learned senior counsel for the respondents, the proviso to the definition states that in the case of multi-storeyed building, the extent of land contiguous to the land occupied by such multi-storeyed building permitted according to the plan approved by the appropriate authority shall be deemed to be the land appurtenant. In view of the same, the entirety of the land in and around the five-storeyed building would come outside the vacant land under Section 3 (p) of the Act which reads as under:

"(p) "Vacant land" means land, not being land mainly used for the purpose of agriculture, in an urban agglomeration but does not include-

(i) .....

(ii) in an area where there are building regulations—

(a) the land occupied by any building constructed before, or under construction on the commencement of this Act with the approval of the appropriate authority and the land appurtenant to such building. ...."

It is clear that in the case of multi-storeyed building which was under construction at the date of commencement of the Act with building plans duly approved, no part of the land attached to the building would come within the scope of the Act. By refusing to pay the balance consideration to purchase the property by getting the sale deed registered, the appellant-Company has not only committed a breach of the Agreement but also showed that it was not ready and willing to complete the Agreement. In those circumstances, the argument assailing the judgment of the Division Bench of the High Court is liable to be rejected.

About title inspection by the lawyers:

15. It is relevant to narrate the actual question and answers by P.W.1 during cross-examination which reads as under:

"Q: Did you inspect the title deeds through your lawyer?

A: Yes.

Q: Did you examine the title deeds before entering into the agreement?

A: We did get the title deeds examined by the lawyer.

Q: I asked you did you get any legal opinion from your lawyer prior to entering into the agreement.

A: Yes.

Q: Have you got the legal opinion?

A: Not in writing asked him to examine the title deed and let us know whether the title deed is in order.

Q: What did he say?

A: He said, the title deed normally could be in order, but he had asked for certain other information such as encumbrance certificates, Urban Land Ceiling Clearance from the Government of India and Government of Tamil Nadu, etc.

Q: Your office prepared any report on title.

A: My legal department always traces title, it is good and competent to peruse the title deeds.

Q: Your legal department is your staff?

A: Yes.

Q: Was any report on title obtained from the lawyer?

A: Yes.

Q: When was that obtained?

A: Somewhere between 20th to 28.8.1981

Q: Have you produced the legal opinion before this Court?

A: No, it is internal affair and we felt it is not necessary.

Q: Have you got the opinion?

A: I am not sure, I am able to find out.

Q: Did they produce all documents of title for approval?

A: Yes. They fulfilled clause No.3

Q: Clause No.4 that also the defendant did not?

A: No.

Q: What do you mean by saying no?

A: Because they have not provided encumbrance to the title deeds, which is part of the title deed, they had applied for Urban Land Ceiling exemption, which they have not disclosed.

Q: Is there any mention about Urban Land Ceiling Clearance?

A: It is not mentioned in the agreement, but I would like to and it is obligatory on the part of the defendant to go through the implications of Section 6 of the Urban Land Ceiling Act.

Q: According to you, unless they do not furnish details of obtaining Urban Land Ceiling clearance, you are not prepared to purchase?

A: No. This is the condition of the negotiation. The vendor has always been acknowledging to produce the documents required by us before we put through the sale. This is also seen in all stamped receipts for which monies were paid even after 230-A clearance obtained."

16. It is also brought to our notice that the State Government in 1995 nearly 10 years after the filing of the suit, claimed 872 sq.mts. as being the excess land above the ceiling limit for which the appellant-Company had filed a writ petition being No. 6312 of 2000 before the High Court. Though the filing of the said writ petition and the ultimate order on 04.08.2005 were not brought to our notice by filing appropriate petition inasmuch as the said fact was not in dispute, we referred to the said decision of the High Court rendered in Writ Petition No. 6312 of 2000. That writ petition came to be filed by the respondent Company for issuance of a writ of *mandamus* to forebear the State and the competent authority

under the Urban Land Ceiling from enforcing the provisions of the Act which has been repealed by Tamil Nadu Act No. 20 of 1999 w.e.f. 16.06.1999 insofar as the land of the petitioner therein (respondents herein at Door No. 46, Cathedral Road, Chennai in R.S. No. 1238/9 Mylapore, Village) is concerned.

17. It is true that despite the fact that there was no provision in the Act laying down the process for seeking an exemption from its operation, the respondent-Company wrote to the Deputy Secretary, Revenue Department, Government of Tamil Nadu on 26.12.1979 seeking such exemption. As there was no response, as rightly pointed out, it was understood that as the proviso to Section 3 applies to the land and no further exemption was needed. It is relevant to point out that the appellant-Company made further applications on behalf of the respondents but to no avail. The entire land is in the enjoyment and possession of the respondent-Company and no part of the land has been taken over by the Government.

18. In the light of the above discussion, we are unable to agree with the claim of the appellant-Company, on the other hand we are in entire agreement with the conclusion arrived at by the Division Bench of the High Court. Consequently, the appeal fails and the same is dismissed. However, parties are directed to bear their own costs.

D.G. Appeal dismissed.

STATE OF MADHYA PRADESH
v.
UNION OF INDIA & ANR.
I.A. NO. 4 OF 2009
in
Original Suit No. 6 of 2004

AUGUST 17, 2011

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

Supreme Court Rules, 1966 – Order XXVI, Rule 8 – Code of Civil Procedure, 1908 – Order VI, Rule 17 – Amendment of pleadings – Central Government issued Notifications/Orders u/ss.58(3) & 58(4) of the Madhya Pradesh Re-organisation Act (MPR Act), notifying the date of dissolution of the M.P. Electricity Board (MPEB) and apportioning its assets, rights and liabilities between successor Electricity Boards for the reorganized States of Madhya Pradesh and Chhattisgarh – The State of Madhya Pradesh approached Supreme Court invoking original jurisdiction u/Article 131 of the Constitution and praying that the said Notifications/Orders be declared null and void for being arbitrary, unjust and unfair – 5 years later, the plaintiff-State filed amendment application, praying for incorporation of additional relief in the plaint viz. to declare ss.58(3) & 58(4) of the MPR Act as violative of Article 14 of the Constitution – Held: Inasmuch as the plaintiff–State of Madhya Pradesh approached Supreme Court invoking original jurisdiction u/ Article 131 of the Constitution, the Supreme Court Rules have to be applied to the case in hand – Order XXVI, Rule 8 of the Rules (which is similar to Order VI, Rule 17 CPC) prescribes that at any stage of the proceedings, the Court may allow either party to amend his pleadings – However, it must be established that the proposed amendment is necessary for the purpose of determining the real question in controversy

between the parties – The original plaint proceeds on the basis that exercise of power by the Central Government by passing the impugned Notifications u/ss.58(3) and 58(4) of the MPR Act was arbitrary, unjust and unfair and had resulted in serious anomalies in the apportionment of assets and liabilities – After praying for such relief, if the amendment as sought for by the plaintiff is allowed and the plaintiff is permitted to challenge the vires of the said provisions, then the very basis on which the plaintiff is claiming its right to apportionment of assets, rights and liabilities of the undivided Board will cease to be in existence and the entire suit of the plaintiff will be rendered infructuous – Leave to amend ought to be refused if it introduces a totally different, new and inconsistent case or challenges the fundamental character of the suit – Also, the amendment application was filed at a belated stage – The plaintiff-State did not assign any reason for not taking steps and for waiting for five years – However, plaintiff given opportunity to put forth its stand that the Central Government issued impugned Notifications/Orders without proper guidelines and affording opportunity to the parties concerned – In the interest of justice, plaintiff-State permitted to raise such objections at the time of trial – Pleadings – Constitution of India, 1950 – Article 131 – Madhya Pradesh Re-organisation Act, 2000 – s.58(3) and s.58(4).

Code of Civil Procedure, 1908 – Order VI, Rule 17 – Purpose and object of – Held: The purpose and object of Order VI Rule 17 of CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just – Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach – Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs – Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations – Pleadings.

Jurisdiction – In regard to questions as to constitutionality of Central laws – Power of judicial review of the writ courts – On facts, plaintiff-State sought to challenge the validity of a Central law in a proceeding (suit) initiated under Article 131 of the Constitution – Held: Normally, for questions relating to validity of Central or other laws, the appropriate forum is extraordinary writ jurisdiction under Articles 32 and 226 of the Constitution in a writ petition and not an original suit filed under Article 131 which vests exclusive jurisdiction of this Court as regards the dispute enumerated therein – Constitution of India, 1950 – Articles 32, 131and 226.

In the year 2004, the State of Madhya Pradesh filed an Original Suit before this Court under Article 131 of the Constitution of India calling for the records relating to the impugned Notifications/Orders dated 02.11.2004 and 04.11.2004 issued by the Ist Defendant–Union of India under Sections 58(3) and 58(4) of the Madhya Pradesh Re-organisation Act, 2000 (MPR Act), notifying the date of dissolution of the M.P. Electricity Board (MPEB) and apportioning its assets, rights and liabilities between the successor Electricity Boards for the reorganized States of Madhya Pradesh and Chhattisgarh and to declare them null and void as the same were unconstitutional and for certain other reliefs. In the year 2009, the plaintiff-State of Madhya Pradesh filed I.A. No.4 of 2009- application for amendment of the plaint, praying for incorporation of additional relief in the plaint viz. to declare Sections 58(3) and 58(4) of the MPR Act as violative of Article 14 of the Constitution.

1st Defendant-Union of India, apart from disputing its maintainability on delay and laches also contested on merits. 2nd Defendant–State of Chhattisgarh objected to the amendment on the ground that the same was totally misconceived and untenable in law and that no recourse whatsoever could be permitted to challenge the validity

of a Central law under the exclusive jurisdiction of this Court under Article 131 of the Constitution. The State of Chhattisgarh further contended that since the plaintiff-State of M.P., on one hand was seeking a prayer that 1st defendant must perform its duty in accordance with the Statute and, on the other hand, was challenging the validity of the very same Statute and, therefore, it was liable to be dismissed.

Disposing of I.A. No. 4 of 2009, the Court

HELD:1.1. Order VI Rule 17 of the Code of Civil Procedure, 1908 enables the parties to make amendment of the plaint. The provision deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It was again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the Court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it must be shown that inspite of due diligence, such amendment could not have been sought earlier. The purpose and object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations. [Para 8] [149-G; 150-C-F]

1.2. However, inasmuch as the plaintiff–State of

Madhya Pradesh approached this Court invoking the original jurisdiction under Article 131 of the Constitution, the Rules framed by this Court, i.e., The Supreme Court Rules, 1966 have to be applied to the case on hand. Order XXVI of the Rules speaks about "Pleadings Generally" and Rule 8 thereof, which is similar to Order VI Rule 17 of the Code, prescribes that at any stage of the proceedings, the Court may allow either party to amend his pleadings. However, it must be established that the proposed amendment is necessary for the purpose of determining the *real question in controversy* between the parties. [Para 9] [150-G-H; 151-A-B]

Surender Kumar Sharma v. Makhan Singh **(2009) 10 SCC 626;** *North Eastern Railway Administration, Gorakhpur v. Bhagwan Das (dead) by LRS* **(2008) 8 SCC 511: 2008 (6) SCR 416;** *Usha Devi v. Rijwan Ahamd and Others* **(2008) 3 SCC 717: 2008 (1) SCR 795** ***(iv)****Rajesh Kumar Aggarwal and Others v. K.K. Modi and Others* **(2006) 4 SCC 385: 2006 (3) SCR 175;** *Revajeetu Builders and Developers v. Narayanaswamy and Sons and Others* **(2009) 10 SCC 84: 2009 (15) SCR 103 – referred to.**

2.1. The plaintiff-State filed the application for amendment of plaint at a belated stage. It is true that there is no embargo in Order VI Rule 17 of CPC and in Order XXVI Rule 8 of the Supreme Court Rules which alone govern the procedural aspects. However, the fact remains that the plaintiff has not assigned any reason for not taking steps when the State had approached this Court under Article 131 by way of a suit even in the year 2004 and waited till 2009. Throughout the pendency of the suit since 01.12.2004, no issue whatsoever was ever raised by the plaintiff as to the validity or constitutionality of the statutory provisions. [Paras 14, 15] [156-E-F; 157-A-C]

2.2. Further, MPEB being the successor Electricity

Board for the reorganized State of M.P., a necessary party to the present *lis*, had filed a separate Writ Petition before this Court under Article 32 of the Constitution where identical pleadings and prayers were made. Though the MPEB approached this Court by way of a writ petition under Article 32, admittedly, the *vires* of those sections were never challenged. In the said writ petition, the present plaintiff was also a party, even then the plea of constitutionality was not raised. Subsequently, the said writ petition along with three other writ petitions were disposed of by this Court vide judgment dated 13.09.2006. This Court did not find any infirmity whatsoever in the manner of exercise of power by the Central Government under Sections 58(3) and 58(4) of the MPR Act while upholding the notifications dated 02.11.2004 and 04.11.2004 as being constitutional and not suffering from any vice of arbitrariness as claimed by the plaintiff-State of M.P. and MPEB. [Para 16] [157-D-H; 158-A]

3. By way of present amendment, the plaintiff-State of M.P. is seeking to challenge the validity of the Central law in a proceeding (suit) initiated under Article 131 of the Constitution. Normally, for questions relating to validity of Central or other laws, the appropriate forum is the extraordinary writ jurisdiction under Articles 32 and 226 of the Constitution in a writ petition and not an original suit filed under Article 131 which vests exclusive jurisdiction of this Court as regards the dispute enumerated therein. Article 131A of the Constitution inserted by (42nd Amendment) Act 1976, provided for exclusive jurisdiction to this Court in regard to questions as to constitutionality of Central laws. The said Article 131A viewed as substantially curtailing the power of judicial review of the writ courts, that is, High Courts under Article 226 and this Court under Article 32 was omitted vide Constitution (43rd Amendment) Act, 1977. It

follows that when the Central laws can be challenged in the State High Courts as well and also before this Court under Article 32, normally, no recourse can be permitted to challenge the validity of a Central law under the exclusive original jurisdiction of this Court provided under Article 131. [Para 7] [158-B-F]

4. Further, the original plaint proceeds on the basis that the exercise of power by the Central Government by passing the impugned Notifications dated 02.11.2004 and 04.11.2004 under Sections 58(3) and 58(4) of the MPR Act was arbitrary, unjust and unfair and had resulted in serious anomalies in the apportionment of assets and liabilities. After praying for such relief, if the amendment as sought for by the plaintiff is allowed and the plaintiff is permitted to challenge the *vires* of the said provisions, then the very basis on which the plaintiff is claiming its right to apportionment of assets, rights and liabilities of the undivided Board will cease to be in existence and the entire suit of the plaintiff will be rendered infructuous. Moreover, it is settled principle of law that leave to amend will be refused if it introduces a totally different, new and inconsistent case or challenges the fundamental character of the suit. However, in spite of the above conclusion, it is felt that the plaintiff may be given an opportunity to put forth its stand that the Central Government issued impugned Notifications/Orders without proper guidelines and affording opportunity to the parties concerned. In the interest of justice, plaintiff-State of M.P. is permitted to raise such objections at the time of trial by placing acceptable materials. [Paras 19, 20] [159-B-F]

Case Law Reference:

(2009) 10 SCC 626	**referred to**	**Para 9**
2008 (6) SCR 416	**referred to**	**Para 9**

2008 (1) SCR 795	**referred to**	**Para 9**
2006 (3) SCR 175	**referred to**	**Para 9**
2009 (15) SCR 103	**referred to**	**Para 9**

CIVIL ORIGINAL JURISDICTION : I.A. No. 4 of 2009.

IN

Original Suit No. 6 of 2004.

H.P. Raval, ASG, C.S. Vaidaynathan, A, Mariarputham, Ravi Shankar Prasad, G. Umapathy, Sudha Umapathy, Rakesh K. Sharma, T.A. Khan, R.K. Tanwar, Yusuf Khan, V.K. Verma, Suparna Srivastava, Rajesh Srivastava for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. In the year 2004, the State of Madhya Pradesh has filed Original Suit No. 6 of 2004 before this Court under Article 131 of the Constitution of India calling for the records relating to the impugned Notifications/Orders dated 02.11.2004 and 04.11.2004 issued by the Ist Defendant–Union of India under Sections 58(3) and 58(4) of the Madhya Pradesh Re-organisation Act, 2000 (hereinafter referred to as "MPR Act"), notifying the date of dissolution of the M.P. Electricity Board (in short "the MPEB") for the undivided State of Madhya Pradesh and apportioning its assets, rights and liabilities between the successor Electricity Boards for the reorganized States of Madhya Pradesh and Chhattisgarh and to declare them null and void as the same are unconstitutional and for certain other reliefs.

2. In the said suit, the plaintiff-State of Madhya Pradesh filed an application for amendment of plaint being I.A. No.4 of 2009 seeking, *inter alia,* the amendment to the effect that Sections 58(3) and 58(4) of the MPR Act are violative of Article 14 of the Constitution of India inasmuch as it enables the

Central Government to determine without any guidelines the manner of exercise of power while deciding the basis of apportionment of the assets and liabilities of the successor Boards.

3. Ist Defendant-Union of India, apart from disputing its maintainability on delay and laches also contested on merits.

4. 2nd Defendant–State of Chhattisgarh has objected to the amendment on the ground that the same is totally misconceived and untenable in law and that no recourse whatsoever can be permitted to challenge the validity of a Central law under the exclusive jurisdiction of this Court under Article 131 of the Constitution of India. The State of Chhattisgarh has also contended that the plaintiff-State of M.P., on the one hand is seeking a prayer that Ist Defendant must perform its duty in accordance with the Statute and, on the other hand, is challenging the validity of the very same Statute and, therefore, it is liable to be dismissed.

5. Heard Mr. C.S. Vaidyanathan, learned senior counsel for the applicant/plaintiff–State of Madhya Pradesh, Mr. H.P. Raval, learned Additional Solicitor General for Respondent No. 1/Ist Defendant-Union of India and Mr. Ravi Shankar Prasad, learned senior counsel for Respondent No. 2/2nd Defendant-State of Chhattisgarh.

6. In view of the fact that at present we are concerned with I.A.No.4 of 2009 – application for amendment of plaint, there is no need to traverse all the factual details as stated in the plaint and written statement. However, it is relevant to point out the reliefs prayed for by the plaintiff in the main suit which are as under:

> "(a) Call for the records relating to the impugned Notifications/Orders dated 02.11.2004 and 04.11.2004 and declare the same as null and void as the same is unconstitutional and in violation of Article 14 of the Constitution;

(b) Direct 1st defendant to dissolve MPEB in consonance with other orders/directions dated 12.04.2001, 04.12.2001 and 23.05.2003 passed by the 1st defendant under Section 58(4) of MPRA;

(c) Direct the 1st Defendant by way of mandatory injunction to perform its constitutional and the statutory duty to lay down proper criteria for apportionment of assets, rights and liabilities in accordance with law and to ensure equitable, just, fair and reasonable apportionment of assets, rights and liabilities amongst the successor Boards on the basis of revenue potential so as to avoid undue hardship and disadvantage to any of the successor Boards; and

(d) Pass any other order and/or direction, as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

7. In the present application, i.e., I.A. No.4 of 2009, the applicant-State of M.P. has prayed for amendment of the plaint by adding the following relief:

"(b) to permit additional relief to be incorporated in the Plaint viz., declare Sections 58(3) and 58(4) of the Madhya Pradesh State Re-organisation Act, 2000 is being unconstitutional, arbitrary and violative of Article 14 of the Constitution"

8. In order to consider the claim of the plaintiff and the opposition of the defendants, it is desirable to refer the relevant provisions. Order VI Rule 17 of the Code of Civil Procedure, 1908 (in short 'the Code') enables the parties to make amendment of the plaint which reads as under;

"**17. Amendment of pleadings –** The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms

as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

The above provision deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it must be shown that in spite of due diligence, such amendment could not have been sought earlier. The purpose and object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations.

9. Inasmuch as the plaintiff–State of Madhya Pradesh has approached this Court invoking the original jurisdiction under Article 131 of the Constitution of India, the Rules framed by this Court, i.e., The Supreme Court Rules, 1966 (in short 'the Rules) have to be applied to the case on hand. Order XXVI speaks about "Pleadings Generally". Among various rules, we are concerned about Rule 8 which reads as under:

"The Court may, at any stage of the proceedings, allow either party to amend his pleading in such manner and on such terms as may be just, but only such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties."

The above provision, which is similar to Order VI Rule 17 of the Code prescribes that at any stage of the proceedings, the Court may allow either party to amend his pleadings. However, it must be established that the proposed amendment is necessary for the purpose of determining the *real question in controversy* between the parties.

10. This Court, while considering Order VI Rule 17 of the Code, in several judgments has laid down the principles to be applicable in the case of amendment of plaint which are as follows:

(i) *Surender Kumar Sharma v. Makhan Singh,* (2009) 10 SCC 626, at para 5:

"5. As noted hereinearlier, the prayer for amendment was refused by the High Court on two grounds. So far as the first ground is concerned i.e. the prayer for amendment was a belated one, we are of the view that even if it was belated, then also, the question that needs to be decided is to see whether by allowing the amendment, the real controversy between the parties may be resolved. It is well settled that under Order 6 Rule 17 of the Code of Civil Procedure, wide powers and unfettered discretion have been conferred on the court to allow amendment of the pleadings to a party in such a manner and on such terms as it appears to the court just and proper. Even if, such an application for amendment of the plaint was filed belatedly, such belated amendment cannot be refused if it is found that for deciding the real controversy between the parties, it can be allowed on payment of costs. Therefore, in our

view, mere delay and laches in making the application for amendment cannot be a ground to refuse the amendment."

(ii) *North Eastern Railway Administration, Gorakhpur v. Bhagwan Das (dead) by LRS,* (2008) 8 SCC 511, at para16:

"16. Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 CPC (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 CPC postulates amendment of pleadings at any stage of the proceedings. In *Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil* which still holds the field, it was held that all amendments ought to be allowed which satisfy the two conditions: (*a*) of not working injustice to the other side, and (*b*) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs."

(iii) *Usha Devi v. Rijwan Ahamd and Others,* (2008) 3 SCC 717, at para 13:

"13. Mr Bharuka, on the other hand, invited our attention to another decision of this Court in *Baldev Singh v. Manohar Singh.* In para 17 of the decision, it was held and observed as follows: (SCC pp. 504-05)

"*17*. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their

documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion on the court to allow an amendment of the written statement at any stage of the proceedings."

(iv) *Rajesh Kumar Aggarwal and Others v. K.K. Modi and Others,* (2006) 4 SCC 385, at paras 15 & 16:

"15. The object of the rule is that the courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

16. Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties."

(v) *Revajeetu Builders and Developers v. Narayanaswamy and Sons and Others,* (2009) 10 SCC 84, at para 63:

"63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be

taken into consideration while allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."

The above principles make it clear that Courts have ample power to allow the application for amendment of the plaint. However, it must be satisfied that the same is required in the interest of justice and for the purpose of determination of real question in controversy between the parties. We have already pointed out the relief prayed for in the plaint. According to the plaintiff-State of Madhya Pradesh, the Notifications/Orders dated 02.11.2004 and 04.11.2004 have to be declared null and void since the same are unconstitutional and in violation of Article 14 of the Constitution of India. The other relief, prayed for by the plaintiff, is to direct the Ist Defendant-Union of India

to dissolve the MPEB in consonance with the orders/directions dated 12.04.2001, 04.12.2001 and 23.05.2003 passed by the Union of India under Section 58(4) of MPR Act. In addition, the plaintiff-State of M.P. has also prayed for to direct the Union of India by way of mandatory injunction to perform its constitutional and statutory duty to lay down proper criteria for apportionment of assets, rights and liabilities in accordance with law and to ensure equitable, just, fair and reasonable apportionment of assets, rights and liabilities amongst the successor Boards on the basis of revenue potential so as to avoid undue hardship and disadvantage to any of the successor Boards.

11. Mr. C. S. Vaidyanathan, learned senior counsel for the plaintiff-State of M.P., by drawing our attention to various averments in the plaint relating to the purported exercise of power by the Central Government submitted that the same being arbitrary, unjust and unfair had resulted in serious anomalies in the apportionment of assets and liabilities by the impugned Notifications/Orders dated 02.11.2004 and 04.11.2004. He also pointed out that the impugned Notifications/Orders have resulted in an unequal division of generating capacity, created a huge gap in demand and supply, affecting the power supply and also the finances of the Board of the plaintiff-State. He further pointed out that Sections 58(3) and 58(4) of MPR Act provided unguided powers to the Central Government to determine the apportionment of assets, rights and liabilities between the successor States of M.P. and Chhattisgarh. According to him, these provisions do not provide for the Central Government to record reasons in support of its decision. In the absence of any guidelines, any decision by the Central Government is arbitrary, unjust, unfair, unreasonable, unconstitutional and violative of Article 14 of the Constitution of India, in particular. In those circumstances, according to him, the amendment of plaint sought for is reasonable and acceptable.

12. As against the above claim, Mr Rawal, learned ASG, appearing for the Union of India submitted that there is no merit in the claim for amendment of plaint. At any rate, the amendment sought for is not maintainable at this juncture.

13. Mr. Ravi Shankar Prasad, learned senior counsel for second Defendant-State of Chhattisgarh strongly objected the proposed amendment both on the ground of delay and laches and on merits. Mr. Prasad highlighted that verification of the Court proceedings would show that the pleadings in the suit are complete, evidence by way of affidavits has been filed, issues for adjudication have been framed, admission/denial of documents filed in support of the pleadings have taken place and the suit is now to be finally heard by this Court. He also contended that the application at this belated stage is not maintainable.

14. It is not in dispute that after complying all the formalities even as early as on 16.04.2007, this Court has framed issues and as rightly pointed out by Mr Prasad, the suit could have been disposed of by that time, however, the plaintiff has filed the present application for amendment of plaint at this belated stage. It is true that there is no embargo in Order VI Rule 17 of the Code and in Order XXVI Rule 8 of the Rules which alone govern the procedural aspects. However, the fact remains that the plaintiff has not assigned any reason for not taking steps when the State had approached this Court under Article 131 by way of a suit even in the year 2004 and waited till 2009.

15. The next objection of the learned counsel for the 2nd Defendant is that in the light of the language used in Rule 8 of Order XXVI of the Rules, the present application for amendment substantially alters the nature of *lis*/claim originally preferred by the plaintiff-State of M.P. We have already adverted to the reliefs prayed for in the suit. The main relief relates to scope and manner of exercise of power by the Central Government under Sections 58(3) and 58(4) of the MPR Act *qua* dissolution of the erstwhile MPEB and apportionment of its assets, rights

and liabilities between the successor Electricity Boards of the reorganized States. The claim was that the purported exercise of power by the Central Government was arbitrary, unjust and unfair and had resulted in serious anomalies in apportionment of assets and liabilities between the two Boards by the impugned Notification/Orders dated 02.11.2004 and 04.11.2004. What was challenged was the manner of exercise of power by the Central Government and not the statutory provisions in the form of Sections 58(3) and 58(4) of the MPR Act which vested such powers in the Central Government. As rightly pointed out by the learned senior counsel for the defendants throughout the pendency of the suit since 01.12.2004, no issue whatsoever was ever raised by the plaintiff as to the validity or constitutionality of these statutory provisions.

16. It is brought to our notice that MPEB being the successor Electricity Board for the reorganized State of M.P., a necessary party to the present *lis*, had filed a separate Writ Petition being No. 675 of 2004 before this Court under Article 32 of the Constitution of India where identical pleadings and prayers were made. There is no serious dispute as to the relief prayed in the said writ petition. Though the MPEB approached this Court by way of a writ petition under Article 32, admittedly, the *vires* of those sections were never challenged. Subsequently, the said writ petition being No. 675 of 2004 along with three other writ petitions were disposed of by this Court vide judgment dated 13.09.2006. It is not clear and not explained to this Court why such recourse was not adopted when the MPEB itself had approached this Court by way of a writ petition to challenge the *vires* of those provisions and, ultimately, this Court dismissed the said writ petition filed by the Board. It is to be noted that this Court did not find any infirmity whatsoever in the manner of exercise of power by the Central Government under Sections 58(3) and 58(4) of the MPR Act while upholding the notifications dated 02.11.2004 and 04.11.2004 as being constitutional and not suffering from any

vice of arbitrariness as claimed by the plaintiff-State of M.P. and MPEB. It was also pointed out and also not in dispute that in the said writ petition, the present plaintiff was also a party, even then the plea of constitutionality was not raised.

17. By way of present amendment, the plaintiff-State of M.P. is seeking to challenge the validity of the Central law in a proceeding (suit) initiated under Article 131 of the Constitution. Normally, for questions relating to validity of Central or other laws, the appropriate forum is the extraordinary writ jurisdiction under Articles 32 and 226 of the Constitution of India in a writ petition and not an original suit filed under Article 131 which vests exclusive jurisdiction of this Court as regards the dispute enumerated therein. It is relevant to point out that Article 131A of the Constitution inserted by (42nd Amendment) Act 1976, provides for exclusive jurisdiction to this Court in regard to questions as to constitutionality of Central laws. The said Article 131A viewed as substantially curtailing the power of judicial review of the writ courts, that is, High Courts under Article 226 and this Court under Article 32 was omitted vide Constitution (43rd Amendment) Act, 1977. It follows that when the Central laws can be challenged in the State High Courts as well and also before this Court under Article 32, normally, no recourse can be permitted to challenge the validity of a Central law under the exclusive original jurisdiction of this Court provided under Article 131.

18. As regards the absence of guidelines in the provisions of Sections 58(3) and 58(4) of MPR Act, on behalf of the defendants it was pointed out that the manner of exercise of power by the Central Government has been laid down in the Sections itself. It is further pointed out that various correspondences exchanged between the plaintiff and the defendants placed on record would show that the plaintiff has never acted under the very same provisions, instead the plaintiff-State has constituted its own Electricity Board. It is also pointed out that the Ist Defendant-Union of India, in its written

statement highlighted that the Central Government did resolve the dispute by passing the impugned Notifications after considering the claims of the affected parties.

19. Finally, the original plaint proceeds that the exercise of power by the Central Government by passing the impugned Notifications dated 02.11.2004 and 04.11.2004 under Sections 58(3) and 58(4) of the MPR Act was arbitrary, unjust and unfair and had resulted in serious anomalies in the apportionment of assets and liabilities. In our view, after praying for such relief, if the amendment as sought for by the plaintiff is allowed and the plaintiff is permitted to challenge the *vires* of the said provisions, then the very basis on which the plaintiff is claiming its right to apportionment of assets, rights and liabilities of the undivided Board will cease to be in existence and the entire suit of the plaintiff will be rendered infructuous. Moreover, it is settled principle of law that leave to amend will be refused if it introduces a totally different, new and inconsistent case or challenges the fundamental character of the suit.

20. In spite of the above conclusion, we feel that the plaintiff may be given an opportunity to put forth its stand that the Central Government issued impugned Notifications/Orders without proper guidelines and affording opportunity to the parties concerned. It is made clear that we have not either accepted or concluded the said claim of the plaintiff but in the interest of justice, plaintiff-State of M.P. is permitted to raise such objections at the time of trial by placing acceptable materials.

21. With the above observation, I.A. No. 4 of 2009 is disposed of with no order as to costs.

B.B.B. Interlocutory Application disposed of.

AMITAVA BANERJEE @ AMIT @ BAPPA BANERJEE
v.
STATE OF WEST BENGAL
(Criminal Appeal No.1939 of 2008)

AUGUST 17, 2011

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

PENAL CODE, 1860: s.302 – Conviction under – Allegation against the accused that he strangulated and killed the victim and buried his dead body – Trial court convicted the accused holding that although motive was not proved but circumstantial evidence was so strong and so unerringly pointed towards the guilt of the appellant that the absence of a motive did not make much of a difference – High Court upheld the order of the trial court – On appeal, held: There were number of incriminating circumstances pointing towards the guilt of the accused viz. the deposition of mother of the victim that the victim wanted to go with the accused to fetch parrots as promised by the accused; victim having been last seen with the accused near the place of incident around the time he was killed; recovery of cap worn by accused and his bicycle from near the place where dead body of the victim was buried; deposition of PW6 that the accused had borrowed the spade, tied it with 'Sutli' after wrapping the wooden part of the spade with the newspaper; presence of the newspaper near the ditch where the victim was buried and the recovery of the 'Sutli' from around the neck of the victim where it had left a ligature mark were also telling circumstances which were explainable only on the hypothesis that the accused was the author of the crime – The circumstances were not only established, but they formed a complete chain, that left no manner of doubt, that the crime with which the accused stood charged was committed by him and no one else – Conviction upheld.

CRIMINAL LAW: Motive – Significance of, and effect of its absence – Discussed.

The prosecution case was that the appellant strangulated the victim-deceased to death and buried his dead body in jungle. The trial court convicted the appellant under section 302 IPC. It held that although prosecution failed to prove the motive for murder of the victim, however, circumstantial evidence available on record was so strong and so unerringly pointed towards the guilt of the appellant that the absence of a motive did not make much of a difference. The High Court upheld the order of the trial court. The instant appeal was filed challenging the order of the High Court.

Dismissing the appeal, the Court

HELD: 1. Motive for the commission of an offence, no doubt, assumes greater importance in cases resting on circumstantial evidence than those in which direct evidence regarding commission of the offence is available. Yet failure to prove motive in cases resting on circumstantial evidence is not fatal by itself. All that the absence of motive for the commission of the offence results in is that the court shall have to be more careful and circumspect in scrutinizing the evidence to ensure that suspicion does not take the place of proof while finding the accused guilty. Absence of motive in a case depending entirely on circumstantial evidence is a factor that shall no doubt weigh in favour of the accused, but what the Courts need to remember is that motive is a matter which is primarily known to the accused and which the prosecution may at times find difficult to explain or establish by substantive evidence. Human nature being what it is, it is often difficult to fathom the real motivation behind the commission of a crime. [Para 27] [180-D-G]

Dhananjoy Chatterjee alias Dhana v. State of W.B. **1994 (2) SCC 220: 1995 (4) Suppl. SCC 498;** *Surinder Pal Jain v. Delhi Administration* **1993 Suppl. (3) SCC 91: 1993 (1) SCR 260;** *Tarseem Kumar v. Delhi Administration* **1994 Suppl. (3) SCC 367: 1994 (2) Suppl. SCR 740;** *Jagdish v. State of M.P.* **2009 (12) Scale 580;** *Mulakh Raj and Ors v. Satish Kumar and Ors.* **1992 (3) SCC 43: 1992 (2) SCR 484 – relied on.**

2. The deposition of the mother of the deceased, that the deceased wanted to go to the appellant to fetch two parrots which the latter had promised, that after returning from the drawing tuition he went go to the appellant on getting a signal from him, sets the stage for drawing the deceased out of the house. He was shortly thereafter seen talking to the appellant who called out for him in the park and carried him away on his bicycle towards Kanchan Oil Mill which fact was proved by two witnesses whose deposition did not suffer from any embellishment or contradiction. The fact that the deceased and the appellant were seen together in Sitaldihi jungle around 6.00/6.30 p.m. on 12th July, 1998 was a highly incriminating circumstance, especially when according to the medical evidence the time of death of the deceased was also around the same time. The deceased having been last seen with the appellant around the time he was killed was a circumstance which together with other circumstances proved in the case, were explainable only on one hypothesis that the appellant was guilty of killing the deceased. The fact that the appellant had borrowed the spade, tide it with 'Sutli' after wrapping the wooden part with the newspaper was fully established by the statement of PW6. So also the deposit of the spade on 12th July, 1998 in the evening with PW11 stood established beyond any doubt whatsoever. The presence of the newspaper near the ditch where the deceased was burried and the recovery of the 'Sutli' from around the

neck of the deceased where it had left a ligature mark were also telling circumstances which were explainable only on the hypothesis that the appellant was the author of the crime. Recovery of the cap which according to the prosecution witnesses was worn by the appellant on the date of occurrence from Sitaldihi jungle was also a circumstance that established that the appellant was in the jungle on 12th July, 1998 around the place from where the dead body was recovered. Similarly, the recovery of the bicycle which the appellant owned from Sitaldihi jungle, from near the place where the dead body was buried was not explainable on any hypothesis except the guilt of the accused-appellant. The fact that the appellant had late in the evening on 12th July, 1998 left the spade at the house of PW11 and entered the flat from the rear door without his chappals as also the fact that when asked where his bicycle was, he gave a false explanation too were incriminating circumstances which were important links in the chain of the circumstances. These circumstances were not only established, but they formed a complete chain, that left no manner of doubt, that the crime with which the appellant stood charged was committed by him and no one else. [Para 34] [188-B-H; 189-A-C]

Birdhichand Sarda v. State of Maharashtra **1984 (4) SCC 116: 1985 (1) SCR 88;** *Tanviben Pankaj Kumar Divetia v. State of Gujarat* **1997(7) SCC 156: 1997 (1) Suppl. SCR 96;** *State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru* **2005 (11) SCC 600: 2005 (2) Suppl. SCR 79;** *Vikram Singh & Ors. v. State of Punjab* **2010 (3) SCC 56: 2010 (2) SCR 22;** *Aftab Ahmad Ansari v. State of Uttaranchal* **2010 (2) SCC 583: 2010 (1) SCR 1027 – relied on.**

3. The argument that the employee of the Kanchal Oil Mill, PW9 could not have seen the boys standing in Sitaldihi jungle from inside Kanchan Oil Mill was not

acceptable. The witness had clearly stated that he had seen the boys (appellant and the deceased) while he was going home by the path which he everyday takes for that purpose. Nowhere has the witness suggested that he had seen the boys from the precincts of the Mill. There was nothing in the cross-examination of this witness that warranted rejection of his testimony. The mere fact that the witness did not volunteer to go to the police to say that the two boys i.e. the appellant whom he described as a boy aged 18/19 years old and the deceased whom he described as a boy 10/11 years old, were seen by him together in the Sitaldihi jungle on 12th July, 1998, would not make the deposition of this witness suspect. The statement of this witness was recorded when the police started questioning the employees of the Mill about the incident. Narration of what the witness had seen in the course of the investigation cannot be said to be so highly belated or afterthought as to cast a doubt about the veracity of the witness especially when the witness had not seen any crime being committed. He was simply a witness to a fact which could independent of other circumstances be a wholly innocent and innocuous circumstance. The fact that the suspect was kept in a room separate from the room in which the witness was made to sit before the T.I. parade proceedings were held is much too clear from the statement of the magistrate who conducted the T.I. parade to call for any adverse inference. All told the investigation into the unfortunate incident and the collection of the evidence has been fair and objective. One reason for such fairness and objectivity could be the fact that the deceased and the appellant were both wards of police officials. There was, therefore, no room for favouring one over the other. In the totality of the circumstances, there was neither any illegality, nor any miscarriage of justice in the judgments and orders under appeal to call for interference. [Para 35] [189-D-H; 190-A-D]

Radha Mohan Singh alias Lal Saheb and Ors. v. State of U.P. **AIR 2006 SC 951: 2006 (1) SCR 519;** *Bhagwan Singh v. State of Rajasthan* **AIR 1976 SC 985: 1976 (1) SCC 15;** *Suresh Kumar Jain v. Shanti Swarup Jain and Ors*. **AIR 1997 SC 2291;** *Kirpal Singh v. State of Utter Pradesh* **AIR 1965 SC 712: 1964 SCR 992 – referred to.**

Case Law Reference:

2006 (1) SCR 519	**referred to**	**Para 11**
1976 (1) SCC 15	**referred to**	**Para 11**
AIR 1997 SC 2291	**referred to**	**Para 11**
1964 SCR 992	**referred to**	**Para 11**
1995 (4) Suppl. SCC 498	**relied on**	**Para 28**
1993 (1) SCR 260	**relied on**	**Para 28**
1994 (2) Suppl. SCR 740	**relied on**	**Para 28**
2009 (12) Scale 580	**relied on**	**Para 28**
1992 (2) SCR 484	**relied on**	**Para 28**
1985 (1) SCR 88	**relied on**	**Para 31**
1997 (1) Suppl. SCR 96	**relied on**	**Para 32**
2005 (2) Suppl. SCR 79	**relied on**	**Para 32**
2010 (2) SCR 22	**relied on**	**Para 32**
2010 (1) SCR 1027	**relied on**	**Para 32**

CRIMINAL APPELLATE JURISDICITION : Criminal Appeal No. 1939 of 2008.

From the Judgment & Order dated 20.12.2006 of the High Court of Clacutta in CRA No. 143 of 2002.

Ranjan Mukherjee, Chanchal Kr. Ganguli, Avrojyoti Chatterjee for the Appellant.

Pradeep Ghosh, Abhijit Sengupta, B.P. Yadav, Soumitra G. Choudhari for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. This appeal by special leave arises out of an order passed by the High Court of Judicature at Calcutta whereby the conviction of the appellant for offences punishable under Sections 302, 364 and 201 of the IPC and the sentence of life imprisonment awarded to him have been affirmed. Briefly stated the prosecution case is as under:

2. Asit Kumar Mondal, Sub-Inspector of Police was at the relevant point of time attached to Jhargram Court. His family comprised his wife and a son named Snehasish Mondal @ Babusona aged about 10/12 years residing at 'B' Block of Thana Quarters' Complex at Ghoradhara, Jhargram. In the same complex, lived the appellant, whose father was also working as a Sub-Inspector of Police and was at the relevant time posted at Beliabera Police Station. According to the prosecution, the deceased Snehasish Mondal was friendly with the younger brother of the appellant and would usually play cricket with him in a park situate behind the residential quarters and by the side of the BDO office. A few days before the incident in question, the deceased is alleged to have come to the house of the appellant to collect a cricket bat and ball for play in the park mentioned above and seen the appellant in a compromising position with Mangala Deloi, PW10 aged about 20 years who was then working as a maid-servant in the house of the appellant. The prosecution case is that the appellant apprehended loss of face in the locality on account of a possible disclosure of his involvement with his maid-servant which according to the prosecution was the motive for silencing the innocent boy for all times by killing him in cold blood.

3. On 12th of July, 1998, the deceased as usual went to play in the park but did not return home by the evening. The parents of the deceased panicked and started a search for the deceased which went fruitless. Asit Mondal, PW1 then lodged a missing report at the Jhargram Police Station who announced the disappearance of the boy in the locality on the public address system. According to Asit Mondal, in the course of the search for the missing boy he came to know that he was seen talking to the appellant and then going with him towards Kanchan Oil Mill on the latter's bicycle. When the appellant returned to his quarter at 9.00 p.m. without his bicycle he was questioned about the whereabouts of the deceased and the fact that he was seen taking the boy towards the Kanchan Oil Mill but the appellant denied the same. About the bicycle the appellant stated that he had handed the same over to one of his friends.

4. On July 13, 1998, Jhargram Police Station received information about a freshly dug ditch filled up with a heap of loose earth in Sitaldihi jungle close to Kanchan Oil Mill. The police on receipt of this information rushed to the spot and found that a freshly dug ditch had indeed been filled up with loose earth and that a black coloured Hero bicycle was parked against one of the trees at some distance. The Executive Magistrate of the area was summoned to the spot by the police and the earth heaped over the ditch got removed only to discover the dead body of the deceased Snehasish Mondal with his hands tied at the back and a handkerchief stuffed into its mouth. Recovery of the dead body of the deceased and conduct of an inquest by the Executive Magistrate led to the registration of FIR No.91 of 1998 for the commission of an offence under Sections 364, 302 and 201 of the IPC on the basis of a written complaint made to the above effect by Asit Kumar Mondal father of the deceased Babusona.

5. The police seized the bicycle from Sitaldihi jungle besides a cap which the appellant was allegedly wearing on

the date of the incident. Post-mortem examination conducted by Dr. Rajat Kanti Satpati, PW 15 proved that the deceased had died as a result of asphyxia because of throattling/ strangulation which was ante-mortem and homicidal in nature. In the course of investigation the police also seized a spade which the appellant had allegedly borrowed from Jadunath Das, PW 6 and which the appellant had on the fateful day left with Rukshmini Yadav, PW 11. Statements of witnesses who had last seen the deceased, in the company of the appellant, in the park and later going towards the Kanchan Oil Mill and inside the Sitaldihi jungle were also recorded. Suffice it to say that on the completion of the investigation a charge-sheet was filed against the appellant before the Court of SDJM Jhargram who committed the case to the Court of Sessions at Midnapore. The Sessions Judge in turn transferred the same to the 5th Additional Sessions Judge Midnapore, for trial and disposal.

6. At the trial the prosecution examined as many as 22 witnesses in support of its case including Asit Mondal, PW1 and his wife Smt. Chhanda Mondal, PW 14, who supported the prosecution case. Gurupada Mondal, PW 2, who reported the presence of the bicycle and the ditch in Sitaldihi jungle to the police, Sunil Deloi, PW 5 who had seen the appellant coming out of the Sitaldihi jungle on 13th July, 1998 at 5.30-6.00 a.m., Jadunath Das, PW 6 who deposed about the borrowing of the spade by the appellant on 12th July, 1998 in the morning, Rajib Roy Chowdhary, PW 7, and Jiten Sen, PW 8 both of whom saw Babusona talking to the appellant in the park and then going towards Sitaldihi jungle on the latter's bicycle. Tarapada Mahato, PW 9 who saw the appellant and the deceased inside the Sitaldihi jungle on 12th July, 1998 in the evening, Rukshmini Yadav, PW 11 who testified to the appellant leaving a spade at her house on 12th July, 1998 in the evening, Tarun Banerjee, PW13 who saw the bicycle in the Sitaldihi jungle and identified it as that of the appellant. Dr. Rajat Kanti Satpati, PW 15 who conducted the post-mortem examination, Dipak Kumar Sarkar, PW-16, Executive Magistrate, who conducted the inquest,

Tapan Kumar Chatterjee, PW17 who made an entry in the General Diary under S.No.463 regarding the presence of a cycle and the ditch in the jungle and Swapan Kumar Mohanti, PW20, Judicial Magistrate, who conducted the test identification parade were also examined by the prosecution apart from the Investigating Officer Shri Kushal Mitra, PW22.

7. On a thorough and careful appreciation of the evidence adduced before it the Trial Court concluded that the prosecution had failed to establish the motive for the murder of the deceased as alleged by it. The Court held that Mangala Deloi, PW10 who was the star witness of the prosecution to prove the alleged motive had not supported the prosecution case in the Court. The witness had no doubt been examined even under Section 164 of Cr.P.C. where she had supported the theory underlying the alleged motive but that version had been disowned by her at the trial. Since, however, the statement of the witness under Section 164 Cr.P.C. did not constitute substantive evidence the same could not be relied upon for convicting the appellant even when the witness had admitted that she had made a statement before the Magistrate. The Court all the same held that the circumstantial evidence available on record was so strong and so unerringly pointed towards the guilt of the appellant that the absence of a motive did not make much of a difference. In paras 68 and 69 of the judgment the Trial Court summarised the incriminating circumstances that were in its opinion firmly established and that formed a complete chain proving the guilt of the appellant. The Court observed:

> "68. In the present case, accused Amitava was seen on 12.7.98 at about 5.30 pm at Ghoradhara park, Jhargram to take deceased Babusona therefrom by his cycle towards Kanchan Oil Mill. He was again seen at Sitaldihi jungle with Babusona and the cycle. On the same date he took the spade from the house of Jadunath. At that time he covered the handle of the spade with a piece of

> newspaper and tied the spade with the cycle with the help of Sutli. He kept the spade at the garden of Rukmini Yadab, PW11 at about 7/7.30 pm on the same day. He was seen in that night without his cycle. On the following day i.e. On 13.7.98 at the very morning he was seen coming out from Sitaldihi jungle without his cycle in a suspicious and frightening manner as discussed earlier. At the material point of time when the accused went to Sitaldihi jungle on 12.7.98 with deceased Babusona, the accused was wearing a chocolate coloured full pant white half genji and one reddish cap and deceased Babusona was wearing yellow-orange coloured shirt, blue half pant and slipper. At the time when the accused was found coming out of Sitaldihi jungle in the morning of 13.7.98, he was seen wearing a chocolate coloured full pant and white genji, but without the cap. The accused is identified by several witnesses. His pant and genji were also seized by the police from his house, which are also identified by the witnesses, who saw him on 12.7.98 at the afternoon and also in the morning of 13.7.98. On 13.7.98 as per information of the witnesses police had been to Sitaldihi jungle and there discovered the place where the dead body of Babusona was kept under the earth. The S.D.P.O, S.D.O and the Id. Executive Magistrate were called along with a photographer. In their presence the dead body was recovered from the ditch after unearthing the same. The cycle of Amitava, two pieces of newspaper and hawai chappal of Babusona were recovered nearby the said ditch. Those are produced in court and identified the witnesses. The dead body was identified by PW1, father of deceased Babusona, as that of his son-Babusona. He lodged the FIR at that spot. Inquest was held over the dead body of Babusona in presence of the witnesses – both by the police and also by the Executive Magistrate. The hands and legs of deceased Babusona were found to be tied with electric wire and his mouth was gagged with handkerchief. Those articles were seized and produced in court and duly

identified by the seizure witnesses. Thereafter the dead body of Babusona was sent to Jhargram S.D. Hospital where post mortem examination was held by the medical Board, including the medical officer, PW15. The post mortem examination was held at 6.45 pm on 13.7.98 and the doctors' opinion is that the death of Babusona took place about 24 hours back due to throttling/strangulation, which was homicidal in nature. After recording the statements of several witnesses, I.O. (PW22) arrested the accused and as shown by the accused the spade was recovered from the premises of Rukmini Yadab (PW11). That spade is produced in court and identified both Jadunath, PW 6, and Rukmini, PW 11, and that spade is produced in court and identified by both Jadunath and Rukmini. Subsequently, on 15.7.98 as per the statement of the accused his reddish cap and sandle were recovered from the bush within Sitaldihi jungle in presence of the witnesses. Those articles are produced in court and identified by the seizure witnesses. The statement of the accused leading to such discovery is also brought into evidence. The statements of witnesses, Rajib, Jiten, Mongala, Rukmini and Jadunath were recorded by the Ld. J.M. Jhargram u/section 164 Cr.P.C. Excepting Mongala, all other witnesses have given substantive evidence in court in support of their earlier statement u/section 164 Cr.P.C.

69. Thus, on the basis of the aforesaid evidence, as discussed earlier, the chain of circumstantial evidence is built up and it is complete one. The standard of proof required to hold the accused guilty on circumstantial evidence is quite sufficient to establish the chain of circumstances. In my considered view, it is so complete leaving no reasonable ground for conclusion consistent with the innocence of the accused. The circumstances brought before the court is quite sufficient to conclude by holding the guilt of the accused. In the present case, there

is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

8. On the above findings the Trial Court found the appellant guilty of offences punishable under Section 302 of the IPC and sentenced him to imprisonment for life and a fine of Rs.2,000/- in default whereof the appellant was directed to undergo a further imprisonment for two months. No separate sentence was, however, awarded to the appellant for the offences punishable under Sections 364 and 201 of the IPC though the said offence held proved.

9. Aggrieved by his conviction and sentence the appellant preferred an appeal before the High Court of Judicature at Calcutta. The High Court has by the judgment and order impugned in this appeal affirmed the conviction and sentence awarded to the appellant and dismissed the appeal. The High Court has while doing so re-appraised the evidence on record held that the circumstances proved at the trial were explainable on no other hypothesis except the guilt of the appellant. The High Court observed:

"If we assemble the above stated facts, evidence and circumstances and consider the same in proper perspective the circumstances and the evidence clearly lead to us to the only possible hypothesis that the appellant was the only person who was responsible for the murder of Babusona. There was no evidence before the Court to prove that deceased was found in the company of any other person on 12.7.98 before his murder. The evidence and circumstances clinchingly establishes that the appellant took away Babusona from Ghoradhara park on his cycle and Babusona was last seen by PW9 in the company of appellant in the Sitaldihi jungle and thereafter he did not return and his dead body was recovered on 13.7.98. Besides the appellant, no other person had the

custody of the deceased before his murder and the entire circumstances establishes and proves that the appellant was the murderer."

10. The present appeal by special leave assails the correctness of the view taken by the courts below. We have heard at considerable length Shri Ranjan Mukherjee learned counsel for the appellant and Shri Pradeep Ghosh, learned senior counsel for the respondent both of whom were at pains to take us through the evidence adduced at the trial.

11. We may at the threshold say that this Court does not ordinarily embark upon a re-appraisal of the evidence where the courts below have concurrently taken a view on facts one way or the other. In a long line of decisions this Court has held that an appeal by special leave is not a regular appeal and that this Court would not re-appreciate evidence except to find out whether there has been any illegality, material irregularity or miscarriage of justice merely because a different view is possible on the evidence adduced at the trial is no ground for the Court to upset the opinion of the Courts below, so long as the same is a reasonably possible view. Perversity in the findings, illegality or irregularity in the Trial, causing injustice, or failure to take into consideration an important piece of evidence have been identified as some of the situation in which this Court would re-appraise the evidence adduced at the trial and not otherwise. (See: *Radha Mohan Singh alias Lal Saheb and Ors. v. State of U.P.* (AIR 2006 SC 951)**,** *Bhagwan Singh v. State of Rajasthan* (AIR 1976 SC 985), *Suresh Kumar Jain v. Shanti Swarup Jain and Ors.* (AIR 1997 SC 2291) and *Kirpal Singh v. State of Utter Pradesh* (AIR 1965 SC 712).

12. It is our task now to examine whether the judgment under appeal suffers from any one or more of the above infirmities, having regard to the quality of the evidence adduced at the trial.

13. We may with that object in view refer to the essence

of the depositions of the witnesses examined at the trial. In his deposition Asit Kumar Mondal, PW1, stated that he was residing with his wife and only son Snehasish Mondal in 'B' Block of the Thana Quarters Complex at Ghoradhara, Jhargram. Amit Banerjee resided with his wife and their three sons in 'A' Block opposite to Block 'B' in which the witness resided. On 12th of July, 1998, the deceased had gone to play in Ghoradhara park situate in front of BDO office but did not return home till evening. He was, therefore, asked by his wife, PW14 to search for their son. In the course of the search he came to know from one Rajib Roy Chowdhury, PW7 also a resident of the same Thana Quarters Complex that he had seen Babusona sitting in the park at about 5.00-5.30 p.m. and later seen him going with the appellant on his bicycle toward Kanchan Oil Mill following the western road touching the said park. The witness also deposed about the missing report lodged by him in Jhargram Police Station marked Ex.13 comprising G.D. Entry No.438 dated 12th July, 1998. The G.D. Entry gave the description of the missing boy and the clothes that he was wearing at the time of his disappearance.

14. Chhanda Mondal, PW 14, who happened to be the mother of the deceased, has in her deposition stated that at about 2 p.m. on 12th July, 1998 Babusona, the deceased expressed his desire to go out for bringing two parrots promised to him by the appellant. At the instance of the mother, the deceased instead went for his drawing classes from where he returned at about 4.45 p.m. Soon thereafter and following a signal from the appellant he went up to the roof of the flat occupied by the appellant where the later was standing. Sometime later the appellant and Babusona were both seen by the witness going towards the nearby park. The appellant was wearing a cap on his head, one white ganjee and a chocolate coloured full pant.

15. Rajib Roy Choudhury, PW 7, deposed that he had seen Babusona sitting on a Bench at about 5.00-5.30 p.m. on 12th

July, 1998 when the appellant came there, called out to Babusona and took him away on his bicycle by making him sit on the front rod of the cycle. The witness admitted that he was examined under Section 164 of the Cr.P.C. which statement was exhibited as Ext.7/1. Also relevant at this stage is the deposition of Jitin Sen, PW 8, who testified that he had seen Babusona at the Ghoradhara Park when the appellant came there called the deceased and took him away on his bicycle. The deceased and also the appellant were, according to the witness, well known to him as both of them were sports lovers.

16. Tarapade Mahato, PW9, who was an employee of the Kanchan Oil Mill and a resident of village Kalinagar, in his deposition stated that on 12th July, 1998 at about 6.00-6.30 p.m. he was returning from his duty from Kanchan Oil Mill following the usual path he noticed a bicycle standing with the support of a tree inside the Sitaldihi jungle. He also noticed two boys one about 10-11 years and another 18-19 years standing at a distance of about 10/12 cubits from the said bicycle. The witness further stated that the boys on noticing him proceeded further inside the jungle holding each other's hands. On the following day i.e. 13th July, 1998, he came to know about the recovery of a dead body from a ditch inside Sitaldihi jungle. He at once rushed to the place and saw the dead body of a boy aged 10/12 years lying in the ditch. He recollected that it was the same boy whom he had seen on the previous day. Witness further deposed that he identified the 18-19 years boy as the one whom he had seen on 12th July, 1998 in the Sitaldihi jungle in the test identification parade.

17. The prosecution has also placed reliance upon the deposition of Jadunath Das, PW 6, who also happened to be one of the residents of the police complex and knew the appellant and the deceased. According to this witness on 12th July, 1998 which happened to be a Sunday, the appellant called him at about 10.30 in the morning and asked for the spade which the witness owned as the former wanted to plant flowers.

The witness further stated that the appellant took the spade and wrapped its wooden part with a piece of newspaper and 'Sutli' (jute string) and carried the spade with him tied to his bicycle. The spade was not, however, returned by the appellant to him. The witness identified the spade seized by the police and marked Ex.11 to be the one which the appellant had borrowed from him on the date mentioned above.

18. Statement of Rukshmini Yadav, PW11 also bears relevance to the spade referred to by Jadunath Das, PW6. According to this witness, her children also take part in different sports. The appellant was according to this witness well acquainted to her and others in the locality. The witness stated that on 12th July at about 7.00-7.30 p.m. the appellant came to her house and called for her and kept one spade in the garden stating that he would take the same back on the following morning. The witness further stated that on 13th July, 1998 at about 9.00-9.30 p.m. the appellant accompanied by the police came to her house and the spade that was left by him was seized at his instance. A seizure memo Ex.10 was also prepared on which the witness had affixed her signature.

19. Aswini Deloi, PW 12 was examined by the prosecution to prove that he had reported the presence of a graveyard and a bicycle in the Sitaldihi jungle, and seen the appellant coming out of the Sitaldihi jungle on the 13th July, 1998 early in the morning. At the trial this witness has partly supported the prosecution. He has stated that about 2½ years ago he had noticed one bicycle and some newspapers lying near graveyard but denied having reported the matter to the local police along with Gurupada Mondal, PW 2. He also denied having seen the appellant coming out of the Sitaldihi jungle in the morning of 13th July, 1998. The witness was declared hostile and was cross-examined. He was confronted with the statement made before the police which was denied. The refusal of the witness to support the prosecution case has not made any material difference having regard to the fact that Gurupada Mondal, PW2 has supported the prosecution and stated in his

deposition that a black colour bicycle and the ditch which looked like a fresh graveyard and a pair of chappal lying nearby besides a newspaper was noticed by him inside the jungle and reported by him and Aswini Deloi, PW 12 to the police.

20. Tarun Banerjee, PW13 was occupying the ground floor flat in the 'B' Block of the complex and was familiar with the appellant as also the deceased-Babusona. According to his deposition on 12th July, 1998 when he returned home he learnt from his wife that Babusona was missing. He rushed to the house of Babusona's father and asked him whether a report regarding missing had been lodged with the police. Till mid-night Babusona could not be traced despite efforts made by police and a public announcement made on a loudspeaker. On the following day he noticed a gathering of people including police personnel on the Sitaldihi jungle. Asit Kumar Mondal, PW1 was also present on the spot and was weeping. A bicycle standing nearby was also seen by the witness which belonged to the appellant. He recognised the bicycle, as he too made use of it occasionally. He is also a witness to the seizure of the clothes which the appellant was wearing on the fateful day. Although the witness has been cross-examined extensively yet nothing has been extracted from him that could shake his credibility. In his cross-examination the witness has stated that the appellant had on 12th July, 1998 at about 9.00/10.00 p.m. told him that his bicycle had been taken by one of his friends but he failed to disclose the name of his friend and said that the friend was simply known to him by name.

21. Dr. Rajat Kanti Satpati, PW15 conducted the post-mortem on the dead body of the deceased and found the following injuries:

"External Injuries:

(1) Homatoma 1" x 1" over the occipital region of the scalp and ½" x ½" on the front and back of right pinna.

(2) Scratch mark surrounding both the wrist joint.

(3) Abrasion on buccal surface on upper lip.

(4) Continuous horizontal ligature mark around the lower part of neck.

(5) Old hemorrhagic mark both upper and lower jaw.

(6) Eccymosis 10" x 6" upper part of back of chest and eccymosis 8" x 6" lower part of back and also eccymosis both of the axilla and noted. On section of the neck below ligature no perchmentization in the subcantanus tissues. Haemorrhage is noted.

On further dissection caretidartery intinct both sides intact. Mussels platysma mark and lacerated left laterally and haemorrhage in and around injuries. Fracture of the hyoid bone on the left side and haemorrhage around fracture hyoid which is resist to washing. Stomach healthy contains full particles.

In our opinion of death is asphyxia as a result of throattling/strangulation which is antemortem and homicidal in nature."

22. The witness further stated that injury no.4 could be caused due to tying of the neck with a substance like 'Sutli'. According to the witness the death of the deceased had occurred approximately 24 hrs. prior to the post-mortem examination which was conducted at 6.45 p.m. on 13th July, 1998.

23. Deepak Kumar Sarkar, PW16 is a witness to the recovery of the dead body of deceased Babusona from the ditch in the jungle and the inquest that followed.

24. Tapan Kumar Chatterjee, PW17 and Swapan Kumar Pal, PW18 are police witnesses. While the former has proved

the GD No.438 dated 12th July, 1998 lodged by Asit Kumar Mondal regarding the missing report of his son Babusona, the latter is a witness to the seizure of the bicycle and the recovery of the dead-body from the ditch inside the Sitaldihi jungle. Dilip Bhattacharyya, PW 19, has scribed the first information report which he wrote under the instruction of the first informant, Asit Kumar Mondal and which has been marked Ext.1. In cross-examination the witness stated that as soon as the dead-body was identified by the father of the deceased the officer-in-charge instructed him to write down the FIR and he accordingly wrote the FIR as per the narrative given by Asit Kumar Mondal, PW1.

25. Swapan Kumar Mahanti, PW20, Judicial Magistrate, recorded the statement of Rajib Roy Chowdhury, PW 7 and Jiten Sen, PW8 under Section 164 of the Cr.P.C. He also recorded the statement of Jadunath Das, PW6 and Rukshmini Yadav which was marked as Ext.11. Statement of Tarapada Mahato PW9 is also recorded by the witness. The Magistrate also testified the holding of a test identification parade on 6th August, 1998 as per the orders of the Ld. Sub-Divisional Judicial Magistrate, Jhargram. In his cross-examination the witness stated that he has administered oath to the witnesses for the statement recorded by him but the same is not recorded in the order-sheet or the statement. There was no serious challenge to the test identification parade in the cross-examination except that undertrial prisoners are produced by the Sub-Jailor and were mixed with the suspect. The particulars of the cases in which the undertrial prisoners were in custody were not, however, recorded in the proceedings. Tapas Giri, PW21 took the photographs on the spot as per the instructions of police while Kushal Mitra, PW22 is the Investigating Officer who in his deposition has proved the various steps that were taken in the course of investigation including the seizures made, the statement of the witnesses recorded, the conduct of the inquest, the post-mortem and the test identification parade. The appellant led no evidence in his defence.

26. Mr. Mukherjee at the very outset argued that in a case based on circumstantial evidence proof of motive of the commission of offence of murder is extremely important. He submitted that prosecution had in the present case failed to prove the motive alleged by it which would break the chain of circumstances and resultantly benefit the appellant. He urged that even when Mangala Deloi, PW10 had supported the prosecution version regarding the alleged motive in her statements under Sections 161 and 164 of the Cr.P.C., the same did not constitute substantive evidence in the case and could not, therefore, be made use of for holding the motive to have been proved.

27. Motive for the commission of an offence no doubt assumes greater importance in cases resting on circumstantial evidence than those in which direct evidence regarding commission of the offence is available. And yet failure to prove motive in cases resting on circumstantial evidence is not fatal by itself. All that the absence of motive for the commission of the offence results in is that the court shall have to be more careful and circumspect in scrutinizing the evidence to ensure that suspicion does not take the place of proof while finding the accused guilty. Absence of motive in a case depending entirely on circumstantial evidence is a factor that shall no doubt weigh in favour of the accused, but what the Courts need to remember is that motive is a matter which is primarily known to the accused and which the prosecution may at times find difficult to explain or establish by substantive evidence. Human nature being what it is, it is often difficult to fathom the real motivation behind the commission of a crime. And yet experience about human nature, human conduct and the frailties of human mind has shown that inducements to crime have veered around to what **Wills** has in his book “Circumstantial Evidence” said:

> “The common inducements to crime are the desires of revenging some real or fancied wrong; of getting rid of rival or an obnoxious connection; of escaping from the pressure

of pecuniary or other obligation or burden of obtaining plunder or other coveted object; or preserving reputation, either that of general character or the conventional reputation or profession or sex; or gratifying some other selfish or malignant passion."

28. The legal position as to the significance of motive and effect of its absence in a given case is fairly well-settled by the decisions of this Court to which we need not refer in detail to avoid burdening this judgment unnecessarily. See *Dhananjoy Chatterjee alias Dhana v. State of W.B.* 1994 (2) SCC 220, *Surinder Pal Jain v. Delhi Administration,* 1993 Suppl. (3) SCC 91, *Tarseem Kumar v. Delhi Administration,* 1994 Suppl. (3) SCC 367, *Jagdish v. State of M.P.,* 2009 (12) Scale 580, *Mulakh Raj and Ors. v. Satish Kumar and Ors.* 1992 (3) SCC 43.

29. It was next argued by Mr. Mukherjee that the evidence adduced at the trial does not form a complete chain and that apart from the improbability of the prosecution version there were certain gaping holes in the prosecution story which would render it unsafe for any Court to pronounce the appellant guilty. He urged that in a case resting entirely on circumstantial evidence it was necessary for the prosecution to establish the circumstances that may be said to be incriminating against the accused but the said circumstances ought to be consistent only with the guilt of the accused in order that the Court may declare him guilty. Both these requirements had, according to Mr. Mukherjee, failed in the instant case entitling the appellant to an acquittal.

30. Mr. Ghosh, on the other hand, argued that the circumstances relied upon by the prosecution had not only been firmly established but the same form a complete chain that leaves no room for any conclusion other than the guilt of the appellant. He referred to the findings recorded by the two Courts below in this regard and submitted that the appellant had not

been able to either question the evidence that proved the circumstances or the inference that inevitably flowed from the same.

31. The tests applicable to cases based on circumstantial evidence are fairly well-known. The decisions of this Court recognising and applying those tests to varied fact situation are a legion. Reference to only some of the said decisions should, however, suffice. In *Sharad Birdhichand Sarda v. State of Maharashtra,* 1984 (4) SCC 116 this Court declared that a case based on circumstantial evidence must satisfy, the following tests:

"(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) The circumstances should be of a conclusive nature and tendency.

(4) They should exclude every possible hypothesis except the one to be proved, and

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

32. To the same effect are the decisions of this Court in *Tanviben Pankaj Kumar Divetia v. State of Gujarat* 1997(7) SCC 156, *State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru* 2005 (11) SCC 600, *Vikram Singh & Ors. v. State of Punjab,* 2010 (3) SCC 56, *Aftab Ahmad Ansari v. State of*

Uttaranchal, 2010 (2) SCC 583. In *Aftab Ahmad Ansari* (supra) this Court observed:

> "In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact must be proved individually and only thereafter the court should consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of the guilt. If the combined effect of all the facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts, by itself/ themselves, is/are not decisive. The circumstances proved should be such as to exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution case succeeds in a case of circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever extravagant and fanciful it might be."

33. What, therefore, needs to be seen is whether the prosecution has established the incriminating circumstances upon which it places reliance and whether those circumstances constitute a chain so complete as not to leave any reasonable ground for the appellant to be found innocent. Both the Courts below have, as seen earlier, appreciated the evidence adduced in the case and enumerated the circumstances that have been according to them established by the prosecution. Having been taken through the evidence adduced at the trial to which we have referred in some detail in the earlier part of this judgment, we have no manner of doubt that the prosecution has satisfactorily and firmly established the following circumstances on the basis of the evidence adduced by it:

> (1) That at about 2 p.m. on 12th July, 1998 Babusona, the deceased expressed his desire to go out for bringing two parrots promised to him by the appellant. At the instance of his mother, Chhanda Mondal, PW14, the deceased was instead sent for his drawing classes from where he returned at about 4.45 p.m. Soon thereafter and following a signal from the appellant he went up to the roof of the flat occupied by the appellant where the latter was standing. Sometime later the appellant and Babusona were both seen by Chhanda Mondal, PW14 going towards the nearby park. The witness again noticed the appellant proceeding on his bicycle wearing a cap on his head, one white ganjee and a chocolate coloured full pant.
>
> (2) The deceased Babusona did not return home from the park till evening, whereupon the parents of the deceased started a search for him. Deposition of Asit Kumar Mondal, PW1 father and Smt. Chhanda Mondal, PW 14, mother of the deceased respectively clearly establish this fact.
>
> (3) When the search undertaken by the parents proved fruitless, Asit Kumar Mondal lodged a missing report at the Jhargram Police Station, which report was registered under General Diary No. 438 dated 12th July, 1998 at 6.55 p.m. marked as Ext. 13 at the trial. The Jhargram Police Station on receipt of the report made an announcement regarding the disappearance of Babusona with the help of loudspeaker in the area. The deposition of Asit Kumar Mondal, PW1 and Chhanda Mondal, PW14 clearly establish this circumstance also.
>
> (4) At about 8.30 p.m. on 12th July, 1998 the parents of the deceased Asit Kumar Mondal, PW 1 and Chhanda Mondal, PW14 saw the appellant entering his (appellant's) residential quarter from the rear door of the quarter. When PW 1 asked him about the whereabouts of the deceased the appellant initially hesitated and showed his ignorance regarding the whereabouts of Babusona. The deposition of Asit Kumar Mondal, PW 1 establishes that at that time the appellant was without any chappal on his feet and the cycle that he owned.

(5) The deceased-Babusona was last seen by Rajib Roy Chowdhury, PW 7 and Jiten Sen, PW8 in the park talking to the appellant and shortly thereafter going with the appellant on his bicycle towards the Kanchan Oil Mill which is in the same direction as of Sitaldihi jungle. The deposition of the said two witnesses has firmly established this fact especially because nothing has been brought out in their cross-examination which may discredit their version or render them unreliable.

(6) The deceased and the appellant were seen in the Sitaldihi jungle by Tarapada Mahato, PW9 while the said witness was returning home from Kanchan Oil Mill. On seeing the witness the appellant and the deceased proceeded deeper into the Sitaldihi jungle.

(7) On the following day i.e. 13th July, 1998 Jhargram Police Station received information about a newly dug ditch inside the Sitaldihi jungle at some distance from the residential complex where the appellant and the deceased used to live. This information was recorded in Diary No.463 dated 13th July, 1998 marked as Ext.17. The depositions of Gurupada Mondal, PW2 established this fact. On receipt of this information the police rushed to the place inside the Sitaldihi jungle and found a newly dug ditch covered with loose earth. Executive Magistrate, Shri Dipak Kumar Sarkar, PW 16 was also sent for besides a photographer named Tapas Giri, PW 21. In their presence and the presence of other witnesses the ditch was dug up and the body of the deceased recovered from the same. The deposition of Asit Kumar Mondal, PW 1, Gurupada Mondal, PW2, Kushal Mitra, PW 22, Sunil Deloi, PW5, Tarun Banerjee, PW13, Dipak Kumar Sarkar, PW16, Swapan Kumar Pal, PW18 and Dilip Bhattacharyya, PW19 firmly establish this fact.

(8) At some distance from the place where the dead body was buried, the police found a pair of hawai chappal, two

leaves of Ananda Bazar Patrika Newspaper apart from the cycle that was parked against a tree. Asit Kumar Mondal recognized the hawai chappal to be that of his son-Babusona and the cycle to be that of the appellant. The cycle was also recognised by Tarun Banrejee, PW13 to be that of the appellant.

(9) Dead body of the Babusona was lying on his back with hands tied behind. The legs were also tied with the help of electric wire. One handkerchief was also stuffed inside the mouth of the deceased and 'Sutli' (jute string) was found around the neck of the deceased. The depositions of Asit Kumar Mondal, PW1, Gurupada Mondal, PW2, Dilip Namata, PW3, Sunil Deloi, PW5, and Kushal Mitra, PW22 establish this fact apart from establishing that there were marks of injuries on different parts of the body including the head.

(10) The deceased was found wearing blue coloured half pant and yellow orange mixed half shirt. These were the very same clothes the deceased was wearing when he was last seen alive. Depositions of Asit Kumar Mondal, PW1, Chhanda Mondal, PW14, Jiten Sen, PW8, Tarapada Mahato, PW9 and Kushal Mitra, PW22 establish this fact.

(11) The appellant was identified by the said Tarapada Mahato, PW9 in T.I. Parade conducted on 6th August, 1998, by Swapan Kumar Mahanti, Judicial Magistrate, examined at the trial as PW20, as the same boy whom he had seen inside the Sitaldihi jungle along with the deceased at about 6.00/6.30 p.m. on 12th July, 1998.

(12) From the Sitaldihi jungle a cap which the appellant was wearing on the fateful day was also recovered in the presence of Gurupada Mondal, PW2 and Dilip Namata, PW3.

(13) Apart from leaves of Anand Bazar Patrika, the 'Sutli' found tied around the neck of the deceased was also seized by the police along with the electric wire marked M.O. Ext.XIII. Depositions of Asit Kumar Mondal, PW1, Dilip Namata, PW3, Sunil Delio PW5, and Kushal Mitra, PW22 establish the fact.

(14) A spade that was dropped by the appellant in the evening of the 12th July, 1998 at the house of Rukshmini Yadav, PW11 telling the said witness that he would collect it the following day was also seized by the police at the instance of the appellant.

(15) The spade had been taken by the appellant on the morning of 12th July, 1998 from Jadunath Das, PW6, on the pretext of planting some flowers. The witness also proved that the appellant had wrapped the wooden part of the spade with newspaper and tied it with 'Sutli' (jute string) and carried the same on his bicycle.

(16) The deposition of Dr. Rajat Kanti Satpati, PW15 who conducted the post-mortem examination and opined that the deceased had died within 24 hrs. prior to the post-mortem which supports the prosecution version that the deceased was done to death around 6.30 or so in the evening on 12th July, 1998. The death was according to this witness homicidal and asphyxia caused for throttling and strangulation which fact is also clearly established by the prosecution. The doctor also found a ligature mark around the neck of the deceased which could be caused by the 'Sutli'.

(17) The clothes which the appellant was wearing according to the witnesses Sunil Deloi, PW5, Rajib Roy Chowdhury, PW7, Jiten Sen, PW8 and Smt. Chhanda Mondal, PW14 seized by Kushal Mitra, PW22 in the presence of Asit Kumar Mondal, PW1, and Tarun Banerjee

PW13 during investigation were duly identified by them in the Court.

34. The above circumstances are, in our opinion, not only established, but they form a complete chain, that leaves no manner of doubt, that the crime with which the appellant stood charged was committed by him and no one else. The deposition of the mother of the deceased, that Babusona wanted to go to the appellant to fetch two parrots which the latter had promised, that he did after returning from the drawing tuition go to the appellant on getting a signal from him, sets the stage for drawing the deceased out of the house. He is shortly thereafter seen talking to the appellant who calls out for him in the park and carries him away on his bicycle towards Kanchan Oil Mill which fact has been proved by two witnesses whose deposition does not suffer from any embellishment or contradiction. The fact that Babusona and the appellant were seen together in Sitaldihi jungle around 6.00/6.30 p.m. on 12th July, 1998 is a highly incriminating circumstance, especially when according to the medical evidence the time of death of the deceased was also around the same time. The deceased having been last seen with the appellant around the time he was killed is a circumstance which together with other circumstances proved in the case, are explainable only on one hypothesis that the appellant was guilty of killing the deceased. The fact that the appellant had borrowed the spade, tide it with 'Sutil' after wrapping the wooden part with the newspaper is fully established by the statement of Jadunath Das, PW6. So also the deposit of the spade on 12th July, 1998 in the evening with Rukshmini Yadav, PW11 stands established beyond any doubt whatsoever. The presence of the newspaper near the ditch where the deceased was burried and the recovery of the 'Sutli' from around the neck of the deceased where it had left a ligature mark are also telling circumstances which are explainable only on the hypothesis that the appellant was the author of the crime. Recovery of the cap which according to the prosecution witnesses was worn by the appellant on the date

of occurrence from Sitaldihi jungle is also a circumstance that establishes that the appellant was in the jungle on 12th July, 1998 around the place from where the dead body was recovered. Similarly, the recovery of the bicycle which the appellant owned from Sitaldihi jungle, from near the place where the dead body was burried is not explainable on any hypothesis except the guilt of the accused-appellant. The fact that the appellant had late in the evening on 12th July, 1998 left the spade at the house of Rukshmini Yadav, PW11 and entered the flat from the rear door without his chappals as also the fact that when asked where his bicycle was, he gave a false explanation too are incriminating circumstances which are important links in the chain of the circumstances.

35. Mr. Mukherjee's argument that Tarapada Mahato, PW9 could not have seen the boys standing in Sitaldihi jungle from inside Kanchan Oil Mill, has in our opinion, no merit whatsoever. The witness has clearly stated that he had seen the boys (appellant and the deceased) while he was going home by the path which he everyday takes for that purpose. Nowhere has the witness suggested that he had seen the boys from the precincts of the Mill. So also the argument that Tarapada Mahato, PW9 was a procured witness has not impressed us. There is nothing in the cross-examination of this witness that may warrant rejection of his testimony. The mere fact that the witness did not volunteer to go to the police to say that the two boys i.e. the appellant whom he described as a boy aged 18/19 years old and the deceased whom he described as a boy 10/11 years old, were seen by him together in the Sitaldihi jungle on 12th July, 1998, would not make the deposition of this witness suspect. The statement of this witness was recorded when the police started questioning the employees of the Mill about the incident. Narration of what the witness had seen in the course of the investigation cannot be said to be so highly belated or afterthought as to cast a doubt about the veracity of the witness especially when the witness had not seen any crime being committed. He was simply a

witness to a fact which could independent of other circumstances be a wholly innocent and innocuous circumstance. The criticism of the learned counsel against the conduct of the test identification parade is also without any merit. The fact that the suspect was kept in a room separate from the room in which the witness was made to sit before the T.I. parade proceedings were held is much too clear from the statement of the magistrate who conducted the T.I. parade to call for any adverse inference. All told the investigation into the unfortunate incident and the collection of the evidence has been fair and objective. One reason for such fairness and objectivity could be the fact that the deceased and the appellant were both wards of police officials. There was, therefore, no room for favouring one over the other. In the totality of the above circumstances, we see neither any illegality, nor any miscarriage of justice in the judgments and orders under appeal to call for our interference.

36. In the result this appeal fails and is hereby dismissed.

D.G. Appeal dismissed.

M/S. DELHI AIRTECH SERVICES PVT. LTD. & ANR.
v.
STATE OF U.P. & ANR.
(Civil Appeal No. 24 of 2009)

AUGUST 18, 2011

[ASOK KUMAR GANGULY AND SWATANTER KUMAR, JJ.]

Land Acquisition Act, 1894 – ss. 17(3A), 17(1), 17(4), 11A, 6 and 5A – Acquisition of abadi land for planned development – Issuance of Notification u/s. 4(1) rw s. 17(1) and 17(4) – Dispensation of provision of hearing u/s. 5A – Publication of declaration u/s. 6 in the year 2002 and thereafter, the possession of the land was taken – Case of the land owners that possession of the land was taken without issuance of notification to them; that the award was not passed within two years of making the declaration u/s. 17(1); and they were not paid 80 per cent of the estimated compensation in terms of s. 17(3A) at the time of taking of possession – Writ petition seeking declaration that the said acquisition proceedings be declared void ab initio and the land be returned to the land owners with damages – Dismissal of writ petition – Issues arising before Supreme Court that when land is acquired in exercise of emergency powers u/s. 17 and have since vested in the State, would the acquisition proceeding lapse and land be transferred to the owners/persons interested in case of non-compliance of s. 11A; whether the provisions of s. 17(3A) are mandatory or directory and in either event, would non-compliance of s. 17(3A) invalidate or vitiate the entire acquisition proceedings, even where the land has vested in the State; whether the emergency provisions are to be construed strictly and the safeguards inbuilt in s. 17(3A) are construed as conditions precedent and mandatory for a valid exercise of emergency provisions; and whether the

*provisions of the said Act are to be construed as a pre-constitutional law in consonance with the fundamental tenets of Article 14 – **Held: Per Ganguly J:** Requirement of payment u/s. 17(3A) is in the nature of condition precedent clamped by the statute before taking possession under emergency acquisition by the State – Provision of s. 17(3A) indicates mandatory compliance – It is a law enacted to prevent deprivation of property rights guaranteed under Article 300 A – Thus, taking over possession of land without complying with the requirement of s. 17(3A) is illegal and in violation of the statutory provision which automatically violates the constitutional guarantee under Article 300A – **Per Swatanter Kumar J:** Once the acquired land has vested in the Government in terms of s. 16 or 17(1), possession of which has already been taken, such land is incapable of being re-vested or reverted to the owners/persons interested therein, for lack of any statutory provision for the same under the Act – Provisions of s. 17(3A) suggests that it is mandatory but, as no consequences of default have been prescribed by the Legislature therein, thus, it would hardly be permissible for the Court to read into the said provision any drastic consequences much less lapsing of entire acquisition proceedings – s. 11A has no application to the acquisition proceedings conducted under the provisions of s. 17 – **In view of divergence of opinion, matter referred to the larger bench** – Reference to larger bench.*

Land owned by appellant No. 1, Company (abadi land) was sought to be acquired for the planned industrial development of New Okhla Industrial Development Authority. Notification was issued under Section 4(1) read with Sections 17(1) and 17(4) of the Land Acquisition Act, 1894, seeking acquisition of the land. The provision of hearing under Section 5A was dispensed with. Pursuant thereto, declaration under Section 6 was published in the year 2002 declaring the area required by the Government and thereafter, the possession of the land was taken under Section 9(1) of the Act. The

appellants alleged that they did not receive any notice under Section 9(1) of the Act but the possession of the land was taken; that the Collector did not pass the award within two years of making the declaration under Section 17(1) as required by Section 11A of the Act; and that they were not paid 80 per cent of the estimated compensation in terms of Section 17(3A) of the Act at the time of taking of possession. The appellants filed a writ petition in the High Court seeking declaration that the acquisition proceedings, relating to the land of the appellant be declared void ab initio; and that the respondents be directed to return the land from the possession of the Government to the owners and pay damages for use and occupation of the land. The respondents contented that they had deposited 80 per cent compensation in terms of Section 17(3A) of the Act with the authorities; that the land was not abadi land and had been acquired for planned development of NOIDA and was in the physical possession of the said authority; and that the possession of the land had been taken on 4th February, 2003 and no right had survived in favour of the appellant. The High Court dismissed the writ petition holding that the provisions of Section 11A of the Act were not attracted to proceedings for acquisition taken by the Government under Section 17 of the Act. Therefore, the appellants filed the instant appeal.

The questions which arose for consideration in the instant appeal are when the Government, in exercise of its emergency powers under Section 17 of the Act acquires lands, which have since vested in the State, can such an acquisition proceeding lapse and consequently the land can be transferred to the owners/persons interested in the event of default by the State, in complying with the provisions of Section 11A of the Act; whether the provisions of Section 17(3A) of the Act are mandatory or directory and in either event, would non-compliance with Section 17(3A) have the effect of invalidating or vitiating the entire acquisition

proceedings, even where the land has vested in the State in terms of Section 17(1) of the Act; whether with the invoking of the emergency provisions which have the effect of dispensing with the provision of hearing under Section 5A of the Act, the Court is entitled to construe the emergency provisions strictly and consider the safeguards inbuilt in Section 17(3A) as conditions precedent and mandatory for a valid exercise of emergency provisions; and whether having regard to the principle of reasonableness, the provisions of the said Act are to be construed, a pre-constitutional law in consonance with reason and justice-the fundamental tenets of Article 14 and thus, arrive at a balanced interpretation of the interest of the State as against the rights of citizens or land owners.

Referring the matter to the larger bench, the Court

HELD: PER GANGULY, J.

1.1 Taking over a possession of land by invoking s. 17(1) and s. 17(2) of the land Acquisition Act, 1894 and without complying with the requirement of Section 17(3A) of making payment, is clearly illegal and in clear violation of the statutory provision which automatically violates the constitutional guarantee under Article 300A of the Constitution. A passing observation to the contrary in * *Satendra Prasad Jain*'s case, must pass *sub silentio* being unnecessary in the facts of the case as otherwise such a finding is *per incuriam*, being in violation of the statute. *A fortiorari* the said finding cannot be sustained as a binding precedent. Therefore, the writ petition cannot be dismissed in view of the decision in * *Satendra Prasad Jain's* case which was decided on totally different facts. The judgment of the High Court is set aside. [Paras 72 and 73] [257-F-G]

**Satendra Prasad Jain and Ors. v. State of U.P. and Ors.*

AIR 1993 SC 2517: (1993) 4 SCC 369 – per incuriam.

1.2 In all cases of emergency acquisition under Section 17, the requirement of payment under Section 17(3A) must be complied with as the provision of Section 17(1) and Section 17(2) cannot be worked out without complying with requirement of payment under Section 17(3A) which is in the nature of *condition precedent*. If Section 17(3A) is not complied with, the vesting under Section 17(1) and Section 17(2) cannot take place. Therefore, emergency acquisition without complying with Section 17(3A) is illegal. This is the plain intention of the statute which must be strictly construed. Any other construction, would lead to diluting the Rule of Law. [Para 74] [257-G-H; 258-A-B]

2.1 The reason behind enacting Section 17 (3A) of the Act is clear from the Statement of Object and Reasons. It is clear therefore, the provisions were incorporated in order to strike a balance between the rights of the State and those of the land owner. A clear legislative intent in Section 17(3A) was thus, expressed that before taking possession of any land under sub-section (1) or sub-section (2) of Section 17, the Collector shall tender payment of 80% of the estimated compensation for such land to the persons interested and entitled thereto. This is the clear mandate of law. Reasonableness in law has to be its implicit content. When law gives a specific mandate on the State to tender the payment before taking possession under Section 17(1) and Section 17(2) by invoking the emergency powers, to hold that the taking over of possession without complying with that mandate is legal is clearly to return a finding which is contrary to the express provision of the statute. Such a finding is certainly not on a reasonable interpretation of Section 17 (3A). [Para 43] [244-D-F]

R.C. Cooper v. Union of India **(1970) 1 SCC 248;**

Maneka Gandhi v. Union of India & Anr. **(1978) 1 SCC 248 – relied on.**

Municipal Corporation of Delhi v. Gurnam Kaur **AIR 1989 SC 38;** *Madhav Rao Jivaji Rao Scindia v. Union of India* **AIR 1971 SC 530;** *Padma Sundara Rao (Dead) & Ors., v. State of Tamil Nadu & others* **(2002) 3 SCC 533 – referred to.**

Gerard v. Worth of Paris Ltd. **1936 (2) AER 905 – referred to.**

Jurisprudence by Salmond "12th Edn **– referred to**

2.2 The emergency provisions of the statute which empowers the State to acquire land by dispensing with the provisions of making an enquiry, is a drastic provision. The provisions of the Act are expropriatory in nature and must be strictly construed. Section 17 of the Act seeks to authorize acquisition and taking over of possession without hearing the land owner. The right of hearing which is given under Section 5A of the Act and which is taken away in view of the emergency acquisition is a very valuable right and is akin to a fundamental right. Therefore, when that right is taken away and the land is acquired by invoking the emergency provision of Section 17(3A) to hold that even the safeguards provided under Section 17(3A) are not mandatory and taking over of possession without complying with the provisions of Section 17 (3A) is not illegal, is to overlook the clear provisions of the Act and come to a finding which is contrary to the Act. [Para 44] [244-H; 245-A-D]

Dev Sharan & Ors. v. State of U.P. & Ors. **JT 2011 (3) SC 102 – referred to.**

2.3 Section 17(3A) is not an isolated provision. Section 17(3A) figures very prominently as part of the statutory mechanism in Section 17 of the Act which

confers special powers in cases of urgency. Section 17 has four sub-sections and all these sub-sections comprise a composite mechanism and are closely intertwined. Power under one sub-section cannot be exercised without complying with the conditions imposed by the other sub-section. It is thus, clear that sub-section (3A) of Section 17 read with sub-section (2) of Section 31 of the Act form a composite statutory scheme. The said scheme has been legislatively framed to balance the promotion of public purpose in acquisition with rights of the individual whose land is acquired. Thus, the provision of s. 17(3A) cannot be viewed in isolation. It is an intrinsic and mandatory step in exercising special powers in cases of emergency. Sections 17(1) and 17(2) and 17(3A) must be read together. Section 17(1) and 17(2) cannot be worked out in isolation. [Paras 45, 47 and 48] [245-E-F; 248-E-H]

2.4 A statute has to be read as a whole and in its context. If the normal mode of vesting of acquired property under Section 16 of the Act is compared with the mode of vesting under emergency provisions of Section 17 thereof, it would be discerned that under the Act the vesting of acquired property in the State presupposes compliance with two conditions. Under Section 16, first there has to be an award under Section 11 and then there has to be taking over of possession. Only thereupon the land shall vest absolutely in the State, free from all encumbrances. However, in case of emergency acquisition, possession is taken before the making of an award. This is clear from Section 17(1) and Section 17(2). But the intention of the legislature is that even though the award is not made, payment mandated under Section 17(3A) must be made before possession is taken either under Section 17(1) and 17(2). Therefore, the provision relating to payment under Section 17(3A) is a *condition precedent* to the vesting of land under Section 17(1) and 17(2).

Union of India v. Sankalchand Himatlal Sheth & Anr. **(1977) 4 SCC 193 – referred to.**

Attorney General v. HRH Prince Earnest Augustus of Hanover **(1957) 1 AER 49 – referred to.**

2.5 Judicial opinion is uniformly in favour of strict construction of an expropriatory law which admittedly Land Acquisition Act, 1894 is. The requirement of payment under Section 17(3A) is in the nature of condition precedent clamped by the statute before taking possession under emergency acquisition by the State. The vesting contemplated either under Section 17(1) or 17(2) of the Act is conditioned upon payment mandated under Section 17(3A). This is clear from the opening words of Section 17(3A) namely "before taking possession of any land either under sub-section (1) or (2), Collector shall……. tender payment." Therefore, the eminent domain concept is subject to the said statutory condition and must be read subject to due process concept introduced in the constitutional law. If Section 17(3A) is read consistently with the constitutional doctrine of due process as articulated in the expression 'authority of law' under Article 300A which constitutionally protects deprivation of a right to property, save by authority of law, the requirement of Section 17(3A) constitutes the authority of law within the meaning of Article 300A. Therefore, in the context of the said statutory dispensation and constitutional provision, the debate whether the provision of Section 17(3A) is mandatory or directory does not present much difficulty. Basically, the language used is 'shall' which primarily indicates mandatory compliance. That apart, in the context of the nature of statute which is admittedly expropriatory in character and the nature of the statutory requirement under Section 17(3A) which is clearly and undoubtedly a condition precedent to the taking over of possession in emergency acquisition, there can be no

doubt that the requirement under Section 17(3A) is mandatory. [Paras 54, 66 and 67] [250-G; 255-B-H]

Secretary of State for India v. Birendra Kishore Manikya **ILR 44 Cal 328;** *Gujarat Electricity Board v Girdharlal Motilal And Anr* **AIR 1969 SC 267;** *Nazir Ahmad v King Emperor* **AIR 1936 PC 253;** *Hindustan Petroleum Corpn. Ltd., v. Darius Shapur Chenai and others* **(2005) 7 SCC 627;** *Bharat Petroleum Corporation Ltd. v Maddula Ratnavalli and Others* **(2007) 6 SCC 81;** *Jilubhai Nanbhai Khachar and others v State of Gujarat and Anr.* **1995 Suppl (1) SCC 596 – referred to.**

Webb v. Manchester and Leeds Rail Co. **(1839) 4 Myl & Cr.116;** *Parkdale Corporation v. West* **(1887) 12 App. Cas. 602, 614;** *A.K. Gopalan v. State of Madras* **AIR 1950 SC 27;** *Henry B. Stacey v The Vermont Central Railroad Co.* **27 Vt. 39 – referred to.**

The Law of Compensation for Land Acquired under Compulsory Powers by Cripps, **Stevens and Sons, Ltd. 8th Edn.;** *A Treatise on the Constitutional Limitations by Cooley* **'Volume II, (Eight Edn);;** *Words and Phrases permanent edition,* **Vol. 8. St. Paul, Minn, West Publishing Co., 1951, p 629;** *Bouvier's Law Dictionary, A Concise encyclopedia of the Law, R*awle's **Third Revision, Vol. 1, Vernon Law Book Company, 1914, p 584;** *Wharton's Law Lexicon*, **1976, reprint, p 228 – referred to.**

2.6 Section 17(3A) has been enacted for protecting the rights of deprived land-loser in an emergency acquisition. The said provision is therefore, based on reason, justice and fairplay. Since the said provision has been introduced by way of an amendment to balance the right of the State as against the interest of the land-loser, the State's power of eminent domain is expressly made subject to said statutory provision as also the constitutional right to property protected under Article

300A. [Para 68] [256-A-B]

Chairman, Indore Vikas Pradhikaran v. Pure Industrial Coke & Chemicals Ltd. and Ors. **(2007) 8 SCC 705 – referred to.**

2.7 The expression 'law' which figures both in Article 21 and Article 300A must be given the same meaning. In both the cases the law would mean a validly enacted law. In order to be valid law it must be just, fair and reasonable having regard to the requirement of Article 14 and 21. This is especially so, as 'law' in both the Articles 21 and 300A is meant to prevent deprivation of rights. Insofar as Article 21 is concerned, it is a Fundamental Right whereas in Article 300A it is a constitutional right which has been given a status of a basic human right. Therefore, Section 17(3A) of the Act is a law which has been enacted to prevent deprivation of property rights guaranteed under Article 300 A. This provision of Section 17(3A) must therefore, be given a very broad interpretation to mean a law that gives a fair, just and reasonable protection of the land-loser's constitutional right to property. Therefore, the provisions of Section 17(3A) read with Article 300A must be liberally construed. [Paras 69,70 and 71] [256-C-G]

Maneka Gandhi v. Union of India & Anr. **(1978) 1 SCC 248 – relied on.**

Madhav Rao Jivaji Rao Scindia v. Union of India **AIR 1971 SC 530 – referred to.**

3. As regards the question of relief, the possession of the land has been taken and same has been handed over to the beneficiary on which construction had taken place and third party interests had arisen. It is very difficult to put the hands of the clock back now, despite the said declaration of law by the Court. In the special

facts of the case, compensation in respect of the land acquired as regards the appellants, cannot be decided on the basis of the date of notice under Section 4. The compensation has to be fixed with regard to the value of the appellant's land as on the date of filing of the writ petition which was in March, 2006 before the High Court. The Section 4 notification must be deemed to have been issued on March 1, 2006 and the compensation must be worked out on that basis. An award on that basis must be passed by the Collector within four months from date and the appellants are given liberty, if so advised, to challenge the same in appropriate proceedings. As the respondent-acquiring authority has proceeded illegally in the matter, it shall pay costs of Rupees one lakh in favour of High Court Mediation Centre. The State is at liberty to recover the same from the erring officials. [Paras 75, 76] [258-C-H]

Dorothy Lynch v. Household Finance Corporation **405 US 538: 31 L Ed. 2d 424 – referred to.**

Democracy, Equality and Freedom **by Justice K.K. Mathew (1978) - referred to.**

PER SWATANTER KUMAR, J:

1. The four legal questions as framed are answered as follows:

A. Section 11A of the Land Acquisition Act, 1894 has no application to the acquisition proceedings conducted under the provisions of Section 17 of the Act. Once the acquired land has vested in the Government in terms of Section 16 or 17(1) of the Act, possession of which has already been taken, such land is incapable of being re-vested or reverted to the owners/persons interested therein, for lack of any statutory provision for the same under the Act.

B. The provisions of Section 17(3A) of the Act, on their bare reading, suggest that the said provision is mandatory but, as no consequences of default have been prescribed by the Legislature in that provision, thus, it would hardly be permissible for the Court to read into the said provision any drastic consequences much less lapsing of entire acquisition proceedings. Default in complying with provisions of Section 17(3A) cannot result in invalidating or vitiating the entire acquisition proceedings, particularly when the possession of the acquired land has been taken and it has vested in the Government free from all encumbrances.

C. Keeping in view the scheme of the Act, the provisions of Section 17 of the Act can be construed strictly but such interpretation must be coupled with the doctrine of literal and contextual interpretation, while ensuring that the object of the legislation is not defeated by such an interpretation. Strict compliance to the conditions contemplated under Section 17 of the Act should be given effect to but within the framework of the statute, without making any additions to the language of the section.

D. Once the right to property ceases to be a Fundamental Right after omission of Articles 19(1)(f) of the Constitution of India, the addition of Articles 31A and 300A by the 44th Constitutional Amendment, 1978, cannot place the legal right to property at the same pedestal to that of a fundamental right falling under Chapter III of the Constitution. The provisions of the Land Acquisition Act are not violative of Article 14 of the Constitution. The rights of the citizens and interest of the State can be balanced under the provisions of the Act, without any violation of the Constitutional mandate. [Para 82] [323-E-H; 324-A-G]

2. The reasons for taking different view are as follows:

(i) The ratio decidendi of the judgment of this Court in the case of Satendra Prasad Jain is squarely applicable to the instant case, on facts and law.

Satendra Prasad Jain & Ors. v. State of U.P. & Ors. **AIR 1993 SC 2517 = (1993) 4 SCC 369 – followed.**

(ii) From the facts recorded, it is clear that within the prescribed period, the payments were deposited with the State office of the Collector/competent authority and it was for the State to distribute the money in accordance with the provisions of the Act. It is not only the scheme of the Act but also an established practice that the amounts are disbursed by the Collector to the claimants and not directly by the beneficiary, for whose benefit the land had been acquired. The beneficiary had discharged its obligation by depositing, in fact, in excess of 80 per cent of due compensation with the competent authority. De hors the approach that one may adopt in regard to the interpretation of Section 17(3A), on facts the notification is incapable of being invalidated for non-compliance of the said Section.

(iii) The doctrine of strict construction does not per se mandate that its application excludes the simultaneous application of all other principles of interpretation. It is permissible in law to apply the rule of strict construction while reading the provisions of law contextually or even purposively. The golden rule of interpretation is the rule of plain language, while preferring the interpretation which furthers the cause of the Statute rather than that which defeats the objects or purposes of the Act.

Offshore Holdings Pvt. Ltd. v. Bangalore Development Authority & Ors. **(2011) 3 SCC 139;** *Tika Ram & Ors. v. State of U.P. & Ors.* **(2009) 10 SCC 689;** *Banda Development Authority, Banda v. Moti Lal Agarwal & Ors.* **2011 (5) SCALE 173;** *Devinder Singh & Others v. State of Punjab and Others* **(2008)1 SCC 728 – referred to.**

(iv) The 44th Constitutional Amendment, on the one hand, omitted Article 19(1)(f) and Article 31 while introducing Articles 31A and 300A to the Constitution of India on the other. Right to property was deleted as a fundamental right in the Constitution. Thus, this right cannot be placed on equi terms, interpretatively or otherwise, to the pre-constitutional amendments. The right to eminent domain would operate on a different sphere, interpretation and effect, pre and post constitutional repealments of these Articles and introduction of Article 300A of the Constitution. [Para 1]

3.1 It is clear that it may not be possible to lay down any straitjacket formula, which could unanimously be applied to all cases, irrespective of considering the facts, legislation in question, object of such legislation, intendment of the legislature and substance of the enactment. It will always depend upon all these factors. Still, these precepts are not exhaustive and are merely indicative. There could be cases where the word 'shall' has been used to indicate the legislative intent that the provisions should be mandatory, but when examined in light of the scheme of the Act, language of the provisions, legislative intendment and the objects sought to be achieved, such an interpretation may defeat the very purpose of the Act and, thus, such interpretation may not be acceptable in law and in public interest. Keeping in mind the language of the provision, the Court has to examine whether the provision is intended to regulate

certain procedure or whether it vests private individuals with certain rights and levies a corresponding duty on the officers concerned. The Court will still have to examine another aspect, even after holding that a particular provision is mandatory or directory, as the case may be, i.e., whether the effect or impact of such non-compliance would invalidate or render the proceedings void ab initio or it would result in imposition of smaller penalties or in issuance of directions to further protect and safeguard the interests of the individual against the power of the State. The language of the statute, intention of the legislature and other factors decide the results and impacts of non-compliance in the facts and circumstances of a given case, before the Court can declare a provision capable of such strict construction, to term it as absolutely mandatory or directory. [Para 27] [278-D-H; 279-A-C]

May George v. Special Tehsildar and Ors. **(2010) 13 SCC 98;** *M/s. Sainik Motors, Jodhpur & Others v. The State of Rajasthan* **AIR 1961 SC 1480;** *Hindustan Petroleum Corporation v. Darius Shapur Chennai and Ors.* **(2005) 7 SCC 627 – referred to**

Attorney General's Reference **(No. 3 of 1999) (2001) 1 All ER 577;** *R. v. Jones, ex p. Daunton* **1963(1) WLR 270R. v. Bullock (1964)1 QB 481 – referred to.**

'Principles of Statutory Interpretation' by Justice G.P. Singh, **12th Edn, 2010 p 389;** '*The Interpretation of Statutes' by Maxwell* **Chapter 12, 12th Edn.;** *'Principles of Statutory Interpretation' by Justice G.P. Singh*, **11th Edn, 2008;** '*Statutory Construction' by Crawford*; *Interpretation of Statutes' by Maxwell* **12th Edition by P. St. J. Langan – referred to.**

3.2 Under the scheme of Section 17 of the Act, the Government can take possession of the property on the expiration of 15 days from publication of notice mentioned

in Section 9(1) of the Act. The provisions of Section 5 of the Act, i.e., the right of the owner to file objection can be declared to be inapplicable. Besides these two significant distinctions, another important aspect that the land vests in the Government under Section 16 of the Act only after the award is made and possession of the land is taken, while under Section 17(1), at the threshold of the acquisition itself, the land could vest absolutely in the Government free from all encumbrances. The possession of the acquired property has to be taken by the Collector in terms of Sections 17(2) and 17(3) of the Act. [Para 28] [279-G-H; 280-A-B]

3.3 Section 17(3A) of the Act, was introduced by the Amendment Act 68 of 1984 for the purposes of safeguarding the interests of the claimants. Section 17(3A) makes it obligatory on the part of the authority concerned to tender/pay 80 per cent of the compensation for the acquired land, as estimated by the Collector, to the persons interested and entitled thereto; unless prevented by any of the contingencies mentioned under Section 31(2) of the Act. The use of the word 'shall' in Section 17(3A) indicates that the enactors of law desired that the procedure stated should be complied with by the authority concerned prior to taking of possession. Deposit of amount is the condition precedent to taking of possession. The amount so deposited or paid in terms of Section 17(3A) of the Act will be taken into account for determining the amount of compensation required to be tendered under Section 31 of the Act and provides for the recovery of amounts if it exceeds the awarded amount. Section 17(3A) unambiguously provides a complete mechanism of taking possession and the requirement of payment of 80 per cent of estimated compensation to the claimants. [Para 29] [281-E-H; 282-A-C]

3.4 Section 17(3A) of the Act is completely silent on

consequences of default in compliance of the provision. Where the Legislature has, in specific terms, provided for the extent of payment, mode of payment and even the difficulties which are likely to arise, i.e, where a person may not be entitled to receive the compensation or in any other eventuality such as where the compensation cannot be paid for the reasons stated in Section 31(1) of the Act, there the Legislature in its wisdom has provided no contingencies and/or consequences of non-deposit of this money. This is in complete contradistinction to the provisions contained in Sections 6 and 11A of the Act. Section 6 provides that no declaration shall be issued where the period specified in the first proviso to Section 6(1) of the Act has expired. Similarly, Section 11A of the Act provides that the acquisition proceedings shall lapse where the Collector fails to make an award within a period of two years from the date of publication of declaration under Section 6 of the Act. Thus, the legislative intent is very clear. The legislature has provided for every contingency for tendering payment, while remaining silent about consequences flowing from default under some other provisions. When the framers of law have not provided for any penal consequences for default in compliance to Section 17(3A), then it will be uncalled for to provide such consequences by judicial interpretation. While interpreting the provisions for compensation, the Court can provide such interpretation as would help to bridge the gaps left by the Legislature, if any, in implementation of the provisions of the Act. But it would hardly be permissible for the Court to introduce such consequences by way of judicial dicta, like requiring lapse of acquisition proceedings. This is not a matter covered by the principles of judicial interpretation. [Paras 30 and 31] [282-C-H; 283-A-D]

3.5 It is a well settled canon of statutory interpretation that the courts would neither add nor subtract from the

plain language of the statutory provision. In the instant case also, there is hardly any justification for the courts to take any contrary view. Once the land has vested in the State and there being no provision for re-vesting the land in the original owners under the provisions of the Act, then it would be in consonance with the scheme of the Act and legislative intent to give an interpretation that would allow provisions of Section 17(1) to operate without undue impediment and keep the vesting of land in the State intact. Otherwise, in some cases the purpose for which such lands were acquired might stand frustrated, while in other cases the purpose of acquisition might have already been achieved and, therefore, divesting State of its title and possession in the acquired land would be incapable of performance. Under such circumstances, then, to interpret Section 17(3A) of the Act to be so mandatory in its absolute terms that the non-payment of money would result in vitiating or lapsing entire acquisition proceedings, can hardly be justified on the strength of any known principle of interpretation of statutes. It is a complete safeguard provided to the land owner inasmuch as the compensation stipulated under Section 17(3A) of the Act should be paid in terms of the provisions of the Act so that the owner is not made to suffer on both counts i.e. he is deprived of his land as well as compensation. It would be unfair for the authorities concerned not to pay the compensation as contemplated under the provisions of the Act. It would be just and fair to read into the provisions of the Section 17(3A) as imposing an obligation on the part of the authorities concerned/the Collector to pay the compensation within the time specified under Section 17(3A). Of course, no specific time, within which the payment has to be made in terms of Section 17(1) has been stated in the provision. But, wherever specific limitations are not stated, the concept of 'reasonable time' would become applicable. So, even if it is submitted that

there is no specific time contemplated for payment/ deposit of 80 per cent of the estimated compensation, even then the claimants would be entitled to receive the amount expeditiously and in any case within very reasonable time. If the authorities are permitted to take possession of the land without payment of the amounts contemplated under Section 17(3A) of the Act, then it would certainly amount to abuse of power of eminent domain within its known legal limitations. The authorities should discern the distinction spelt out under Section 16 of the Act on the one hand and Section 17(1) read with Section 17(3A) of the Act on the other. [Para 32] [283-E-H; 284-A-G]

Banwari Lal & Sons Pvt. Ltd. vs. Union of India & Ors. **1991 (1) DRJ (Suppl.) 317;** *Union of India & Ors. v. Krishan Lal Arneja & Ors.* **(2004) 8 SCC 453;** *Tika Ram & Ors. v. State of U.P. & Ors.* **(2009) 10 SCC 689;** *Satender Prasad Jain Pratap & Anr. v. State of Rajasthan* **(1996) 3 SCC 1;** *Rajender Kishan Gupta v. Union of India* **(2010) 9 SCC 46 – referred to.**

3.6 The provisions of Section 17(3A) of the Act are not mandatory. Such a conclusion can safely be arrived at, even for the reason that the Court would have to read into the provisions of Section 17(3A) consequences and a strict period of limitation within which amount should be deposited, which has not been provided by the Legislature itself in that section. The consequences and contingencies arising from non-compliance of the said provisions have not been stated in the Act. Once the land has vested in the Government, non-compliance with the obligation of payment of 80 per cent of estimated compensation would not render the possession taken under Section 17(1) as illegal. The land cannot be re-vested or reverted back to the claimants as no provisions under the Act so prescribe. Furthermore, if the

interpretation put forward by the appellants is accepted, it would completely frustrate the objects and purpose of the Act, rather than advancing the same. The expression 'shall' used in Section 17(3A) has to be understood in its correct perspective and is not to be construed as suggestive of the provisions being absolutely mandatory in its application. Thus, the provisions of Section 17(3A) are not mandatory. They are directive provisions, though their compliance is necessary in terms of the Act. [Para 39] [290-G-H; 291-A-D]

3.7 The obligation on the part of the Government or concerned authority to deposit the amount prior to taking possession under Section 17(1) should essentially be complied with. The amount of 80 % of the estimated compensation in terms of Section 17(3A) should be deposited. Once the provisions of Sections 17(1) and 17(3A) is read conjunctively, it implies that the amounts are to be deposited within 15 days from the publication of the notice in terms of Section 9(1) of the Act and before taking of possession of the acquired land. The Legislature has sufficiently indicated that the payment of the due 80 per cent of compensation should be made at the earliest and, particularly, before possession is taken. Non-compliance of the provisions of Section 17(3A) would not vitiate the acquisition proceedings, but depending on the facts of a given case, the payment should be made within the time indicated and in any case within a reasonable time, and the claimant should then be entitled to additional benefits for such non-compliance. The Court would fill a part of the gap which has remained unfilled by the Legislature. [Para 40]

3.8 Irrespective of whether the provision is held to be mandatory or directory, compliance with its substance is equally important. In either case, the authority entrusted with a duty is not absolved of its obligation to perform

the specified duty or obligation in the manner stated in law. It is primarily the consequences which result from non-performance of duty, which are of significance in determining the impact of mandatory or directory nature of a provision. Normally, in both cases, some consequences should flow from non-performance. Even if the provisions of Section 17(3A) are directory, the deposit of 80 per cent of estimated compensation within the period of limitation i.e. 15 days and prior to taking possession of the land, has to be made. There is no ambiguity in this requirement. Thus, it shall be the duty of the Court to fill the lacuna (i.e., the consequences of non-payment of compensation) to complete the chain of the legislative scheme contained in Section 17 of the Act. Having taken recourse to the emergency provisions and having taken possession of the land, the Government and its authorities cannot be permitted to defer the payment of the requisite amount, in terms of Section 17(3A) of the Act, indefinitely or for an unduly long period. A responsibility is cast upon the authorities concerned to make payments within time and not unduly cause inconvenience and harassment to persons interested in the compulsorily acquired land and who have been deprived of possessory benefits also. The provisions of Section 34 is to be read together with the provisions of Sections 17(1) and 17(3A) of the Act. They have to be construed harmoniously, keeping in mind the object sought to be achieved by a conjoint reading of these provisions. The expression 'before taking possession of the land' has been used in Section 17 read with Section 17(3A) and in Section 34 as well. Once the Government has invoked the emergency provisions, it is pre-supposed that the Government needs the land urgently and, in its wisdom, has decided that it is not in public interest to go through the normal procedure prescribed for acquisition and payment of compensation under Part

II of the Act. It requires immediate possession of the land for achievement of the purpose for which land was required. As the Government would take possession by depriving the land owners of some of their rights, as would have been available to them under normal acquisition procedure, the Legislature has created special safeguards in their favour. Firstly, they would be given 15 days notice prior to taking of possession of the land (Section 9(1) of the Act). Secondly, 80 per cent of the estimated compensation shall be paid to them in terms of Section 17(3A) of the Act, before the possession is taken. Thus, the Legislature has balanced the rights and obligations between the parties. Section 34, therefore, cannot be read so as to destroy the protections or safeguards provided to claimants/owners of the land under Section 17 of the Act. These provisions must be read harmoniously. These provisions should be construed so as to give benefit to the owners of the land against compulsory acquisition, rather than accepting an interpretation which would defeat the benefits intended by the Legislature. The Legislature was fully aware of the provisions of Section 34 while introducing Section 17(3A) into the Act, as both the provisions were introduced by the same Amending Act of 1984. This clearly demonstrates the legislative intent that the protections specified under Section 17(1) would operate in their own field and the provisions of Section 34 would also apply in its own sphere. It would be unfair, if the Government takes possession of the property within 15 days of the notice issued under Section 9(1) (as is contemplated under Section 17(1) of the Act) and does not make payment of compensation for a long period, with no additional liability whatsoever. This is not the legislative intent that the Government would not be liable to pay higher rate of interest where it has taken possession of the land in exercise of its powers under Section 17 of the

Act. It would be unfair if the liability to pay higher rate of interest in terms of Section 34 would arise only after a period of one year from the date of possession even in cases of emergent acquisition. Such an interpretation may result in frustrating the balance sought to be created by the Legislature. [Para 41] [292-A-F; 293-C-H; 294-A-E]

3.9 The statutory benefit contained in Section 34 of the Act should be made applicable to the provisions of Section 17(1) read with Section 17(3A) in the manner that it would give the requisite benefit to the owners/claimants of the land rather than deprive them of both, their land and income, without any additional benefit despite non-compliance of the provisions of the Act. Thus, the owners/claimants should be entitled to receive, on the strength of these provisions and alike, the interest payable under the proviso to Section 34 i.e. interest at the rate of 15 per cent per annum from the date of expiry of the period of 15 days as stated under Section 17(1) and from taking of possession of the land from the owners/ persons interested in the land till payment of compensation in terms of Section 17(3A) of the Act. These conditions have to be satisfied cumulatively and not alternatively, to give rise to the liability to pay interest of 15 per cent from the date afore-stated. This approach which is adopted is restricted in application to the acquisitions made by the Government in exercise of its emergency powers under Section 17 of the Act. Section 34 would otherwise operate in its own sphere and only after the lapse of the period specified in the proviso. The conclusion is that non-compliance of provisions of Section 17(1) read with Section 17(3A) would not render the acquisition proceedings invalid or void ab initio in law however, liability to pay interest at the rate of 15 per cent per annum would arise from the date and for the period afore-noticed. [Para 41 & 42] [294-E-H; 295-A-C]

4.1 A bare reading of Section 11A shows that the Legislature places an obligation upon the Collector to make an award at the earliest. Wherever the award under Section 11 of the Act has not been made within two years from the date of publication of the declaration, the entire proceedings for acquisition of land shall lapse. Explanation to Section 11A of the Act further excludes from this period, any period during which any action or proceeding, to be taken in pursuance of the said declaration, is stayed by an order of a Court which had been in force. Exclusion of no other period is contemplated under this provision. Thus, a definite intention of the framers of law is clear that the award should be made at the earliest and, in any case, within a maximum period of two years from the declaration under Section 6 of the Act, if the acquisition proceedings are to survive. The acquisition under the Act being compulsory acquisition, a safeguard or right has been provided to the private party against the State. Thus, the statute imposes a duty upon the State to act within time and also provides for consequences that shall ensue in the event of default. These consequences are of a very serious nature, whereby the entire acquisition proceedings shall stand lapsed. This would render the land free from acquisition or any restriction and title over the land would stand reverted to the owners/persons interested. [Para 44]

4.2 It is clear from the substance of the language and from the intention of the legislature that the right created in favour of the citizen and the duties imposed on the State should be construed strictly. Section 11A of the Act provides for discharge of obligations within the specified time and there are serious consequences of such non-fulfillment. This would clearly lead to the conclusion that the provisions of Section 11A of the Act are capable of strict construction and are mandatory in their application. [Para 45] [296-G-H; 297-A]

Mohan & Anr. v. State of Maharahtra **(2007) 9 SCC 431;** *Satendra Prasad Jain & Ors. v. State of U.P. & Ors.* **AIR 1993 SC 2517: (1993) 4 SCC 369;** *Yusufbhai Noormohmed Nendoliya v. State of Gujarat* **(1991) 4 SCC 531 – Relied on.**

Awadh Bihari Yadav & Ors. v. State of Bihar & Ors. **(1995) 6 SCC 31;** *P. Chinnanna & Ors. v. State of A.P. & Ors.* **(1994) 5 SCC 486;** *Allahabad Development Authority v. Nasiruzzaman & Ors.* **(1996) 6 SCC 424;** *Banda Development Authority, Banda v. Moti Lal Agarwal & Ors.* **2011 (5) SCALE 173 – referred to**

4.3 Section 17(1) of the Act uses the expression 'though no such award has been made'. This clearly demonstrates that making of an award is not a sine qua non for issuance of a notification under Section 4(1) read with Section 17(1) of the Act or even taking possession in terms thereof. After publication of a notification under Section 4 read with Sections 17(1) and 17(4) of the Act, the authority is obliged only to publish a notice under Section 9(1) of the Act and comply with the provisions of Section 17(3A) before it can take possession within the stipulated period. Once possession of the land is taken, it shall thereupon vest absolutely in the Government free from all encumbrances. In other words, Section 17(4) itself is a permissible exception to the provisions of Section 11 of the Act and, therefore, the question of enforcing Section 11A against proceedings under Section 17 would not arise. Under Section 16, the land shall vest in the Government free from all encumbrances only after the award is made and possession is taken. In contradistinction to this, under Section 17(1) the land shall vest absolutely in the Government free from all encumbrances even when no award is made and possession thereof is taken in terms of Sections 17(1) and 17(3A) of the Act. The language of Section 17(1) is to be given its plain meaning, within the field of its operation. Once such possession is taken and the land is so vested,

the Act does not make any provision for re-vesting of land in the owners/persons interested. Reversion of title or possession of property acquired, which has vested in the Government or in the authority for whose benefit such lands are acquired, is unknown to the scheme of the Act. To introduce such a concept by interpretative process would neither be permissible nor proper. [Para 53] [302-E-H; 303-A-D]

5.1 No award is required to be made before the provisions of Section 17(1) can be invoked. The amount of 80 per cent of the estimated compensation deposited under Section 17(3A) of the Act is to be finally adjusted against the award made under Section 11 in terms of Section 17(3B) of the Act. A cumulative reading of these provisions clearly suggests that provisions of Section 11A of the Act can hardly be applied to the acquisition under Section 17 of the Act. [Para 55] [304-C-E]

5.2 Section 48 empowers the Government to withdraw from the acquisition of the land of which possession has not been taken. Where the Government withdraws from such an acquisition, it is its duty to determine the amount of compensation for the damages suffered by the owners as a consequence of the notice or any other proceeding taken thereunder, which amounts have to be paid as per provisions of Part III. Section 48, thus, is a clear indication that the power of the Government to withdraw the acquisition is subject to the limitation stated under Section 48 itself. There is no ambiguity in the language of Section 48 of the Act to give it any other interpretation except that the Government is not vested with the power of withdrawing from the acquisition of any land, of which the possession has been taken. Where the award has been made and possession has been taken, the land vests in the Government in terms of Section 16 of the Act. On the

contrary, the land vests absolutely in the Government free from all encumbrances where award has not been made and only possession as contemplated under Section 17(1) of the Act has been taken. If the Government has no power to withdraw from acquisition of any land, the possession of which has been taken, then by no stretch of imagination can it be held that the Government will have the power to withdraw from the acquisition of any land where the land has vested in the Government or the land has been subsequently transferred in favour of an authority for whose development activity the lands were acquired. [Paras 55 and 56] [304-F-G; 305-C-F]

Offshore Holdings Pvt. Ltd. v. Bangalore Development Authority & Ors. **(2011) 3 SCC 139;** *Lt. Governor of Himachal Pradesh and Anr. v. Avinash Sharma* **(1970) 2 SCC 149;** *Rajasthan Housing Board and Others v. Shri Kishan and Others* **(1993) 2 SCC 84;** *Sanjeevanagar Medical & Health Employees' Cooperative Housing Society v. Mohd. Abdul Wahab and Others* **(1996) 3 SCC 600;** *Bangalore Development Authority and Others v. R. Hanumaiah and Others* **(2005) 12 SCC 508;** *National Thermal Power Corporation Limited v. Mahesh Dutta and Others* **(2009) 8 SCC 339;** *U.P. Jal Nigam, Lucknow through its Chairman and Another v. Kalra Properties (P) Ltd., Lucknow & Others* **(1996) 3 SCC 124 – referred to.**

5.3 The lands which have been acquired under the provisions of Section 17 of the Act are incapable of being reverted to the owners/persons interested. The Act does not make any such provision and, thus, the Court is denuded of any such power. The Court must exercise its power within the framework of law, i.e., the provisions of the Act. In the case of an ordinary acquisition, if the land has vested in the State Government then neither the Government nor the court can take recourse to the provisions of Section 48(1) of the Act, there the question

of applying Section 11A of the Act to acquisition proceedings under Section 17 of the Act cannot arise, as it would tantamount to achieving something indirectly which would be impermissible to be achieved directly. Thus, Section 11A of the Act has no application to the acquisition proceedings under the provisions of Section 17 of the Act. [Paras 64 and 65] [309-G-H; 310-A-B]

5.4 There is no dispute in the instant case that the provisions of Section 11A of the Act have not been complied with. Admittedly, the notification under Section 4(1) read with Section 17(4) was published on 17th April, 2002, declaration under Section 6 was made on 22nd August, 2002 and the possession of the property was taken on 4th February, 2003. The award was made on 9th June, 2008, much after the expiry of the prescribed period of two years under Section 11A of the Act. There being an admitted violation of the provisions of Section 11A of the Act, the natural consequence is that its rigours would be attracted. [Para 66] [310-C-E]

5.5 In both the cases, acquisitions in exercise of emergent powers under Section 17 of the Act and the acquisitions made otherwise, notification under Section 4(1) has to be published in accordance with the provisions of the Act. Notification under Section 4 is a sine qua non for commencement of the acquisition proceedings. Where the lands are acquired in exercise of emergent powers of the State under Section 17 of the Act, a notification under Section 4(1) of the Act is issued and the notification itself refers to the provisions of Section 17(1) as well as Section 17(4) of the Act. A specific power is vested in the appropriate Government to declare that provisions of Section 5A would not be applicable to such acquisition. Therefore, there is no obligation upon the Collector/authority concerned to invite and decide upon objections in terms of Section 5A of the Act, prior to

publication of a declaration under Section 6 of the Act. However, notice under Section 9(1) of the Act has to be published to completely and fully invoke the powers vested in the State for taking possession of the land, in terms of Section 17(1) of the Act. After the expiry of 15 days from such publication under Section 9(1), the possession of the land can be validly taken by the Government, whereupon the land would vest absolutely in the Government, free from all encumbrances. In other words, for proper computation of the specified period of 15 days, issuance of notification under Section 9(1) of the Act would be necessary, but it cannot be held to be mandatory in its operation so as to render the execution proceedings invalid. [Paras 68, 69] [311-E; 313-A; 312-D-H]

Narender Jeet Singh v. State of U.P. **(1970) 1 SCC 125;** ***May George*** **– referred to.**

5.6 Before the Government takes possession of the land in exercise of its powers under Section 17(1) of the Act, it has to comply with the requirements of Section 17(3A) of the Act. The amount so paid, if falls short, and/or is in excess of compensation actually due to the land owners, the same shall be determined and adjusted while making the final award under Section 11 of the Act. It is evident that both these acquisitions have distinct schemes of acquisition. Section 17 of the Act itself refers to some other provisions, like Sections 5A, 9, 11, and 31 of the Act. Wherever such reference was considered necessary by the Legislature, it has been so made. Thus, there is no occasion for the Court to read into Section 17, the language of Section 11A of the Act which has not been provided by the Legislature; more so when doing so would destroy or frustrate the very object of the urgent acquisition. Marked distinction between the implementation of these two types of acquisition

schemes contained in the Act is clearly suggestive that these schemes operate in their respective fields without any contradiction. Thus, the Court would adopt an interpretation which would further such a cause, rather than the one which will go contra to the very scheme of the Act. Thus, it cannot be held that the provisions of Section 11A of the Act, despite being mandatory, would apply to the scheme of acquisition contained under Section 17 of the Act. [Para 70] [313-B-G]

6.1 Once the development activity has been completed in the entire sector, it would not be equitable to release the lands from acquisition. It is settled canon of equitable jurisdiction that the person who feels aggrieved by an action of the State should approach the Court without any unnecessary delay, particularly in cases such as the instant one. While the Notification under Section 4 read with Sections 17(1) and 17(4) of the Act was issued on 14th April, 2002 and possession taken on 4th February, 2003 the writ petitions were filed four years subsequent to the issuance of the Notification under Section 4. It was contended that the cause of action to challenge the acquisition proceedings arose only after the period of two years had lapsed from the date of issuance of the notification. Even if that be so, still there is an unexplained and undue delay of more than two years in approaching the Court. This would itself disentitle the appellants to claim any equitable relief in the facts and circumstances of the instant case. [Para 72] [314-B-F]

6.2 It cannot be said that in every case of delay, per se, the Court would decline to exercise its jurisdiction if the party to the lis can otherwise be granted relief in accordance with law. This has to be decided keeping in view the facts and circumstances of a given case. [Para 73] [314-G]

6.3 Undisputedly in the intervening period of nearly ten years, the acquired areas have fully developed. During the course of hearing the award was finally made by the authorities on 9th June, 2008 and has been accepted by nearly 97.6 per cent of the owners whose lands were acquired vide the said Notification. Nearly all land owners have accepted the award and permitted the development activity to be carried out. This conduct of the owners as a whole would again be a factor which would weigh against the grant of any relief to the appellants. Huge amounts of money and resources of the State, as well as other bodies or persons have been invested on the development of this sector which is stated to be an industrial sector. It would be unjust and unfair to uproot such a developed sector on the plea raised by the appellants. There is no merit in the contentions of law raised by the appellants. Even on equity, the appellants has no case. [Paras 74 and 75] [314-H; 315-A-C]

Tamil Nadu Housing Board v. L. Chandrasekaran (Dead) by Lrs. & Ors. **(2010) 2 SCC 786;** *A.S. Naidu v. State of Tamil Nadu* **(2010) 2 SCC 801 – relied on.**

6.4 These authorities are instrumentalities of the State and the officers are empowered to exercise the power on behalf of the State. Such exercise of power attains greater significance when it arises from the statutory provisions. The level of expectation of timely and just performance of duty is higher, as compared to the cases where the power is executively exercised in discharge of its regular business. Thus, all administrative norms and principles of fair performance are applicable to them with equal force, as they are to the Government department, if not with a greater rigour. [Para 77] [320-F-G]

Centre for Public Interest Litigation and Anr. v. Union of India and Anr. **(2005) 8 SCC 202 – referred to.**

6.5 The doctrine of 'full faith and credit' applies to the acts done by the officers in the hierarchy of the State. There is a presumptive evidence of regularity in official acts, done or performed, and there should be faithful discharge of duties to elongate public purpose in accordance with the procedure prescribed. Avoidance and delay in decision making process in Government hierarchy is a matter of growing concern. Sometimes delayed decisions can cause prejudice to the rights of the parties besides there being violation of the statutory rule. [Para 79] [321-F-H]

State of Bihar v. Subhash Singh **(1997) 4 SCC 430;** *State of Andhra Pradesh v. Food Corporation of India* **(2004) 13 SCC 53 – referred to.**

6.6 The concept of public accountability and performance of functions takes in its ambit, proper and timely action in accordance with law. Public duty and public obligation both are essentials of good administration whether by the State or its instrumentalities. Principles of public trust and publc accountability are applicable to such officers/officials with all their rigour. Greater the power to decide, higher is the responsibility to be just and fair. The dimensions of administrative law permit judicial intervention in decisions, though of administrative nature, which are ex facie discriminatory. The adverse impact of lack of probity in discharge of public duties can result in varied defects, not only in the decision making process but in the final decision as well. Every officer in the hierarchy of the State, by virtue of his being 'public officer' or 'public servant', is accountable for his decisions to the public as well as to the State. This concept of dual responsibility should be applied with its rigours in the larger public interest and for proper governance. [Paras 78 and 80] [321-C; 322-B-D]

6.7 Repeated default on the part of the Government Departments is causing undue inconvenience, harassment, hardship and ultimately resulting in the acquisition itself being inequitable against the land owners/persons interested therein. In the normal course and as per the requirements of the provisions of Section 17(3A) read with Section 17(1), 80 per cent of the estimated compensation ought to have been paid to the owners of the land/persons interested, within that period prior to taking possession and/or, in any case, within a very limited and reasonable time. To do things within a reasonable time is an obligation of the State, as is imposed by the Legislature itself and even otherwise as per the canons of proper governance, i.e., *vigilantibus, non dormientibus, jura subveniunt*, which means the laws assist those who are vigilant, not those who sleep over their rights. According to Respondent No.2, they had deposited 10 per cent of the estimated compensation prior to issuance of notification under Section 4, i.e., 17th April, 2002 and 70 per cent of the amount was deposited with the Government on 8/14th July, 2002 by a cheque. The amount deposited was nearly Rs. 6,66,00,000/- and odd. The amount was made available to the Government and its authorities for disbursement to the owner/ claimants prior to (or soon after) taking of the possession but still the claimants were deprived of their legitimate dues until passing of the award, without any justification or reason. It was also the duty of respondent No.2 to ensure that the payments were made to the claimants prior to taking of possession but, in any case, it was an unequivocal statutory obligation on the part of the State/ Collector to ensure that the payments were made to the claimants in terms of Section 17(1) read with Section 17(3A) prior to taking of possession. There is no justification, whatsoever, for the Government, for such an intentional default and the casual attitude of the concerned officers/officials in the State hierarchy that

despite deposit by the beneficiary, not to pay 80 per cent of the estimated compensation due to the claimants within the requisite time and not even within the reasonable time. It was breach of statutory and governance obligation of the State's officers/officials to pay the amount to the claimants after more than five years. It is expected of the State officers not to forget that these are compulsory acquisitions in exercise of State's power of eminent domain and the legislative intent behind providing safeguards and some benefits against such acquisition ought not to be frustrated by inaction and omissions on the part of the officers/officials. [Paras 76 and 81] [319-D-H; 320-A-D; 322-E-G]

7. To ensure the maintenance of balance between the might of the State on the one hand and the rights of land owners on the other, the following directions are issued:

(i) The Government/acquiring authority shall be liable to pay interest at the rate of 15 per cent per annum with reference to or alike the provisions of Section 34 of the Act, after the expiry of 15 days from issuance of Notification under Section 9(1) of the Act, and from the date on which the possession of the land is taken, till the amount of 80 per cent of the estimated compensation is paid to the claimants. The Government is also liable to pay interest as afore-indicated on the balance amount determined upon making of an award in accordance with Section 11 of the Act.

(ii) The Central Government and all the State Governments shall issue appropriate and uniform guidelines, to ensure that the land owners and the persons interested in the lands acquired by the State or its instrumentalities are not put to any undue harassment, hardship and inequity because of

inaction and omission on the part of the acquiring authority, in cases of urgent acquisition, in exercise of its powers of eminent domain under Section 17 of the Act. The Government should ensure timely action for acquisition and payment of compensation in terms of Section 17(3A) of the Act.

(iii) The concerned Government shall take appropriate disciplinary action against the erring officers/officials including making good the loss caused to the Government revenue on account of the liabilities towards interest or otherwise, because of such undue delay on the part of such officers/ officials;

(iv) The claimants would be entitled to the cost of ' 1,00,000/- (Rupees one lakh only) which shall be deposited at the first instance by the State Government of Uttar Pradesh and then would be recovered from the salaries of the defaulting/erring officers/officials in accordance with law. [Para 83 and 84] [325-A-H; 326-A-E]

Case Law Reference:

Per Ganguly, J.

(1978) 1 SCC 248	**Referred to**	**Para 24, 29,30, 31, 43**
405 US 538	**Referred to**	**Para 26**
AIR 1950 SC 27	**Referred to**	**Para 29**
(1970) 1 SCC 248	**Referred to**	**Para 32, 43**
AIR 1989 SC 38	**Referred to**	**Para 38**
1936 (2) AER 905	**Referred to**	**Para 39**
AIR 1971 SC 530	**Referred to**	**Para 40**

(2002) 3 SCC 533	**Referred to**	**Para 41**
AIR 1993 SC 2517	**Per incuriam**	**Para 43, 72 73.**
JT 2011 (3) SC 102	**Referred to**	**Para 44**
(1957) 1 AER 49	**Referred to**	**Para 49**
(1977) 4 SCC 193	**Referred to**	**Para 51**
(1839) 4 Myl & Cr.116	**Referred to**	**Para 54**
ILR 44 Cal 328	**Referred to**	**Para 55**
(1887) 12 App. Cas. 602	**Referred to**	**Para 57**
27 Vt. 39	**Referred to**	**Para 61**
AIR 1969 SC 267	**Referred to**	**Para 64**
AIR 1936 PC 253	**Referred to**	**Para 64**
(2005) 7 SCC 627	**Referred to**	**Para 64**
(2007) 6 SCC 81	**Referred to**	**Para 64**
1995 Suppl (1) SCC 596	**Referred to**	**Para 65**
(2007) 8 SCC 705	**Referred to**	**Para 68**
(1978) 1 SCC 248	**Relied on**	**Para 69**
AIR 1971 SC 530	**Referred to**	**Para 71**

Per Swatanter Kumar, J:

(1993) 4 SCC 369	**Referred to**	**Para 1**
(2011) 3 SCC 139	**Referred to**	**Para 1**
(2009) 10 SCC 689	**Referred to**	**Para 1**
2011 (5) SCALE 173	**Referred to**	**Para 1**
(2008) 1 SCC 728	**Referred to**	**Para 13**

(2010) 13 SCC 98	**Referred to**	**Para 17**
1963(1) WLR 270	**Referred to**	**Para 22**
(1964) 1 QB 481	**Referred to**	**Para 22**
AIR 1961 SC 1480	**Referred to**	**Para 23**
(2005) 7 SCC 627	**Referred to**	**Para 26**
1991 (1) DRJ (Suppl.) 317	**Referred to**	**Para 33**
(2004) 8 SCC 453	**Referred to**	**Para 34**
(2009) 10 SCC 689	**Referred to**	**Para 35**
(1996) 3 SCC 1	**Referred to**	**Para 36**
(2010) 9 SCC 46	**Referred to**	**Para 37**
(2007) 9 SCC 431	**Referred to**	**Para 45**
(1995) 6 SCC 31	**Referred to**	**Para 47**
(1994) 5 SCC 486	**Referred to**	**Para 48**
(1996) 6 SCC 424	**Referred to**	**Para 48**
2011 (5) SCALE 173	**Referred to**	**Para 49**
(1991) 4 SCC 531	**Referred to**	**Para 50**
(2011) 3 SCC 139	**Referred to**	**Para 54**
(1970) 2 SCC 149	**Referred to**	**Para 56**
(1993) 2 SCC 84	**Referred to**	**Para 57**
(1996) 3 SCC 600	**Referred to**	**Para 58**
(2005) 12 SCC 508	**Referred to**	**Para 59**
(2009) 8 SCC 339	**Referred to**	**Para 60**
(1996) 3 SCC 124	**Referred to**	**Para 61**

(1970) 1 SCC 125	**Referred to**	**Para 68**
(2010) 2 SCC 786	**Referred to**	**Para 74**
(2010) 2 SCC 801	**Referred to**	**Para 74**
(2005) 8 SCC 202	**Referred to**	**Para 78**
(2004) 13 SCC 53	**Referred to**	**Para 79**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 24 of 2009.

From the Judgment & Order dated 28.08.2006 of the High Court of Judicature at Allahabd in Civil Misc. Writ Petition No. 22251 of 2006.

Sudhir Chadra, Arun K. Sinha, Siddhant Asthana, Rakesh Singh, Sumit Sinha, Dharmesh Misra for the Appellants.

S.R. Singh, S.K. Dwivedi, Manoj K. Dwivedi, G.V. Venkateswara Rao, Ravindra Kumar for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. The facts giving rise to the present appeal are simple and fall within a narrow compass. However, they raise questions which are of public importance and legal significance. Thus, it will be appropriate for us to state the questions of law at the very threshold:

A. When the Government, in exercise of its emergency powers under Section 17 of the Land Acquisition Act, 1894 (for short the 'Act') acquires lands, which have since vested in the State, can such an acquisition proceeding lapse and consequently the land can be transferred to the owners/persons interested in the event of default by the State, in complying with the provisions of Section 11A of the Act?

B. Whether the provisions of Section 17(3A) of the Act are mandatory or directory? In either event, would non-compliance with this Section have the effect of invalidating or vitiating the entire acquisition proceedings, even where the land has vested in the State in terms of Section 17(1) of the Act?

C. Whether with the invoking of the emergency provisions which have the effect of dispensing with the provision of hearing under Section 5A of the Act, the Court is entitled to construe the emergency provisions strictly, being drastic provisions in an exproprietory law and consider the safeguards inbuilt in Section 17(3A) against such drastic provisions as conditions precedent and mandatory for a valid exercise of emergency provisions.

D. Whether having regard to the principle of reasonableness being a basic component of fundamental rights under the Constitution, this Court has to construe the provisions of the said Act, a pre-constitutional law in consonance with reason and justice-the fundamental tenets of Article 14 and thus arrive at a balanced interpretation of the interest of the State as against the rights of citizens or land owners.

FACTS:

2. The appellant No.1 is a company duly incorporated under the provisions of the Indian Companies Act, 1956 and is alleged to be the owner of the land sought to be acquired by the respondents. The appellant's land, admeasuring about 2-06-1/3-0 Bighas situated in Village Haldauni, Tehsil and Pargana Dadri, District Gautam Budh Nagar which is *abadi* land, was sought to be acquired by the appropriate Government under a notification dated 17th April, 2002 issued under Section 4(1) read with Sections 17(1) and 17(4) of the Act. This land

was acquired for the planned industrial development in District Gautam Budh Nagar through the New Okhla Industrial Development Authority (NOIDA). The notification also stated that the provisions of Section 5A of the Act shall not apply. In pursuance to the said notification, a declaration under Section 6 of the Act was published on 22nd August, 2002, declaring the area which was required by the Government. It also stated that after expiry of 15 days from the date of the publication of the notification under sub-section (1) of Section 9 of the Act, possession of the acquired land shall be taken. The appellants have alleged that they did not receive any notice under Section 9(1) of the Act but possession of the land was nevertheless taken on 4th February, 2003. According to the appellants, even after a lapse of more than three and a half years after the declaration under Section 6 of the Act, no award had been made and published.

3. The appellants further alleged that, despite inordinate delay, they were neither paid 80 per cent of the estimated compensation in terms of Section 17(3A) of the Act at the time of taking of possession, nor had the Collector passed an award within two years of making the declaration under Section 17(1), as required by Section 11A of the Act. It was the case of the appellants that this has the effect of vitiating the entire acquisition proceedings. Non-payment of compensation and conduct of the Government compelled the appellants to file a writ petition in the High Court of Allahabad praying for issuance of an order or direction in the nature of *certiorari* or any other writ, and not to create any encumbrance or interest on the land of the appellants. Further, they prayed that the acquisition proceedings, insofar as they relate to the land of the appellants, be declared void ab *initio* and that the respondents be directed to return the land under the possession of the Government to the owners. Lastly, the appellants pray that the respondents/ Government be directed to pay damages for use and occupation of the land.

4. To this writ petition, on behalf of NOIDA a counter affidavit was filed in the High Court, denying that the acquired land was in fact part of *abadi* land. NOIDA also stated that 80 per cent compensation in terms of Section 17(3A) had been deposited with the state authorities. The land had been acquired for planned development of NOIDA and it was in the physical possession of the said authority. Possession of the land had been taken on 4th February, 2003 and no right had survived in favour of the appellant as the land had vested in the Government.

5. The High Court, vide its judgment dated 28th August, 2006, dismissed the writ petition. The High Court relied upon the judgment of this Court in the case of *Satendra Prasad Jain & Ors. v. State of U.P. & Ors.,* [AIR 1993 SC 2517 = (1993) 4 SCC 369], and dismissed the petition as the High Court held that provisions of Section 11A of the Act are not attracted to proceedings for acquisition by the Government under Section 17 of the Act. However, liberty was granted to the appellants to pray for grant of appropriate compensation in accordance with law before the competent forum.

6. Aggrieved by the said order of the High Court, the appellants have filed the present appeal impugning the judgment dated 28th August, 2006.

7. In the counter affidavit filed before this Court by NOIDA, the stand in the counter filed before the High Court has been reiterated, with an additional fact that the sector in question was designated as industrial area, and, after development activity was completed, allotment has been made and possession of these industrial plots has also handed over to such entrepreneurs/allottees. This falls under Sector 88 of the NOIDA City. The rest of the allegations made in the writ petition, except the dates in question, have been disputed.

8. It has also been stated at the Bar by the State Counsel, on the basis of the record, without filing an affidavit, despite

directions given to that effect by this Court on 5.1.2009, that 10 per cent of the estimated compensation was deposited by NOIDA with the State Government even prior to the date of the notification under Section 4(1) read with Section 17(4) of the Act, issued by the Government on 17.4.2002. The remaining 70 per cent of the estimated compensation had been allegedly deposited vide cheque dated 8/14th July, 2002 amounting to approximately Rs.6,66,00,000/-. As such, it is claimed there is compliance with the provisions of Section 17(3A) of the Act. The Award was made on 9.6.2008, which has been accepted by a large number of owners, i.e., 97.6 per cent of all owners. Some of these facts have also been averred in the counter affidavit of NOIDA filed before the High Court.

9. It may be noted that neither before the High Court nor before this Court any affidavit was filed either by the State or by the Collector. The assertion of the appellant about non-payment of compensation as contemplated under Section 17(3A) of the Act has not been controverted. Such payment has to be tendered by the Collector to the person interested and entitled to the same, subject to certain statutory conditions. Assuming there has been deposit of 80% of the compensation amount by NOIDA with the state authorities, that does not satisfy the requirement of Section 17(3A) of the Act. From the above pleadings of the parties, the admitted facts that emerge from the record can be usefully recapitulated.

10. The Governor of State of Uttar Pradesh on 17th April, 2002, issued a notification under Section 4(1) of the Act, expressing the intention of the Government to acquire the land stated in the said Notification for a public purpose, namely, for the planned industrial development in District of Gautam Budha Nagar through NOIDA. Vide the same notification the emergency provisions contained in Section 17 of the Act, specifically Section 17(4) of the Act, were also invoked, intimating the public at large that the provisions of Section 5A of the Act shall not be applicable. After issuance of the

declaration under Section 6 of the Act, admittedly the possession of the land in question was taken on 4th February, 2003. Another undisputed fact is that the claimants-owners of the land were not paid 80 per cent of the estimated compensation prior to taking of possession in terms of Section 17(3A) of the Act.

11. The Collector had not made or published this award even at the time of pronouncement of the judgment of the High Court, in Writ Petition No. 22251 of 2006, on 28 August 2006. The High Court, in the impugned judgment, directed respondent No.1 to ensure that the Award is made as early as possible, preferably within a period of three months from the date of production of the certified copy of that order. In the counter affidavit filed before this Court by NOIDA, it has been stated that the Award was finally made and published on 9th June, 2008. According to the appellant, in terms of Section 11A of the Act, the Award ought to have been pronounced on or before 26th August, 2004 as the declaration under Section 6 of the Act was dated 22nd August, 2002.

Legal Issues

12. If I may consider certain features of the said Act and the constitutional provisions.

13. Enactment of the said Act was rooted in the colonial past of this country having been brought on the statute book on 1894 as Act 1 of 1984. With enormous expansion of State's role in promoting welfare and development activities since independence, acquisition of land for public purposes increased with the passage of time. Several decades after the enactment of the Act, came Constitution in India in 1950. Along with it came the concept of social and economic justice based on expansive values of human rights. Under article 366 (10) of the Constitution the Act was an 'existing law' made before the commencement of the Constitution.

Article 366(10) is quoted below:-

> "366 (10) "existing law" means any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye-law, rule or regulation;"

14. Article 372 of the Constitution provides for continuance in force of such 'existing law' and their adaptation. Article 372 (1) of the Constitution makes it clear that notwithstanding the provision of the Article 395, but subject to the other provisions of the Constitution, all laws in force in the territory of India immediately before the commencement of the Constitution shall continue in force until altered or repealed or amended by a competent Legislature or other competent authority.

15. Article 13 of the Constitution, which is a part of Fundamental Right (Part III), also defines 'laws in force' under Article 13(3)(b). Article 13(3)(b) is set out:-

> "13 (3) (b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas."

16. The said definition of 'laws in force' under Article 13(3)(b) with certain changes, is consistent with the definition of 'existing laws' in Article 366(10).

17. The said Act is thus both an 'existing law' within the meaning of Article 366(10) and 'laws in force' within the meaning of Article 13(3)(b) of the Constitution.

18. Article 13(1), which is relevant in this context, is set out below:

> **"Article 13. Laws inconsistent with or in derogation of the fundamental rights:** (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void."

19. Under Article 372 such laws in force can continue with some amendments, subject to 'the other provisions of this Constitution'. Article 13 certainly comes within 'the other provisions of the Constitution'.

20. Therefore, Article 372 and Article 13 must be read together in as much as both the articles relate to continuance of pre-constitutional laws validly made. Article 372 permits such continuance and Article 13 stipulates the condition on which they can continue. Article 13 is of greater importance as it is part of fundamental right and makes all laws, whether pre or post-constitution, subject to the primacy of fundamental rights. The continuance of the said Act is thus made to depend on its compliance with the mandate of Article 13. The mandate of Article 13(1) is clear that such law can continue provided it is not inconsistent with the provision of Part III. In the event of such laws becoming inconsistent with the provision of Part III, such laws, to the extent of their inconsistency, shall be void. This is the mandate of the Constitution.

21. Therefore, several amendments were made to the said Act keeping in view the broad concept of social and economic justice which is one of the main constitutional goals. In the instant case I am concerned with some amendments to the said Act by amendment Act 68 of 1984 which took effect from 24th September 1984. Among several new sections, Section 11(A) and 17(3A) were introduced by amendment to the said Act.

22. From the Statement of Objects and Reasons for the

said amendment it will be clear that the said amendment was brought into existence to give effect to the message of social and economic justice based on the concept of Social Welfare State on broad principles of human rights. The Statements of Objects and Reasons are as follows:

> "With the enormous expansion of the State's role in promoting public welfare and economic development since independence, acquisition of land for public purposes, industrialization, building of institutions, etc., has become far more numerous than ever before. While this is inevitable, promotion of public purpose has to be balanced with the rights of the individual whose land is acquired, thereby often depriving him of his means of livelihood. Again, acquisition of land for private enterprises ought not to be placed on the same footing as acquisition for the State or for an enterprise under it. The individual and institutions who are unavoidably to be deprived of their property rights in land need to be adequately compensated for the loss keeping in view the sacrifice they have to make for the larger interests of the community. The pendency of acquisition proceedings for long periods often causes hardship to the affected parties and renders unrealistic the scale of compensation offered to them.
>
> 2. It is necessary, therefore, to restructure the legislative framework for acquisition of land so that it is more adequately informed by this objective of *serving the interests of the community in harmony with the rights of the individual.* Keeping the above objects in view and considering the recommendations of the Law Commission, the Land Acquisition Review Committee as well as the State Governments, institutions and individuals, proposals for amendment to the Land Acquisition Act, 1894, were formulated and a Bill for this purpose was introduced in the Lok Sabha on the 30th April, 1982. The same has not been passed by either House of Parliament.

> Since the introduction of the Bill, various other proposals for amendment of the Act have been received and they have also been considered in consultation with State Governments and other agencies. It is now proposed to include all these proposals in a fresh Bill after withdrawing the pending Bill…."
>
> (emphasis added)

23. It is clear from the aforesaid objects and reasons that by introducing the provisions of Section 11A and 17(3A) by way of amendment to the Act, greater responsibility was fastened upon the concerned State authorities, whereby they were obliged to make an award within two years of the declaration made under Section 6 of the Act. Thus the rights of the land owners were sought to be protected by balancing the same against the rights of the State. In respect of emergency provisions where land is acquired without a hearing, it is provided under Section 17(3A) that before taking possession either under Section 17(1) and 17(2) it was obligatory upon the authorities concerned to pay 80 per cent of the estimated compensation to the land owners. This was also for protecting the right of the land owners.

24. These amendments along with Statement, Objects and Reasons are very crucial in interpretation of some of the amended provisions. The amendment was brought about in 1984 and by that time, the contents and reach of Fundamental Rights in Part III, as interpreted by this Court had assumed a very expansive profile. In view of the mandate of Article 13, the provision of the said Act must be tested on the anvil of the broad interpretation of Fundamental Rights given by this Court. In view of the decision of this Court in *Maneka Gandhi v. Union of India & Another* – (1978) 1 SCC 248, the interpretation of Part III rights namely rights under Article 14, 19 and 21 given therein by this Court, read with Article 141, becomes the law of the land. Therefore, the reach of Article 13(1) is correspondingly widened. Thus, the 1984 amendments must be construed as

a conscious attempt by the legislature being aware of the expansive interpretation of Fundamental Rights by this Court, to bring the said act consistent with the rights of the citizens and persons in Part III.

25. Despite the fact that Right to Property in terms of Article 19(1)(f) of the Constitution stood deleted from Chapter III of the Constitution, vide 44th Constitutional Amendment, 1978, Article 300A of the Constitution was added by the same Constitutional Amendment, mandating that 'no person shall be deprived of his property save by authority of law'. This indicates that the Constitution still mandates that right to property may have ceased to be a fundamental right, but it is still protected by the Constitution and is a Constitutional right. Constitution also provides that deprivation of that right cannot be brought about save by authority of law.

26. It is accepted in every jurisprudence and by different political thinkers that some amount of property right is an indispensable safeguard against tyranny and economic oppression of the Government. Jefferson was of the view that liberty cannot long subsist without the support of property. "Property must be secured, else liberty cannot subsist" was the opinion of John Adams. Indeed the view that property itself is the seed bed which must be conserved if other constitutional values are to flourish is the consensus among political thinkers and jurists. The U.S. Supreme Court in *Dorothy Lynch v. Household Finance Corporation,* 405 US 538: 31 L Ed. 2d 424 held:

> "….the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. *In fact, a fundamental interdependence exists between the personal right to liberty and the personal*

right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. J. Locke, of Civil Government 82-85 (1924); J. Adams, A Defence of the Constitutions of Government of the United States of America, in F. Coker, Democracy, Liberty, and Property 121-132 (1942); 1 W. Blackstone, Commentaries 138-140..." (P.552 of the report)

27. Justice K.K. Mathew in his treatise on "Democracy, Equality and Freedom": (1978) very categorically expressed the view:

"In a Society with a mixed economy, who can be sure that freedom in relation to property might not be regarded as an aspect of individual freedom? People without property have a tendency to become slaves. They become the property of others as they have no property themselves. They will come to say: "Make us slaves, but feed us". Liberty, independence, self-respect, have their roots in property. To denigrate the institution of property is to shut one's eyes to the stark reality evidenced by the innate instinct and the steady object of pursuit of the vast majority of people. Protection of property interest may quite fairly be deemed in appropriate circumstances an aspect of freedom." (P.38-39)

28. Explaining the interrelation between the right of property and personal liberty, Learned Hand ruled that property right is a personal right. (Learned Hand : The Spirit of Liberty)

29. In our Constitution the word 'law' finds place both in Article 21 and in Article 300A. The term 'law' in Article 21 has been interpreted by the Supreme Court from time to time. In *A.K. Gopalan v. State of Madras,* (AIR 1950 SC 27), the expression 'law' meant enacted law, meaning thereby if the law was passed by a competent legislature and was not violative of any other provision of the Constitution, the law would be

valid. But the said interpretation does no longer hold good after the epoch making decision of this Court in *Maneka Gandhi* (supra), where this Court held the law does not mean any enacted piece. According to the majority decision in *Maneka Gandhi* (supra) "law is reasonable law not any enacted piece" (para 85 page 338 of the report)

30. In *Maneka Gandhi* (supra) this Court held that the expression 'procedure established by law' in Article 21 means a procedure established by a just, reasonable and fair law. Thus the concept of due process of law was incorporated in our constitutional framework by way of judicial interpretation even though it was rejected by the framers.

31. As a result of incorporation of this doctrine of 'due process' in our constitutional framework, the concept of Articles 14 and 21 has undergone a sea-change. In *Maneka Gandhi* (supra), Justice Bhagwati, as His Lordship then was, gave a very dynamic interpretation of Articles 14 and 21.

32. Even prior to the decision in Maneka Gandhi (supra), a Constitution Bench of this Court in *R.C. Cooper v. Union of India* – (1970) 1 SCC 248 also gave a composite and integrated interpretation of rights under Part III of the Constitution. The question before this Court in *R.C. Cooper* (supra) was whether the rights under Articles 19(1)(f) and 31(2) are mutually exclusive. Answering the said question, the majority of the Constitution Bench, speaking through Shah, J. analysed the different features of Fundamental Rights in para 52 at page 289 of the report and came to a conclusion that part III of the Constitution "weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields: they do not attempt to enunciate distinct rights." (page 289)

33. In the following paragraph 53, the learned judges further made it clear by saying:

"acquisition must be under the authority of a law and the expression "law" means a law which is within the competence of the Legislature, and does not impair the guarantee of the rights in Part III."

34. In view of this clear enunciation of law by two Constitution Benches of this Court and the wording of Article 300A of the Constitution, let us examine the correctness of the impugned Judgment of the High Court which relies only on *S.P. Jain's* case (supra).

35. The facts are totally different in *S.P. Jain* (supra). It is clear from the facts in *S.P. Jain* (supra) that the third respondent, the *Krishi Utpadan Mandhi Samity,* in whose favour the land was acquired for construction of market-yard, resolved on 13th January, 1989 to withdraw from the acquisition as it was suffering from a fund crunch and the proposed Mandhi site was far away from Baraut (para 5).

36. The second round of litigation, out of which the judgment in *S.P. Jain* (supra) was rendered by this Court, was filed after the aforesaid resolution of the third respondent was passed. Challenging the same, the writ petition was filed before the High Court on 10th August, 1989 wherein the writ petitioner prayed that the State of Uttar Pradesh (the first respondent), The Collector, Merrut (the second respondent) and the Mandhi (the third respondent) be directed by Writ of Mandamus to make and publish an award in respect of the land. In that context this Court examined various provisions of the Act and gave a direction upon the first and second respondents to publish an award within 12 weeks and imposed a cost of Rs.10,000/- on the third respondent. In fact the writ petition in terms of the prayer was allowed.

37. In coming to the aforesaid conclusion this Court held that in a case where the emergency provisions are invoked under Section 17 of the Act, the provisions of Section 11A will

not apply. And this Court came to an incidental finding, though it was not strictly in issue, that taking over the possession without making payment under Section 17 (3A) of the Act is not illegal. This finding was not at all necessary for deciding the issue, namely whether prayer in the writ petition for publishing the award was correctly made or not.

38. It has been held in the decision of this Court in *Municipal Corporation of Delhi v. Gurnam Kaur,* reported in AIR 1989 SC 38 that when a point does not fall for decision of a Court but incidentally arises for its consideration and is not necessary to be decided for the ultimate decision of the case, such a decision does not form a part of the ratio of the case but the same is treated as a decision passed sub silentio. The concept of 'sub silentio' has been explained by Salmond on Jurisprudence "12th Edition" as follows:

"A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the Court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the Court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio." (page 43)

39. The aforesaid passage has been quoted with approval by the three Judge Bench in *Gurnam Kaur* (supra). This Court in *Gurnam Kaur* (supra), in order to illustrate the aforesaid proposition further relied on the decision of the English Court in *Gerard v. Worth of Paris Ltd.,* reported in 1936 (2) All England Reports 905. In Gerard, the only point argued was on the question of priority of the claimant's debt. The Court found

that no consideration was given to the question whether a garnishee order could be passed. Therefore, a point in respect of which no argument was advanced and no citation of authority was made is not binding and would not be followed. This Court held that such decisions, which are treated having been passed sub silentio and without argument, are of no moment. The Court further explained the position by saying that one of the chief reasons behind the doctrine of precedent is that once a matter is fully argued and decided the same should not be reopened and mere casual expression carry no weight. In *Gurnam Kaur* (supra) this Court conclusively held that not every passing expression of a Judge, however eminent, can be treated as "ex cathedra statement, having the weight of authority" (see para 12 page 43)

40. Similarly, it has also been held by the majority opinion in Constitution Bench of this Court in the case of *Madhav Rao Jivaji Rao Scindia v. Union of India,* reported in AIR 1971 SC 530 that "it is difficult to regard a word, a clause or a sentence occurring in a judgment of this Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment." (page 578 of the report)

41. In another Constitution Bench decision of this court in *Padma Sundara Rao (Dead) & Ors., v. State of Tamil Nadu & others* reported in (2002) 3 SCC 533, similar views have been expressed by this Court in para 9, at page 540 of the report wherein the unanimous Constitution Bench of this Court opined:

> "9. Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treting the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the seting of the facts of a

> particular case, said Lord Morris in *Herrington V. British Railways Board* - (1972) AC 877. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

42. The reason behind enacting Section 17 (3A) of the Act is clear from the Statement of Object and Reasons extracted above. It is clear therefore the provisions were incorporated in order to strike a balance between the rights of the State and those of the land owner. A clear legislative intent in Section 17(3A) was thus expressed that before taking possession of any land under sub-section (1) or sub-section (2) of Section 17, the Collector shall tender payment of 80% of the estimated compensation for such land to the persons interested and entitled thereto. This is the clear mandate of law.

43. In view of the principles enunciated in *R.C. Cooper* (supra) and *Maneka Gandhi* (supra), reasonableness in law has to be its implicit content. Here no challenge to the reasonableness of Section 17 (3A) is either argued or considered by this Court. But when law gives a specific mandate on the State to tender the payment before taking possession under Section 17(1) and Section 17(2) by invoking the emergency powers, to hold that the taking over of possession without complying with that mandate is legal is clearly to return a finding which is contrary to the express provision of the statute. Such a finding is certainly not on a reasonable interpretation of Section 17 (3A). Therefore, the casual observation in para 17 (page 375) in *S.P. Jain* (supra) to the effect of taking possession of land under emergency provision and without making the payment mandated under Section 17(3A) is a valid mode of taking possession is in clear violation of Section 17(3A) and be regarded made per incuriam and does not have the effect of a binding precedent.

44. If I look at the emergency provisions of the statute which empowers the State to acquire land by dispensing with the provisions of making an enquiry it is clear that the said provision

is a drastic provision. It is well-known that the provisions of the said Act are expropriatory in nature and must be strictly construed. In that expropriatory legislation, Section 17 is a very drastic provision as Section 17 of the Act seeks to authorize acquisition and taking over of possession without hearing the land owner. This Court held that the right of hearing which is given under Section 5A of the Act and which is taken away in view of the emergency acquisition is a very valuable right and is akin to a fundamental right. (See *Dev Sharan & Ors. v. State of U.P. & Ors.* - JT 2011 (3) SC 102). Therefore, when that right is taken away and the land is acquired by invoking the emergency provision of Section 17(3A) to hold that even the safeguards provided under Section 17(3A) are not mandatory and taking over of possession without complying with the provisions of Section 17 (3A) is not illegal is to overlook the clear provisions of the Act and come to a finding which is contrary to the Act. This Court is unable to accept that the taking over of the possession by invoking Section 17(1) or Section 17(2) of the Act and without making the payment under Section 17(3A) is legal taking over of possession.

45. This Court is of the view that Section 17(3A) is not an isolated provision. Section 17(3A) figures very prominently as part of the statutory mechanism in Section 17 of the Act which confers special powers in cases of urgency. Section 17 has four sub sections and all these sub sections comprise a composite mechanism and are closely intertwined. Power under one sub section cannot be exercised without complying with the conditions imposed by the other sub section. For a proper appreciation of this question, section 17 with all its sub sections are set out:

> "17. Special powers in cases of urgency. (1) In cases of urgency, whenever the appropriate Government, so directs, the Collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in section 9, sub-section (1), take possession of any land needed for a public purpose. Such land shall thereupon vest absolutely in the Government, free from all encumbrances.
>
> (2) Whenever, owing to any sudden change in the channel of any navigable river or other unforeseen emergency, it becomes necessary for any Railway administration to acquire the immediate possession of any land for the maintenance of their traffic or for the purpose of making thereon a river-side or ghat station, or of providing convenient connection with or access to any such station, or the appropriate Government considers it necessary to acquire the immediate possession of any land for the purpose of maintaining any structure or system pertaining to irrigation, water supply, drainage, road communication or electricity, the Collector may, immediately after the publication of the notice mentioned in sub-section (1) and with the previous sanction of the appropriate Government, enter upon and take possession of such land, which shall thereupon vest absolutely in the Government free from all encumbrances:
>
> Provided that the Collector shall not take possession of any building or part of a building under this sub-section without giving to the occupier thereof at least forty-eight hours' notice of his intention so to do, or such longer notice as may be reasonably sufficient to enable such occupier to remove his movable property from such building without unnecessary inconvenience.
>
> (3) In every case under either of the preceding sub-sections the Collector shall at the time of taking possession offer to the persons interested compensation for the standing crops and trees (if any) on such land and for any other damage sustained by them caused by such sudden dispossession and not excepted in section 24; and, in case such offer is not accepted, the value of such crops and

trees and the amount of such other damage shall be allowed for in awarding compensation for the land under the provisions herein contained.

(3A) Before taking possession of any land under sub-section (1) or sub-section (2), the Collector shall, without prejudice to the provisions of sub-section (3),-

(a) tender payment of eighty per centum of the compensation for such land as estimated by him to the persons interested entitled thereto, and

(b) pay it to them, unless prevented by some one or more of the contingencies mentioned in section 31, sub-section (2),

and where the Collector is so prevented, the provisions of section 31, sub-section (2), (except the second proviso thereto), shall apply as they apply to the payment of compensation under that section.

(3B) The amount paid or deposited under sub-section (3A), shall be taken into account for determining the amount of compensation required to be tendered under section 31, and where the amount so paid or deposited exceeds the compensation awarded by the Collector under section 11, the excess may, unless refunded within three months from the date of the Collector's award, be recovered as an arrear of land revenue.

(4) In the case of any land to which, in the opinion of the appropriate Government, the provisions of sub-section (1) or sub-section (2) are applicable, the appropriate Government may direct that the provisions of section 5A shall not apply, and, if it does so direct, a declaration may be made under section 6 in respect of the land at any time after the date of publication of the notification under section 4, sub-section (1)."

46. Sub-section (3A) of Section 17 is linked with sub section (2) of Section 31. Sub section (2) of Section 31 runs thus:

"(2) If they shall not consent to receive it, or if there be no person competent to alienate the land, or if there be any dispute as to the title to receive the compensation or as to the apportionment of it, the Collector shall deposit the amount of the compensation in the Court to which a reference under section 18 would be submitted:

Provided that any person admitted to be interested may receive such payment under protest as to the sufficiency of the amount:

Provided also that no person who has received the amount otherwise than under protest shall be entitled to make any application under section 18:

Provided also that nothing herein contained shall affect the liability of any person, who may receive the whole or any part of any compensation awarded under this Act, to pay the same to the person lawfully entitled thereto."

47. It is thus clear that sub section (3A) of Section 17 read with sub section (2) of Section 31 of the Act form a composite statutory scheme. The said scheme has been legislatively framed to balance the promotion of public purpose in acquisition with rights of the individual whose land is acquired. This is clear from the Statement of Objects and Reasons which was kept in view for bringing about the amendment of the said Act by Amendment Act 68 of 1984. By the said amendment Section 17(3A) was brought on the statute.

48. Therefore, the provision of Section 17(3A) cannot be viewed in isolation as it is an intrinsic and mandatory step in exercising special powers in cases of emergency. Sections 17(1) and 17(2) and 17(3A) must be red together. Section 17(1) and 17(2) cannot be worked out in isolation.

49. It is well settled as a canon of construction that a statute has to be read as a whole and in its context. In *Attorney General v. HRH Prince Earnest Augustus of Hanover,* reported in (1957) 1 AER 49, Lord Viscount Simonds very elegantly stated the principle that it is the duty of Court to examine every word of a statute in its context. The learned Law Lord further said that in understanding the meaning of the provision, the Court must take into consideration "not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari material, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy" (page 53 of the report).

50. Lord Normand expressed the same view differently and which is equally pertinent and worth remembering and parts of which are excerpted below:

> "The key to the opening of every law is the reason and spirit of the law – it is the animus imponentis, the intention of the law maker, expressed in the law itself, taken as a whole. Hence to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed detached from its context … meaning by this as well the title and the preamble as the purview or enacting part of the statute" (page 61 of the report).

51. These principles have been followed by this Court in its Constitution Bench decision in *Union of India v. Sankalchand Himatlal Sheth & anr.,* [(1977) 4 SCC 193]. At page 240 of the report, Justice Bhagwati, as His Lordship then was, in a concurring opinion held that words in a statute cannot be read in isolation, their colour and content are derived from their context and every word in a statute is to be examined in its context. His Lordship explained that the word context has to be taken in its widest sense and expressly quoted the formulations of Lord Viscount Simonds, set out above. (See para 54, P.241 of the report).

52. In this connection, if I compare the normal mode of vesting of acquired property under Section 16 of the Act with the mode of vesting under emergency provisions of Section 17 thereof, I will discern that under the said Act the vesting of acquired property in the State presupposes compliance with two conditions. Under Section 16, first there has to be an award under section 11 and then there has to be taking over of possession. Only thereupon the land shall vest absolutely in the state, free from all encumbrances. Section 16 of the act which makes it clear is as under:

> "16. Power to take possession.- When the Collector has made an award under section 11, he may take possession of the land, which shall thereupon vest absolutely in the Government, free from all encumbrances.

53. But in case of emergency acquisition, possession is taken before the making of an award. This is clear from section 17(1) and section 17(2). But the intention of the legislature is that even though the award is not made, payment mandated under Section 17(3A) must be made before possession is taken either under Section 17(1) and 17(2). Therefore this provision relating to payment under Section 17(3A) is a *condition precedent* to the vesting of land under Section 17(1) and 17(2). In the later part of this judgment, I shall discuss some authorities which have opined that when possession is illegally taken over without following the conditions precedent for taking such possession, vesting of a property in law does not take place in the authority which thus illegally enters upon the property.

54. Judicial opinion is uniformly in favour of strict construction of an expropriatory law which admittedly Land Acquisition Act, 1894 is. Reference in this connection can be made to the observations of Cottenham, L.C. in *Webb v. Manchester and Leeds Rail Co.,* [(1839), 4 Myl. & Cr.116] where the Lord Chancellor held:

> "The powers are so large - it may be necessary for the benefit of the people – but they are so large, and so injurious to the interests of the individuals, that I think it is the duty of every court to keep them most strictly within those powers; and if there be any reasonable doubt as to the extent of their powers, they must go elsewhere and get enlarged powers; but they will get none from me by way of construction of their Act of Parliament."

55. In the Indian context, as early as in 1916. Judicial committee of Privy Council in *Secretary of State for India v. Birendra Kishore Manikya* (ILR 44 Cal 328), speaking through Lord Dunedin held, 'the Act is drastic in its character and makes invasion in private rights…matter must be brought "strictly within its provisions".' (p 343)

56. Cripps in *"The Law of Compensation for Land Acquired under Compulsory Powers"* (8th ed., Stevens and Sons, Ltd.) has quoted the above opinion of the Lord Chancellor and further dealt with this aspect of the matter at page 27 of the book wherein the learned author said, "Where the promoters of a public undertaking have authority from Parliament to interfere with private property on certain terms, any person whose property is interfered with by virtue of that authority has a right to require that the promoters shall comply with the letter of the enactment, so far as it makes provision on his behalf." Again at page 100, the learned author has stressed the above position very strongly to the following effect:-

> "If no consent has been given, and the promoters have not complied with the statutory conditions as to entry on lands, they can be proceeded against as trespassers by any owner who has an interest in the lands. The principle is that all statutory conditions which have been imposed as condition precedent to an entry on lands must be fulfilled."

57. In support of this aforesaid proposition, the learned

author has relied on *Parkdale Corporation v. West* [(1887), 12 App. Cas. 602, 614].

58. And again at page 173, the learned author opines:

> "It must be borne in mind that promoters have no powers, other than those comprised in their special Acts and the Acts therewith incorporated, to enter upon or take lands against the wish of the owners. It is incumbent on promoters to comply with all conditions and limitations imposed upon them, and, unless they have so complied, any interested owner can restrain them by injunction from taking, as against him, further proceedings".

I am in respectful agreement with the aforesaid principles.

59. I find that same principles have been laid down in *Cooley's 'A Treatise on the Constitutional Limitations' Volume II, (Eight Edition).* Cooley while dealing with the concept of 'Eminent Domain' in Chapter 15 opined (p.1120):

> "…whenever in pursuance of law the property of an individual is to be divested by proceedings against his will, a strict compliance must be had with all the provisions of law which are made for his protection and benefit, or the proceeding will be ineffectual. *Those provisions must be regarded as in the nature of conditions precedent, which are not only to be observed and complied with before the right of the property owner is disturbed,* but the party claiming authority under the adverse proceeding must show affirmatively such compliance".
>
> (emphasis added)

60. The learned author explained the aforesaid proposition with certain illustration which very closely fit in with the legal framework with which I am concerned in this case. The learned author said:

"So if the statute vests the title to lands appropriated in the state or in a corporation on payment therefore being made, it is evident that, under the rule stated, the payment is a condition precedent to the passing of the title."

(Emphasis added)

61. Reference in this connection should be made to the decision of Supreme Court of Vermont in *Henry B. Stacey v The Vermont Central Railroad Co,* (27 Vt. 39). In that case, while discussing the concept of Eminent Domain, the court after referring to various decisions held "that this provision (relating to deposit of the appraised value) should be considered in the nature of a condition precedent, not only to the acquisition of the legal title to the land, but also to the right to enter and take the permanent possession of the land for the use of the corporation."

62. The expression *condition precedent* has been defined in Words and Phrases (permanent edition, Vol. 8. St. Paul, Minn, West Publishing Co., 1951, p 629) as those which 'must be punctually performed before the estate can vest'. Similarly, in Bouvier's Law Dictionary, (A Concise encyclopedia of the Law, Rawle's Third Revision, Vol. 1, Vernon Law Book Company, 1914, p 584), virtually the same principles have been followed. The learned author expressed this even more strongly by explaining that:

"The effect of a Condition precedent is, when performed, to vest an estate, give rise to an obligation, or enlarge an estate already vested; […]. Unless a condition precedent be performed, no estate will vest; and this even where the performance is prevented by the act of God or of the law; […]."

63. In Wharton's Law Lexicon, it has been held that conditions precedent in their primary meaning are those events, but for the happenings of which rights will not arise. (Wharton's

Law Lexicon, 1976, reprint, p 228).

64. In the case of *Gujarat Electricity Board v Girdharlal Motilal And Anr* (AIR 1969 SC 267), this court while dealing with the power of the State Electricity Board to purchase the property of the licensee held that right can be exercised only in the manner provided in the act and not in any other way. The court held that since this power of the Board under the law is to interfere with the property rights of the licensee, such power will have to be strictly construed. In laying down the said principle this court relied on the well-known doctrine in case of *Nazir Ahmad v King Emperor* [AIR 1936 PC 253] that when a power is to be exercised in a manner it has to be exercised in that manner alone and in no other manner. In two other recent judgments, this court reiterated the same principle, and held that expropriatory statute, as is well known, must be strictly construed. [See *Hindustan Petroleum corpn. Ltd., v. Darius Shapur Chenai and others* reported in (2005) 7 SCC 627]. The said principle has also been followed by this Court in the case of *Bharat Petroleum Corporation Ltd. v Maddula Ratnavalli and Others* [(2007) 6 SCC 81] where learned judges relying on Hindustan Petroleum reiterated the same principle of strict construction of expropriatory legislation (p 91).

65. In an earlier decision *Jilubhai Nanbhai Khachar and others v State of Gujarat and Anr* [1995 Suppl (1) SCC 596], this Court while dealing with the concept of eminent domain and right to property in Article 300A held as follows (para 50, p. 628):

"50. All modern constitutions of democratic character provide payment of compensation as the condition to exercise the right of expropriation. Commonwealth of Australia Act, a Frecnh Civil Code (Article 545), the 5th Amendment of the Constitution of USA and the Italian constitution provided principles of "just terms", "Just indemnity", Just compensation" as reimbursement for the property taken, have been provided for. As pointed out in

Halsbury's Law of England that "when Parliament has authorized the compulsory acquisition of land it is almost invariably provided for payment of a money compensation to the person deprived of his interest in it."

66. On the basis of aforesaid principles, I hold that the requirement of payment under section 17(3A) is in the nature of condition precedent clamped by the statute before taking possession under emergency acquisition by the State. The vesting contemplated either under Section 17(1) or 17(2) of this Act is conditioned upon payment mandated under Section 17(3A). This is clear from the opening words of Section 17(3A) namely "before taking possession of any land either under sub-section (1) or (2), Collector shall..... tender payment." Therefore, the eminent domain concept is subject to the aforesaid statutory condition and must be read subject to due process concept introduced in our constitutional law in *Maneka Gandhi* (supra). If I read, Section 17(3A) as I must, consistently with the constitutional doctrine of due process as articulated in the expression 'authority of law' under Article 300A which constitutionally protects deprivation of a right to property, save by authority of law, the conclusion in my judgment is inescapable that the requirement of section 17(3A) constitutes the authority of law within the meaning of Article 300A. Therefore, in the context of aforesaid statutory dispensation and constitutional provision, the debate whether the provision of section 17(3A) is mandatory or directory does not present much difficulty for the reasons discussed above and also for the following reasons.

67. Basically, the language used is 'shall' which primarily indicates mandatory compliance. That apart, in the context of the nature of statute which is admittedly expropriatory in character and the nature of the statutory requirement under section 17(3A) which is clearly and undoubtedly a condition precedent to the taking over of possession in emergency acquisition, there can be no doubt that the requirement under section 17(3A) is mandatory.

68. Section 17(3A) has been enacted for protecting the rights of deprived land-loser in an emergency acquisition. The said provision is therefore based on reason, justice and fairplay. Since the said provision has been introduced by way of an amendment as noted above to balance the right of the state as against the interest of the land-loser, the State's power of eminent domain is expressly made subject to aforesaid statutory provision as also the constitutional right to property protected under Article 300A. Right to property has been pronounced as fundamental human right by this Court in *Chairman, Indore Vikas Pradhikaran v. Pure Industrial Coke & Chemicals Ltd., and others* reported in (2007) 8 SCC 705.

69. The expression 'law' which figures both in Article 21 and Article 300A must be given the same meaning. In both the cases the law would mean a validly enacted law. In order to be valid law it must be just, fair and reasonable having regard to the requirement of Article 14 and 21 as explained in *Maneka Gandhi* (supra). This is especially so, as 'law' in both the Articles 21 and 300A is meant to prevent deprivation of rights. Insofar as Article 21 is concerned, it is a Fundamental Right whereas in Article 300A it is a constitutional right which has been given a status of a basic human right.

70. I, therefore, hold that Section 17(3A) of the Act is a law which has been enacted to prevent deprivation of property rights guaranteed under Article 300 A. This provision of Section 17(3A) must therefore be given a very broad interpretation to mean a law that gives a fair, just and reasonable protection of the land-loser's constitutional right to property.

71. Therefore, the provisions of section 17(3A) read with Article 300A must be liberally construed. Reference in this connection be made to the majority opinion in the Constitution Bench decision in the case of *Madhav Rao Jivaji Rao Scindia* (supra). Shah, J., speaking for the majority opinion observed (para 33, p 576):

> "The court will interpret a statute as far as possible, agreeably to justice and reason and that in case of two or more interpretations, one which is more reasonable and just will be adopted, for there is always a presumption against the law maker intending injustice and unreason. The court will avoid imputing to the Legislature an intention to enact a provision which flouts notions of justice and norms of fairplay, unless a contrary intention is manifest from words plain and unambiguous. A provision in a statute will not be construed to defeat its manifest purpose and general values which animate its structure. In an avowedly democratic polity, statutory provisions ensuring the security of fundamental human rights including the right to property will, unless the contrary mandate be precise and unqualified, be construed liberally so as to uphold the right. These rules apply to the interpretation of constitution and statutory provisions alike."

72. On the above premise, taking over a possession of land without complying with the requirement of section 17(3A) is clearly illegal and in clear violation of the statutory provision which automatically violates the constitutional guarantee under Article 300A. A passing observation to the contrary in *S.P. Jain* (supra) must pass sub silentio being unnecessary in the facts of the case as otherwise such a finding is per incuriam, being in violation of the statute. A fortiorari the said finding cannot be sustained as a binding precedent.

73. For the reason aforesaid, this Court holds that the writ petition cannot be dismissed in view of the decision in *S.P. Jain* (supra) which was decided on totally different facts. The judgment of the High Court is set aside.

74. This court further holds that in all cases of emergency acquisition under section 17, the requirement of payment under section 17(3A) must be complied with. As the provision of section 17(1) and section 17(2) cannot be worked out without

complying with requirement of payment under section 17(3A) which is in the nature of condition precedent. If section 17(3A) is not complied with, the vesting under section 17(1) and section 17(2) cannot take place. Therefore, emergency acquisition without complying with section 17(3A) is illegal. This is the plain intention of the statute which must be strictly construed. Any other construction, in my opinion, would lead to diluting the Rule of Law.

75. However, coming to the question of relief in the instant case, the Court has to take note of the fact situation. Admittedly, possession of the land has been taken and same has been handed over to the beneficiary on which construction had taken place and third party interests had arisen. It is very difficult to put the hands of the clock back now, despite the aforesaid declaration of law by the Court. This Court, therefore, has to think in terms of adequately compensating the appellants. In the special facts of this case, compensation in respect of the land acquired insofar as the appellants are concerned cannot be decided on the basis of the date of notice under Section 4.

76. In view of the discussions above, the compensation has to be fixed with regard to the value of the appellant's land as on the date of filing of the writ petition which was in March, 2006 before the High Court. The section 4 notification must be deemed to have been issued on March 1, 2006 and the compensation must be worked out on that basis. An award on that basis must be passed by the Collector within four months from date and the appellants are given liberty, if so advised, to challenge the same in appropriate proceedings. All questions relating to compensation in aforesaid proceeding are kept open for both the parties. As the respondent – the acquiring authority has proceeded illegally in the matter, it must pay costs of Rupees one lakh in favour of Allahabad High Court Mediation Centre within a period of six weeks from date. The State is at liberty to recover the same from the erring officials.

77. The appeal is, thus, allowed with costs as aforesaid.

SWATANTER KUMAR, J. 1. I had the advantage of reading the well-written judgment of my learned brother, A.K. Ganguly, J. Regretfully but respectfully, I am unable to persuade myself to concur with the findings recorded and the exposition of law expressed by my learned brother. In order to discernly state the reasons for my expressing a contrary view and dismissing the appeals of the appellants on merits, it has become necessary for me to state the facts as well as the law in some detail. It has been necessitated for the reason that complete facts, as they appear from the record and the facts which were brought to the notice of the Court during the course of hearing by the respondents, supported by the official records, duly maintained by them in normal course of their business, have not, in their entirety, and correctly been noticed in the judgment. I am also of the considered view that, in fact, the questions framed (particularly question 'D') in the judgment by my learned brother neither so comprehensively arise in the facts and circumstances of the present case nor were argued in that manner and to that extent before the Court. Be that as it may, I consider it necessary to restate the facts, deal with different legal aspects of the case and then record the conclusions which would even provide answers to the questions framed by my learned brother at the very beginning of his judgment. Before I proceed to do so, let me briefly but, *inter alia*, state the reasons for my taking a view contrary to the one recorded in the judgment of my learned brother:

I. I have already stated that complete and correct facts, in their entirety, as they emerge from the records produced before the Court (including the trial court record) as well as the documents referred to during the course of arguments by the respondents have not been correctly noticed. The records referred to have been maintained by the authorities in the normal course of their business

and their authenticity can hardly be questioned. These documents have been executed *inter se* various institutions/departments, including the Collector's office, who discharges quasi-judicial functions under the Act.

II. The judgment of this court in the case of *Satendra Prasad Jain & Ors. v. State of U.P. & Ors.* [AIR 1993 SC 2517 = (1993) 4 SCC 369], in my humble view, cannot be ignored and the principle stated therein cannot be avoided on the ground that the judgment was *sub silentio*. This I say so, for the reason that it is not a decision in which the point was not raised, argued and perceived by the Court. On the contrary, the issue in relation to the consequences of non-payment flowing from Section 17(3A) of the Land Acquisition Act (for short, the 'Act') was specifically noticed by the three-Judge Bench in paragraph 11 of the judgment. It was discussed in some detail and a definite finding was recorded thereby bringing the judgment well within the dimensions of good precedent. Thus, I, with respect, would prefer to follow the larger Bench judgment rather than ignoring the same for the reasons stated by my learned brother in his judgment do not apply in the facts of the present case.

III. The *ratio decidendi* of the judgment of this Court in the case of *Satendra Prasad Jain* (supra) is squarely applicable to the present case, on facts and law.

IV. It has not been correctly noticed in the judgment that 80 per cent of due compensation, which even the appellants did not dispute during the course of hearing, had not been tendered or paid to the claimants, as contemplated under Section 17(3A)

of the Act. From the facts recorded hereinafter, it is clear that within the prescribed period, the payments were deposited with the State office of the Collector/competent authority and it was for the State to distribute the money in accordance with the provisions of the Act. It is not only the scheme of the Act but also an established practice that the amounts are disbursed by the Collector to the claimants and not directly by the beneficiary, for whose benefit the land had been acquired. The beneficiary had discharged its obligation by depositing, in fact, in excess of 80 per cent of due compensation with the competent authority. *De hors* the approach that one may adopt in regard to the interpretation of Section 17(3A), on facts the notification is incapable of being invalidated for non-compliance of the said Section.

V. The doctrine of strict construction does not *per se* mandate that its application excludes the simultaneous application of all other principles of interpretation. It is permissible in law to apply the rule of strict construction while reading the provisions of law contextually or even purposively. The golden rule of interpretation is the rule of plain language, while preferring the interpretation which furthers the cause of the Statute rather than that which defeats the objects or purposes of the Act.

VI. Non-providing of consequences under Section 17(3A) of the Act, in contradistinction to Sections 6 and 11 of the same Act, in my considered view is largely the determinative test for proper and judicious interpretation of Section 17(3A).

VII. The judgment by my learned brother does not consider the judgments of the Constitution Bench,

the larger Bench and even the equi-Bench, which have to some extent a direct bearing on the matters in issue before us. In this regard, reference can be made to the Constitution Bench judgment of this Court in the case of *Offshore Holdings Pvt. Ltd. v. Bangalore Development Authority & Ors.* [(2011) 3 SCC 139], the three-Judge Bench judgment in the case of *Tika Ram & Ors. v. State of U.P. & Ors.,* [(2009) 10 SCC 689] and particularly the judgment of another equi-Bench of this Court in the case of *Banda Development Authority, Banda* v. *Moti Lal Agarwal & Ors.* [2011 (5) SCALE 173], to which my learned brother (Ganguly, J.) was a member. The latter case, *inter alia*, dealt with a question of lapsing of proceedings under Section 11A on the ground that the possession of the property had not been taken as required under that provision. While rejecting such a contention in that case, the Court observed that if the beneficiary of the acquisition is an agency or instrumentality of the State 80 per cent of the total compensation is deposited in terms of Section 17(3A) and substantial portion of the acquired land has been utilized in furtherance of the particular public purpose, it could reasonably be presumed that the possession of the acquired land had been irrevocably taken. The Court then held that relief to the appellants (like the appellants in the present case) of invalidating the acquisition proceedings and restoring the land could not be granted.

VIII. The 44th Constitutional Amendment, on the one hand, omitted Article 19(1)(f) and Article 31 while introducing Articles 31A and 300A to the Constitution of India on the other. Right to property was deleted as a fundamental right in the Constitution. Thus, this right cannot be placed on

equi terms, interpretatively or otherwise, to the pre-constitutional amendments. The right to eminent domain would operate on a different sphere, interpretation and effect, pre and post constitutional repealments of these Articles and introduction of Article 300A of the Constitution. Even on this aspect, I respectfully disagree with the conclusions recorded by my learned brother (Ganguly, J.).

FACTS:

2. Appellant No.1 is a company duly incorporated under the provisions of the Indian Companies Act, 1956 and is alleged to be the owner of the land sought to be acquired by the respondents. The land of the appellant, admeasuring about 2-06-1/3-0 Bighas situated in Village Haldauni, Tehsil and Pargana Dadri, District Gautam Budh Nagar, which is an *abadi* land, was sought to be acquired by the appropriate Government under a notification dated 17th April, 2002 issued under Section 4(1) read with Sections 17(1) and 17(4) of the Act. This land was acquired for the planned industrial development in District Gautam Budh Nagar through the New Okhla Industrial Development Authority (NOIDA). The notification also stated that the provisions of Section 5A of the Act shall not apply. In pursuance to the said notification, a declaration under Section 6 of the Act was published on 22nd August, 2002, declaring the area which was required by the Government. It also stated that after expiry of 15 days from the date of the publication of the notification possession of the acquired land shall be taken under sub-section (1) of Section 9 of the Act. The appellants have alleged that they did not receive any notice under Section 9(1) of the Act but possession of the land was nevertheless taken on 4th February, 2003. According to the appellants, even after lapse of more than three and a half years after publication of declaration under Section 6 of the Act, the award had not been made and published.

3. The appellants also alleged in the petition that, despite inordinate delay, they were neither paid 80 per cent of the estimated compensation in terms of Section 17(3A) of the Act at the time of taking of possession, nor had the Collector passed an award within two years of making the declaration under Section 17(1), as required by Section 11A of the Act. It was the case of the appellants in the writ petition that this has the effect of vitiating the entire acquisition proceedings. Non-payment of the compensation and conduct of the Government compelled the petitioners to file a writ petition in the High Court of Allahabad praying for issuance of an order or direction in the nature of *certiorari* or any other writ, not to create any encumbrance or interest on the land of the petitioners. Further, they prayed that the acquisition proceedings, in so far as they relate to the land of the petitioner, be declared void *ab initio* and that the respondents be directed to return the land from the possession of the Government to the owners. Lastly, the petitioners prayed that the respondents/Government be directed to pay damages for use and occupation of the land.

4. To this writ petition, the respondents had filed a counter affidavit in the High Court, denying that the acquired land was in fact a part of the *abadi* land. The respondent-authority has also stated that 80 per cent compensation in terms of Section 17(3A) of the Act had been deposited with the authorities. The land had been acquired for planned development of NOIDA and was in the physical possession of the said authority. Possession of the land had been taken on 4th February, 2003 and no right had survived in favour of the petitioners as the land vested in the Government.

5. The High Court, vide its judgment dated 28th August, 2006, dismissed the writ petition. The High Court relied upon the judgment of this Court in the case of *Satendra Prasad Jain* (supra) and dismissed the petition holding that the provisions of Section 11A of the Act are not attracted to proceedings for acquisition taken by the Government under Section 17 of the

Act. However, liberty was granted to the petitioners to pray for grant of appropriate compensation in accordance with law before the competent forum.

6. Aggrieved by the said order of the High Court, the appellants have filed the present appeal impugning the judgment dated 28th August, 2006.

7. In the counter affidavit filed by respondent No.2 before this Court, the submissions made before the High Court have been reiterated with an additional fact that the sector in question was designated as industrial area and after the development activity was completed, allotment has been made and possession of these industrial plots has also been handed over to such entrepreneurs/allottees. This land falls under Sector 88 of the NOIDA City. The rest of the allegations made in the writ petition, except the dates in question, have been disputed.

8. It has also been stated at the Bar, on the basis of the record maintained in regular course of its business by the respondent-authority, that 10 per cent of the estimated compensation was deposited by the Authority with the State Government even prior to the date of the notification under Section 4(1) read with Section 17(4) of the Act, issued by the Government, i.e., 17th April, 2002. The remaining 70 per cent of the estimated compensation had allegedly been deposited vide cheque dated 8/14th July, 2002 amounting to approximately Rs. 6,66,00,000/-. As such, there is complete compliance with the provisions of Section 17(3A) of the Act by the authority concerned. The Award was made on 9th June, 2008, which has been accepted by a large number of owners, i.e., 97.6 per cent of all owners. Some of these facts have also been averred in the counter affidavit filed before the High Court.

9. From the above pleadings of the parties, the admitted facts that emerge from the record can be usefully recapitulated. The Governor of the State of Uttar Pradesh on 17th April, 2002, issued a notification under Section 4(1) of the Act, expressing

the intention of the Government to acquire the land stated in the said Notification for a public purpose, namely, for the planned industrial development in District Gautam Budha Nagar through NOIDA. Vide the same notification the emergent provisions contained in Section 17 of the Act, specifically Section 17(4), were also invoked, intimating the public at large that the provisions of Section 5A of the Act shall not be applicable. After issuance of the declaration under Section 6 of the Act, admittedly the possession of the land in question was taken on 4th February, 2003. However, it remains a matter of some dispute before the Court as to whether 80 per cent compensation, which is deposited by the beneficiary with the State, had actually been received by the land owners/claimants, if so, to what extent and by how many.

10. The Collector had not made or published the award even at the time of pronouncement of the judgment of the High Court, in Writ Petition No. 22251 of 2006, on 28th August, 2006. The High Court, in the impugned judgment, has directed the respondent No.1 to ensure that the Award is made as early as possible, preferably within a period of three months from the date of production of the certified copy of that order. In the counter affidavit filed before this Court, it has been stated by the State of Uttar Pradesh that the Award was finally made and published on 9th June, 2008. According to the appellant, given the fact that the declaration under Section 6 of the Act was dated 22nd August, 2002, then in terms of Section 11A of the Act, the acquisition proceedings had lapsed as the award ought to have been pronounced on or before 21st August, 2004.

Discussion on objects and reasons of the Act

11. With the enormous expansion of the State's role in promoting public welfare and economic development since independence, the acquisition of land for public purposes, like industrialization, building of institutions, etc., has become far more numerous than ever before. This not only led to an increase in exercise of executive powers, but also to various

legislative amendments to the Act. The 1870 Act abolished the system of uncontrolled direction by arbitrators and in lieu thereof, required the Collector, when unable to come to terms with the persons interested in the land which it desired to acquire, to refer these differences to the Civil Courts. It was also felt necessary by the framers, to restructure the legislative framework for acquisition of land so that it is more adequately informed by this objective of servicing the interests of the community in harmony with the rights of the individual. Various amendments were made and certain new provisions added to the Act by Amendment Act, 68 of 1984, which took effect from 24th September, 1984. Amongst others, Sections 11A and 17(3A) of the Act were new provisions added by this enactment. The objects and reasons for amending the Act were to bring a greater degree of harmony between the interests of the owners of the land, on the one hand, and the acquiring authority on the other. In its recommendations, the Law Commission also expressed a view that individuals and institutions, who are unavoidably deprived of their property rights, need to be adequately compensated for their loss keeping in view the sacrifice they have had to make in the larger interests of the community. The pendency of acquisition proceedings for long periods causes hardship to the affected parties; so steps were required to be taken to truncate the procedural aspect of acquisition proceedings on the one hand, and to pay adequate compensation to the owners of the land on the other. By introducing the provisions of Section 11A of the Act to the normal course of acquisition proceedings, greater responsibility was intended to be fastened upon the concerned authorities, whereby they were obliged to make an award within two years of the declaration made under Section 6 of the Act. The other obvious purpose of the amendment was that before emergency provisions are invoked by the State and possession is taken in terms of Section 17(1) of the Act, as opposed to the normal procedure of acquisition of land where possession is taken after the making of an award, it was to be obligatory upon the authorities concerned to pay 80 per cent of the

estimated compensation to the land owners, prior to taking possession of the land in terms of Section 17(3A) of the Act. Despite the fact that Right to Property in terms of Article 19(1)(f) of the Constitution stood deleted from Chapter III of the Constitution, vide 44th Constitutional Amendment, 1978, Article 300A of the Constitution was added by the same Constitutional Amendment, mandating that 'no person shall be deprived of his property save by authority of law'. This indicates that the Constitution still mandates two aspects in relation to acquisition of land by the exercise of power of eminent domain vested in the State. Firstly, such acquisition has to be by the authority of law; in other words, it has to be in accordance with the law enacted by the competent legislature and not by mere executive action. Secondly, there has to be a public purpose for acquisition of land and the person interested in such land would be entitled to compensation.

12. The objects and reasons for introducing the Bill leading to the Amendment Act 68 of 1984, have explained the amendments made to the Act. It is not necessary for us to dwell upon all the amendments carried out in the Act. Suffice it to refer to the amendment made in the definition of 'public purpose' under Section 3(f) of the Act and to the provisions of Sections 11A and 17(3A), with which this Court is primarily concerned in the present case. If I may put it in rather simple language, the object of the legislation was to create greater balance between the exercise of power of eminent domain by the State and the owner's deprivation of his property by way of compulsory acquisition and the greater acceptability of acquisition proceedings amongst land owners. This balance is sought to be created by introducing higher responsibility and statutory obligations upon the acquiring authority. Expeditious and proper payment of fair market value for the acquired land to the claimants is required in the light of sacrifice made by them in the larger public interest.

13. In the case of *Devinder Singh & Others v. State of*

Punjab and Others [(2008)1 SCC 728], a Bench of this Court took the view that the provisions of the Act should be strictly construed. Referring to the provisions of the Act, it spelt out the ingredients of valid acquisition to be, (a) the existence of a public purpose; and (b) the payment of requisite compensation. In cases of acquisition of land for a private company, the existence of a public purpose is not necessary but all other statutory requirements were held to remain imperative in character, requiring strict compliance.

Whether the provisions of Sections 17(3A) and 11A of the Act are mandatory or directory and to what effect?

14. Let us first examine the general principles that could help the Court in determining whether a particular provision of a statute is mandatory or directory.

15. In 'Principles of Statutory Interpretation', 12th Edition, 2010, Justice G.P. Singh, at page 389 states as follows:

> "As approved by the Supreme Court: "The question as to whether a statute is mandatory of directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislation must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it the one way or the other" "For ascertaining the real intention of the Legislature", points out Subbarao, J, "the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of the other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with

> the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered". If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory, serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory. But all this does not mean that the language used is to be ignored, but only that the prima facie inference of the intention of the Legislature arising from the words used may be displaced by considering the nature of the enactment, its design and the consequences flowing from alternative construction. Thus, the use of the words 'as nearly as may be' in contrast to the words 'at least' will prima facie indicate a directory requirement, negative words a mandatory requirement 'may' a directory requirement and 'shall' a mandatory requirement."

16. Maxwell, in Chapter 13 of his 12th Edition of 'The Interpretation of Statutes', used the word 'imperative' as synonymous with 'mandatory' and drew a distinction between imperative and directory enactments, at pages 314-315, as follows:

> "Passing from the interpretation of the language of statutes, it remains to consider what intentions are to be attributed to the legislature on questions necessarily arising out of its enactments and on which it has remained silent."
>
> The first such question is: when a statute requires that something shall be done, or done in a particular manner or form, without expressly declaring what shall be the consequence of non-compliance, is the requirement to be regarded as imperative (or mandatory) or forms prescribed by the statute have been regarded as essential to the act or thing regulated by it, and their omission has

been held fatal to its validity. In others, such prescriptions have been considered as merely directory, the neglect of them involving nothing more than liability to a penalty, if any were imposed, for breach of the enactment. "An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially".

It is impossible to lay down any general rule for determining whether a provision is imperative or directory. "No universal rule," said Lord Campbell L.C., "can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed." And Lord Penzance said: "I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."

17. In a recent judgment of this Court, *May George v. Special Tehsildar and Ors.* [(2010) 13 SCC 98], the Court stated the precepts, which can be summed up and usefully applied by this Court, as follows:

(a) While determining whether a provision is mandatory or directory, somewhat on similar lines as afore-noticed, the Court has to examine the context in which the provision is used and the purpose it seeks to achieve;

(b) To find out the intent of the legislature, it may also

be necessary to examine serious general inconveniences or injustices which may be caused to persons affected by the application of such provision;

(c) Whether the provisions are enabling the State to do some things and/or whether they prescribe the methodology or formalities for doing certain things;

(d) As a factor to determine legislative intent, the court may also consider, *inter alia*, the nature and design of the statute and the consequences which would flow from construing it, one way or the other;

(e) It is also permissible to examine the impact of other provisions in the same statute and the consequences of non-compliance of such provisions;

(f) Physiology of the provisions is not by itself a determinative factor. The use of the words 'shall' or 'may', respectively would ordinarily indicate imperative or directory character, but not always.

(g) The test to be applied is whether non-compliance with the provision would render the entire proceedings invalid or not.

(h) The Court has to give due weightage to whether the interpretation intended to be given by the Court would further the purpose of law or if this purpose could be defeated by terming it mandatory or otherwise.

18. Reference can be made to the following paragraphs of *May George* (supra) :

"16. In Dattatraya Moreshwar v. The State of Bombay and Ors. [AIR 1952 SC 181], this Court observed that law which creates public duties is directory but if it confers private

rights it is mandatory. Relevant passage from this judgment is quoted below:

> '7……..It is well settled that generally speaking the provisions of the statute creating public duties are directory and those conferring private rights are imperative. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of legislature, it has been the practice of the Courts to hold such provisions to be directory only, the neglect of them not affecting the validity of the acts done.'

17. A Constitution Bench of this Court in *State of U.P. and Ors. v. Babu Ram Upadhya* [AIR 1961 SC 751] decided the issue observing:

> '29…..For ascertaining the real intention of the Legislature, the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered.'

22. In *B.S. Khurana and Ors. v. Municipal Corporation of*

Delhi and Ors. [(2000) 7 SCC 679], this Court considered the provisions of the Delhi Municipal Corporation Act, 1957, particularly those dealing with transfer of immovable property owned by the Municipal Corporation. After considering the scheme of the Act for the purpose of transferring the property belonging to the Corporation, the Court held that the Commissioner could alienate the property only on obtaining the prior sanction of the Corporation and this condition was held to be mandatory for the reason that the effect of non-observance of the statutory prescription would vitiate the transfer though no specific power had been conferred upon the Corporation to transfer the property.

23. In State of Haryana and Anr. v. Raghubir Dayal [(1995) 1 SCC 133], this Court has observed as under:

> '5. The use of the word `shall' is ordinarily mandatory but it is sometimes not so interpreted if the scope of the enactment, or consequences to flow from such construction would not so demand. Normally, the word `shall' prima facie ought to be considered mandatory but it is the function of the Court to ascertain the real intention of the legislature by a careful examination of the whole scope of the statute, the purpose it seeks to serve and the consequences that would flow from the construction to be placed thereon. The word `shall', therefore, ought to be construed not according to the language with which it is clothed but in the context in which it is used and the purpose it seeks to serve. The meaning has to be described to the word `shall; as mandatory or as directory accordingly. Equally, it is settled law that when a statute is passed for the purpose of enabling the doing of something and prescribes the formalities which are to be attended for the purpose, those

prescribed formalities which are essential to the validity of such thing, would be mandatory. However, if by holding them to be mandatory, serious general inconvenience is caused to innocent persons or general public, without very much furthering the object of the Act, the same would be construed as directory.' "

19. The Legislature in Sections 11A and 17(3A) of the Act has used the word 'shall' in contradistinction to the word 'may' used in some other provisions of the Act. This also is a relevant consideration to bear in mind while interpreting a provision.

20. The distinction between mandatory and directory provisions is a well accepted norm of interpretation. The general rule of interpretation would require the word to be given its own meaning and the word 'shall' would be read as 'must' unless it was essential to read it as 'may' to achieve the ends of legislative intent and understand the language of the provisions. It is difficult to lay down any universal rule, but wherever the word 'shall' is used in a substantive statute, it normally would indicate mandatory intent of the legislature. Crawford on 'Statutory Construction' has specifically stated that language of the provision is not the sole criteria; but the Courts should consider its nature, design and the consequences which could flow from construing it one way or the other.

21. Thus, the word 'shall' would normally be mandatory while the word 'may' would be directory. Consequences of non-compliance would also be a relevant consideration. The word 'shall' raises a presumption that the particular provision is imperative but this *prima facie* inference may be rebutted by other considerations such as object and scope of the enactment and the consequences flowing from such construction. Where a statute imposes a public duty and proceeds to lay down the manner and timeframe within which the duty shall be performed, the injustice or inconvenience resulting from a rigid adherence

to the statutory prescriptions may not be a relevant factor in holding such prescription to be only directory. For example, when dealing with the provisions relating to criminal law, legislative purpose is to be borne in mind for its proper interpretation. It is said that the purpose of criminal law is to permit everyone to go about their daily lives without fear of harm to person or property and it is in the interests of everyone that serious crime be effectively investigated and prosecuted. There must be fairness to all sides. (*Attorney General's Reference* (No. 3 of 1999) (2001) 1 All ER 577 Reference : Justice G.P. Singh on 'Principles of Statutory Interpretation', 11th Edition 2008). In a criminal case, the court is required to consider the triangulation of interests taking into consideration the position of the accused, the victim and his or her family and the public.

22. The basic purpose of interpretation of statutes is further to aid in determining either the general object of the legislation or the meaning of the language in any particular provision. It is obvious that the intention which appears to be most in accordance with convenience, reason, justice and legal principles should, in all cases of doubtful interpretation, be presumed to be the true one. The intention to produce an unreasonable result is not to be imputed to a statute. On the other hand, it is not impermissible, but rather is acceptable, to adopt a more reasonable construction and avoid anomalous or unreasonable construction. A sense of the possible injustice of an interpretation ought not to induce Judges to do violence to the well settled rules of construction, but it may properly lead to the selection of one, rather than the other, of the two reasonable interpretations. In earlier times, statutes imposing criminal or other penalties were required to be construed narrowly in favour of the person proceeded against and were more rigorously applied. The Courts were to see whether there appeared any reasonable doubt or ambiguity in construing the relevant provisions. Right from the case of *R. v. Jones, ex p. Daunton* [1963(1) WLR 270], the basic principles state that even statutes dealing with jurisdiction and procedural law are,

if they relate to infliction of penalties, to be strictly construed; compliance with the procedures will be stringently exacted from those proceedings against the person liable to be penalized and if there is any ambiguity or doubt, it will be resolved in favour of the accused/such person. These principles have been applied with approval by different courts even in India. Enactments relating to procedure in courts are usually construed as imperative. A kind of duty is imposed on court or a public officer when no general inconvenience or injustice is caused from different construction. A provision of a statute may impose an absolute or qualified duty upon a public officer which itself may be a relevant consideration while understanding the provision itself. (See 'Maxwell on The Interpretation of Statutes', 12th Edition by P. St. J. Langan and *R. v. Bullock*, [(1964)1 QB 481])

23. One school of thought has accepted that the word 'shall' raises a presumption that the particular provision is imperative, while the other school of thought believes that such presumption is merely *prima facie*, subject to rebuttal by the other considerations mentioned above. For example, in *M/s. Sainik Motors, Jodhpur & Others v. The State of Rajasthan* [AIR 1961 SC 1480], the word 'shall' has been held to be merely directory.

24. G.P. Singh in the same edition of the above-mentioned book, at page 409, stated that the use of the word 'shall' with respect to one matter and use of word 'may' with respect to another matter in the same section of a statute will normally lead to the conclusion that the word 'shall' imposes an obligation, whereas the word 'may' confers a discretionary power. But that by itself is not decisive and the Court may, having regard to the context and consequences, come to the conclusion that the part of the statute using 'shall' is also directory. It is primarily the context in which the words are used which will be of significance and relevance for deciding this issue.

25. Statutes which encroach upon rights, whether as regards person or property, are subject to strict construction in the same way as penal Acts. It is a recognized rule that they should be interpreted, if possible, so as to respect such rights and if there is any ambiguity, the construction which is in favour of the freedom of the individual should be adopted. (See 'Maxwell on The Interpretation of Statutes', 12th Edition by P. St. J. Langan)

26. This Court in the case of *Devinder Singh* (supra) held that the Land Acquisition Act is an expropriatory legislation and followed the case of *Hindustan Petroleum Corporation v. Darius Shapur Chennai and Ors.* [(2005) 7 SCC 627]. Therefore, it should be construed strictly. The Court has also taken the view that even in cases of directory requirements, substantial compliance with such provision would be necessary.

27. If I analyze the above principles and the various judgments of this Court, it is clear that it may not be possible to lay down any straitjacket formula, which could unanimously be applied to all cases, irrespective of considering the facts, legislation in question, object of such legislation, intendment of the legislature and substance of the enactment. In my view, it will always depend upon all these factors as stated by me above. Still, these precepts are not exhaustive and are merely indicative. There could be cases where the word 'shall' has been used to indicate the legislative intent that the provisions should be mandatory, but when examined in light of the scheme of the Act, language of the provisions, legislative intendment and the objects sought to be achieved, such an interpretation may defeat the very purpose of the Act and, thus, such interpretation may not be acceptable in law and in public interest. Keeping in mind the language of the provision, the Court has to examine whether the provision is intended to regulate certain procedure or whether it vests private individuals with certain rights and levies a corresponding duty on the officers concerned. The Court will still have to examine another

aspect, even after holding that a particular provision is mandatory or directory, as the case may be, i.e., whether the effect or impact of such non-compliance would invalidate or render the proceedings *void ab initio* or it would result in imposition of smaller penalties or in issuance of directions to further protect and safeguard the interests of the individual against the power of the State. The language of the statute, intention of the legislature and other factors stated above decide the results and impacts of non-compliance in the facts and circumstances of a given case, before the Court can declare a provision capable of such strict construction, to term it as absolutely mandatory or directory.

28. Having analysed the principles of statutory interpretation, I will now refer to the provisions of Section 17(3A) of the Act. Section 17 of the Act vests the appropriate Government with special powers to be exercised in cases of urgency. This provision falls within Part II of the Act. Part II of the Act deals with the entire scheme of acquisition of land by the State, right from the stage of issuance of a notification under Section 4 of the Act till making of an award taking possession of acquired land and its consequential vesting in the State. However, to some extent, the provisions of Section 17 of the Act are an exception to the provisions under Sections 4 to 16 of the Act. The distinguishing features of normal acquisition are that after the issuance of notification under Section 4 of the Act, the State must provide an opportunity to the owners of the land to object to the acquisition in terms of Section 5A of the Act, issue a declaration under Section 6 of the Act, issue notice under Section 9 of the Act and determine compensation by making an award under Section 11 of the Act. However, under the scheme of Section 17 of the Act, the Government can take possession of the property on the expiration of 15 days from publication of notice mentioned in Section 9(1) of the Act. Furthermore, the provisions of Section 5 of the Act, i.e., the right of the owner to file objection can be declared to be inapplicable. Besides these two significant distinctions, another

important aspect that the land vests in the Government under Section 16 of the Act only after the award is made and possession of the land is taken, while under Section 17(1), at the threshold of the acquisition itself, the land could vest absolutely in the Government free from all encumbrances. The possession of the acquired property has to be taken by the Collector in terms of Sections 17(2) and 17(3) of the Act. Section 17(3A) of the Act, as already noticed, was introduced by the Amendment Act 68 of 1984 for the purposes of safeguarding the interests of the claimants and required the payment of 80 per cent of the estimated compensation before taking possession. At this stage itself, it will be useful to refer to the relevant provisions of Section 17 of the Act.

Section 17 reads as under:

"17. Special powers in case of urgency. – (1) In cases of urgency whenever the appropriate Government, so directs, the Collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in section 9, sub-section (1) take possession of any land needed for a public purpose. Such land shall thereupon vest absolutely in the Government, free from all encumbrances.

(2) xxxxxx

(3) xxxxxx

(3A) Before taking possession of any land under sub-section (1) or sub-section (2), the Collector shall, without prejudice to the provisions of sub-section (3)(a) tender payment of eighty per centum of the compensation for such land as estimated by him to the person interested entitled thereto, and (b) pay it to them, unless prevented by some one or more of the contingencies mentioned in section 31, sub-section (2),and where the Collector is so prevented, the provisions of section 31, sub-section (2), (except the

second proviso thereto), shall apply as they apply to the payment of compensation under that section.

(3B) The amount paid or deposited under section (3A), shall be taken into account for determining the amount of compensation required to be tendered under section 31, and where the amount so paid or deposited exceeds the compensation awarded by the Collector under section 11, the excess may, unless refunded within three months from the date of Collector's award, be recovered as an arrear of land revenue.

(4) In the case of any land to which, in the opinion of the appropriate Government, the provisions of sub-section (1) or sub-section (2) are applicable, the appropriate Government may direct that the provisions of section 5A shall not apply, and, if it does so direct, a declaration may be made under section 6 in respect of the land at any time after the date of the publication of the notification under section 4, sub-section (1)."

29. Section 17(3A) of the Act makes it obligatory on the part of the authority concerned to tender/pay 80 per cent of the compensation for the acquired land, as estimated by the Collector, to the persons interested and entitled thereto; unless prevented by any of the contingencies mentioned under Section 31(2) of the Act. The use of the word 'shall' in Section 17(3A) indicates that the enactors of law desired that the above mentioned procedure should be complied with by the authority concerned prior to taking of possession. That is why the legislature has even taken care to make a provision for deposit of due compensation in court in terms of Section 31(2) of the Act, where an authority is prevented from tendering the amount to the claimants for reasons stated in Section 31(1) of the Act. 80 per cent of the estimated compensation is to be deposited in the Court to which reference under Section 18 of the Act would lie. This clearly shows that there is statutory obligation upon the authorities concerned to tender to the interested

persons, compensation in accordance with law. Deposit of money, certainly, is the condition precedent to taking of possession as is amply clear from the language 'before taking possession of any land'. The amount so deposited or paid in terms of Section 17(3A) of the Act will be taken into account for determining the amount of compensation required to be tendered under Section 31 of the Act and provides for the recovery of amounts if it exceeds the awarded amount. Section 17(3A) unambiguously provides a complete mechanism of taking possession and the requirement of payment of 80 per cent of estimated compensation to the claimants.

30. Now, I would examine **WHAT ARE THE CONSEQUENCES** of default in compliance to the provisions of Section 17(3A) of the Act. The said Section is completely silent on such consequences. Where the Legislature has, in specific terms, provided for the extent of payment, mode of payment and even the difficulties which are likely to arise, i.e, where a person may not be entitled to receive the compensation or in any other eventuality such as where the compensation cannot be paid for the reasons stated in Section 31(1) of the Act, there the Legislature in its wisdom has provided no contingencies and/or consequences of non-deposit of this money. This is in complete contradistinction to the provisions contained in Sections 6 and 11A of the Act. Section 6 provides that no declaration shall be issued where the period specified in the first proviso to Section 6(1) of the Act has expired. In other words, it spells out the consequences of failure to do an act within the stipulated period. Similarly, Section 11A of the Act provides that the acquisition proceedings shall lapse where the Collector fails to make an award within a period of two years from the date of publication of declaration under Section 6 of the Act.

31. Thus, the legislative intent is very clear. Keeping the objects and reasons for amendment in mind, the Act strives for a fair balance between the rights of private individuals and the

power of eminent domain of the State and also attempts to ensure expeditious disbursement of compensation, as determined in accordance with law, to the claimants. The legislature has provided for every contingency for tendering payment, while remaining silent about consequences flowing from default under some other provisions. Sections 11A and 17(3A) of the Act are clear illustrations of clarity and purpose in legislative intent. When the framers of law have not provided for any penal consequences for default in compliance to Section 17(3A), then it will be uncalled for to provide such consequences by judicial interpretation. While interpreting the provisions for compensation, the Court can provide such interpretation as would help to bridge the gaps left by the Legislature, if any, in implementation of the provisions of the Act. But it will hardly be permissible for the Court to introduce such consequences by way of judicial dicta, like requiring lapse of acquisition proceedings. This is not a matter covered by the principles of judicial interpretation.

32. It is a well settled canon of statutory interpretation that the courts would neither add nor subtract from the plain language of the statutory provision. In the present case also, there is hardly any justification for the courts to take any contrary view. Once the land has vested in the State and there being no provision for re-vesting the land in the original owners under the provisions of the Act, then it will be in consonance with the scheme of the Act and legislative intent to give an interpretation that would allow provisions of Section 17(1) to operate without undue impediment and keep the vesting of land in the State intact. Otherwise, in some cases the purpose for which such lands were acquired might stand frustrated, while in other cases the purpose of acquisition might have already been achieved and, therefore, divesting State of its title and possession in the acquired land will be incapable of performance. Under such circumstances, then, to interpret Section 17(3A) of the Act to be so mandatory in its absolute terms that the non-payment of money would result in vitiating or lapsing entire acquisition

proceedings, can hardly be justified on the strength of any known principle of interpretation of statutes. This question arises more often, as the provisions of Section 17 of the Act are being invoked by the Union of India and State Governments very frequently, so, the consequences of this default, within the framework of law and anything short of invalidation of the acquisition proceedings should be stated by the court with reference to the facts and circumstances of each case. It is a complete safeguard provided to the land owner inasmuch as the compensation stipulated under Section 17(3A) of the Act should be paid in terms of the provisions of the Act so that the owner is not made to suffer on both counts i.e. he is deprived of his land as well as compensation. It will be unfair for the authorities concerned not to pay the compensation as contemplated under the provisions of the Act. It would be just and fair to read into the provisions of the Section 17(3A) as imposing an obligation on the part of the authorities concerned/ the Collector to pay the compensation within the time specified under Section 17(3A). Of course, no specific time, within which the payment has to be made in terms of Section 17(1) has been stated in the provision. But, it is a settled principle of law that wherever specific limitations are not stated, the concept of 'reasonable time' would become applicable. So, even if it is argued that there is no specific time contemplated for payment/ deposit of 80 per cent of the estimated compensation, even then the claimants would be entitled to receive the amount expeditiously and in any case within very reasonable time. If the authorities are permitted to take possession of the land without payment of the amounts contemplated under Section 17(3A) of the Act, then it would certainly amount to abuse of power of *eminent domain* within its known legal limitations. The authorities should discern the distinction spelt out under Section 16 of the Act on the one hand and Section 17(1) read with Section 17(3A) of the Act on the other.

33. Let me examine the judgment of this Court dealing with the provisions of Section 17(3A) of the Act. The judgments of

different High Courts have been brought to the notice of this Court, taking divergent views on the question whether the provisions of Section 17(3A) are mandatory or directory. Some of these judgments, I would shortly refer to, if necessary. However, I may notice that none of these judgments have specifically discussed the consequences of non-adherence to the provisions of Section 17(3A) of the Act. A Bench of Delhi High Court in the case of *Banwari Lal & Sons Pvt. Ltd. vs. Union of India & Ors.*, [1991 (1) DRJ (Suppl.) 317 (Delhi Reported Journal)], whilst quashing the notification issued under Section 4 read with Section 17(1) of the Act on the ground of factual lack of urgency for acquisition, held that there was non-compliance to the provisions of Section 17(3A) of the Act. Of course, the High Court took the view that the notification issued under Section 4 read with Section 17(1) of the Act was not maintainable and while quashing the said notification, it also held that there was violation of provisions of Section 5A of the Act and, in fact, no urgency existed. There was no direct discussion as to whether the provisions of Section 17(3A) of the Act are mandatory or directory. However, this judgment neither provides any reasoning nor actually states the consequences of non-compliance with the provisions of Section 17(3A). For these reasons, this judgment is of no help to the parties appearing in the present appeal. Against the judgment of Delhi High Court in *Banwari Lal* (supra), the Special Leave Petition preferred before this Court was dismissed at the admission stage itself.

34. In the case of *Union of India & Ors. v. Krishan Lal Arneja & Ors.*, [(2004) 8 SCC 453], a part of the acquisition was challenged and writ petitions had been filed for quashing the notification dated 6th March, 1987 issued under Section 4 and Section 17(1) of the Act by Banwari Lal and other owners of the acquired lands. These writ petitions were allowed by a learned Single Judge of the High Court, appeal against which was dismissed by the Division Bench of the High Court. While considering the appeal against the order of the Division Bench,

this Court also dismissed the same. In the appeal, arguments had also been advanced that since the Government before this Court had not made the payment of 80 per cent of estimated compensation in terms of Section 17(3A) of the Act, the acquisition had lapsed. However, in paragraph 36 of that judgment, this Court declined to deal with these contentions as it had dismissed the appeal on other grounds. The Court incidentally observed that it was not a fair stand to be taken by the State before the Court to argue that it could de-notify the acquired land on the plea that it had failed to comply with the statutory provisions of the Act. In short, the question in controversy in the present case was not actually pronounced upon by the Court in that case.

35. The question of the provisions of Section 17(3A) of the Act being mandatory or directory again fell for consideration before this Court in the case of *Tika Ram & Ors. v. State of U.P. & Ors*. [(2009) 10 SCC 689]. In this case, challenge to the constitutional validity of the provisions of Section 17 was also made. The Court, while holding that the said provisions are constitutional, also declared that the provisions of Section 17(3A) were not mandatory and their non-compliance would not vitiate the whole acquisition proceedings. The following paragraphs of the judgment are relevant:

> "91. However, the question is as to what happens when such payment is not made and the possession is taken. Can the whole acquisition be set at naught?
>
> 92. In our opinion, this contention on the part of the appellants is also incorrect. If we find fault with the whole acquisition process on account of the non-payment of 80% of the compensation, then the further question would be as to whether the estimation of 80% of compensation is correct or not. A further controversy can then be raised by the landlords that what was paid was not 80% and was short of 80% and therefore, the acquisition should be set at naught. Such extreme interpretation cannot be afforded

because indeed under Section 17 itself, the basic idea of avoiding the enquiry under Section 5-A is in view of the urgent need on the part of the State Government for the land to be acquired for any eventuality discovered by either sub-section (1) or sub-section (2) of Section 17 of the Act.

93. The only question that would remain is that of the estimation of the compensation. In our considered view, even if the compensation is not paid or is short of 80%, the acquisition would not suffer. One could imagine the unreasonableness of the situation. Now suppose, there is state of emergency as contemplated in Section 17(2) of the Act and the compensation is not given, could the whole acquisition come to a naught? It would entail serious consequences.

94. This situation was considered, firstly, in *Satendra Prasad Jain* v*. State of U.P.* It was held therein that once the possession is taken as a matter of fact, then the owner is divested of the title to the land. The Court held that there was then no question of application of even Section 11-A. Commenting upon Section 11-A, it was held that that the Section could not be so construed as to leave the Government holding title or the land without an obligation to determine the compensation, make an award and pay to the owner the difference between the amount of the award and the amount of the 80% of the estimated compensation. The three-Judge Bench of the Court took the view that even where 80% of the estimated compensation was not paid to the landowners, it did not mean that the possession was taken illegally or that the land did not vest in the Government. In short, this Court held that the proceedings of acquisition are not affected by the nonpayment of compensation. In that case, the Krishi Utpadan Mandi Samiti, for which the possession was made, sought to escape from the liability to make the payment. That was not allowed. The Court, in para 17, held

as under : (Satendra Prasad Jain case, SCC p. 375, para 17)

> "17. In the instant case, even that 80% of the estimated compensation was not paid to the appellants although Section 17 (3-A) required that it should have been paid before possession of the said land was taken but that does not mean that the possession was taken illegally or that the said land did not thereupon vest in the first respondent. It is, at any rate, not open to the third respondent, who, as the letter of the Special Land Acquisition Officer dated 27.6.1990 shows, failed to make the necessary monies available and who has been in occupation of the said land ever since its possession was taken, to urge that the possession was taken illegally and that, therefore, the said land has not vested in the first respondent and the first respondent is under no obligation to make an award."

95. Further, in a judgment of this Court in *Pratap v. State of Rajasthan,* a similar view was reported. That was a case under the Rajasthan Urban Improvement Act, 1987, under which the acquisition was made using Section 17 of the Act. The Court took the view that once the possession was taken under Section 17 of the Act, the Government could not withdraw from that position under Section 18 and even the provisions of Section 11-A were not attracted. That was of course a case where the award was not passed under Section 11-A after taking of the possession. A clear-cut observation came to be made in that behalf in para 12, to the effect that the non-compliance with Section 17 of the Act, insofar as payment of compensation is concerned, did not result in lapsing of the land acquisition proceedings. The law laid down by this Court in Satendra Prasad Jain v. State of U.P. was approved. The Court also relied on

the decision in *P. Chinnanna v. state of A.P.* and *Awadh Bihari Yadav v. State of Bihar,* where similar view was taken regarding the land acquisition proceedings not getting lapsed. The only result that may follow by the non-payment would be the payment of interest, as contemplated in Section 34 and the proviso added thereto by the 1984 Act. In that view, we do not wish to further refer the matter, as suggested by Shri Trivedi, learned Senior Counsel and Shri Qamar Ahmad, learned counsel for the appellants. Therefore, even on the sixth question, there is no necessity of any reference."

36. As is obvious from the above paragraphs, there is an indefeasible obligation on the part of the Government to make the payment in terms of Section 17(3A) of the Act but non-compliance thereto could not result in vitiation of the acquisition proceedings. The observations made by this Court in the case of *Satendra Prasad Jain* (supra), in paragraph 17, suggest that the Government was required to hold title to the acquired land coupled with its obligation to determine the compensation, make the award and then to pay to the owner the difference between the amount of 80 per cent of the estimated compensation and the amount finally determined. The Court even went to the extent of observing that non-payment of 80 per cent of the estimated compensation *per se* does not mean that possession was taken illegally or that the said land did not thereupon vest in the Government. This decision does provide any reasoning and conclusions which support the view that Section 17(3A) of the Act is not a mandatory provision. Following this judgment, another Bench of this Court in the case of *Pratap & Anr. v. State of Rajasthan* [(1996) 3 SCC 1] took the same view.

37. However, another Bench of this Court, in the case of *Rajender Kishan Gupta v. Union of India* [(2010) 9 SCC 46], had made certain observations which were at some variance to the dicta of this Court in the cases referred above. In that case, neither the validity nor the effects of non-compliance with

Section 17(3A) of the Act were directly in issue. The challenge was to a notification issued under Section 4(1) of the Act for the land which was subsequently needed for the Metro Project in Delhi. The challenge was primarily based on the ground that the land could only be acquired under the Metro Rail Construction Works Act, 1978 and the emergency clause could not be used as a way to dispense with enquiry under Section 5A of the Act. The Court, while dismissing the appeal preferred by the claimants and rejecting the contentions in paragraph 29, made the following observations :

"In the light of the above discussion, we are satisfied that the existence of public purpose and urgency in executing the project before the Commonwealth Games, the adjoining land belonging to DDA being forest land as per the notification and also of the fact that the respondents have fully complied with the mandatory requirements including deposit of 80% of the compensation amount, we are in entire agreement with the stand taken by the respondents as well as the conclusion of the High Court."

38. The Bench, dealing with the matter, did use the expression 'mandatory requirements, including deposit of 80 per cent of the compensation amount', but there was no discussion or reasoning of the effects and consequences of such default, anywhere in the judgment, before it has been concluded that the said provisions are mandatory. Thus, these observations do not come to the aid of the appellants in challenging the entire acquisition proceedings on this ground.

39. Consistent with the view expressed by this Court in the cases referred (supra), I am of the considered view that the provisions of Section 17(3A) of the Act are not mandatory. Such a conclusion can safely be arrived at, even for the reason that the Court would have to read into the provisions of Section 17(3A) consequences and a strict period of limitation within which amount should be deposited, which has not been provided by the Legislature itself in that section. The

consequences and contingencies arising from non-compliance of the said provisions have not been stated in the Act. Once the land has vested in the Government, non-compliance with the obligation of payment of 80 per cent of estimated compensation would not render the possession taken under Section 17(1) as illegal. The land cannot be re-vested or reverted back to the claimants as no provisions under the Act so prescribe. Furthermore, if the interpretation put forward by the appellants is accepted, it would completely frustrate the objects and purpose of the Act, rather than advancing the same. The expression 'shall' used in Section 17(3A) has to be understood in its correct perspective and is not to be construed as suggestive of the provisions being absolutely mandatory in its application. *Inter alia* for these reasons and as per the above discussions, I hold that the provisions of Section 17(3A) are not mandatory. They are directive provisions, though their compliance is necessary in terms of the Act.

40. Having held as above, I hasten to add that the obligation on the part of the Government or concerned authority to deposit the amount prior to taking possession under Section 17(1) of the Act should essentially be complied with. The amount of 80 per cent of the estimated compensation in terms of Section 17(3A) should be deposited. Once we read the provisions of Sections 17(1) and 17(3A) conjunctively, it implies that the amounts are to be deposited within 15 days from the publication of the notice in terms of Section 9(1) of the Act and before taking of possession of the acquired land. The Legislature has sufficiently indicated that the payment of the due 80 per cent of compensation should be made at the earliest and, particularly, before possession is taken. Non-compliance of the provisions of Section 17(3A) would not vitiate the acquisition proceedings, but depending on the facts of a given case, the payment should be made within the time indicated and in any case within a reasonable time, and the claimant should then be entitled to additional benefits for such non-compliance. The Court would fill a part of the gap which has remained unfilled by the Legislature.

41. Irrespective of whether the provision is held to be mandatory or directory, compliance with its substance is equally important. In either case, the authority entrusted with a duty is not absolved of its obligation to perform the specified duty or obligation in the manner stated in law. It is primarily the consequences which result from non-performance of duty, which are of significance in determining the impact of mandatory or directory nature of a provision. Normally, in both cases, some consequences should flow from non-performance. Even if the provisions of Section 17(3A) are directory, as held by me above, the deposit of 80 per cent of estimated compensation within the period of limitation i.e. 15 days and prior to taking possession of the land, has to be made. There is no ambiguity in this requirement. Thus, it shall be the duty of the Court to fill the lacuna (i.e., the consequences of non-payment of compensation) to complete the chain of the legislative scheme contained in Section 17 of the Act. Having taken recourse to the emergency provisions and having taken possession of the land, the Government and its authorities cannot be permitted to defer the payment of the requisite amount, in terms of Section 17(3A) of the Act, indefinitely or for an unduly long period. A responsibility is cast upon the authorities concerned to make payments within time and not unduly cause inconvenience and harassment to persons interested in the compulsorily acquired land and who have been deprived of possessory benefits also. Persons who are so deprived of their land and possessory benefits thereof, are not in a position to carry out agricultural activity or derive any other benefit as they might have been deriving prior to compulsory acquisition/taking possession of the land. In other words, it is a case of deprivation of property and to some extent deprivation of sources of income. Without hesitation, the claimants/owners of land should be and ought to be entitled to certain additional benefits within the legislative framework of the Act. Certain additional and interest benefits are provided under Sections 23(1A), 23(2), 28 and 34 of the Act. The legislature has even taken care of providing higher rates of interest where the possession of

the land has already been taken and compensation has not been paid or deposited within the specified time or in the manner prescribed under Section 34 of the Act. Proviso to this Section states that where the compensation payable, or any part thereof, has not been paid or deposited within a period of one year from the date on which possession is taken, interest at the rate of 15 per cent per annum shall be payable from the date of expiry of the said period of one year, calculated on the amount of compensation or part thereof which has not been paid or deposited before the date of such expiry, until the time such payment is finally made. We have to read the provisions of Section 34 together with the provisions of Sections 17(1) and 17(3A) of the Act. They have to be construed harmoniously, keeping in mind the object sought to be achieved by a conjoint reading of these provisions. The expression 'before taking possession of the land' has been used in Section 17 read with Section 17(3A) and in Section 34 as well. Once the Government has invoked the emergency provisions, it is pre-supposed that the Government needs the land urgently and, in its wisdom, has decided that it is not in public interest to go through the normal procedure prescribed for acquisition and payment of compensation under Part II of the Act. It requires immediate possession of the land for achievement of the purpose for which land was required. As the Government would take possession by depriving the land owners of some of their rights, as would have been available to them under normal acquisition procedure, the Legislature has created special safeguards in their favour. Firstly, they would be given 15 days notice prior to taking of possession of the land (Section 9(1) of the Act). Secondly, 80 per cent of the estimated compensation shall be paid to them in terms of Section 17(3A) of the Act, before the possession is taken. Thus, the Legislature has balanced the rights and obligations between the parties. Section 34, therefore, cannot be read so as to destroy the protections or safeguards provided to claimants/owners of the land under Section 17 of the Act. These provisions must be read harmoniously. These provisions should be construed so

as to give benefit to the owners of the land against compulsory acquisition, rather than accepting an interpretation which would defeat the benefits intended by the Legislature. The Legislature was fully aware of the provisions of Section 34 while introducing Section 17(3A) into the Act, as both the provisions were introduced by the same Amending Act of 1984. This clearly demonstrates the legislative intent that the protections specified under Section 17(1) would operate in their own field and the provisions of Section 34 would also apply in its own sphere. It will be unfair, if the Government takes possession of the property within 15 days of the notice issued under Section 9(1) (as is contemplated under Section 17(1) of the Act) and does not make payment of compensation for a long period, with no additional liability whatsoever. It appears to me that this is not the legislative intent that the Government would not be liable to pay higher rate of interest where it has taken possession of the land in exercise of its powers under Section 17 of the Act. It will be unfair if the liability to pay higher rate of interest in terms of Section 34 would arise only after a period of one year from the date of possession even in cases of emergent acquisition. Such an interpretation may result in frustrating the balance sought to be created by the Legislature. For these reasons, I am of the considered view that the statutory benefit contained in Section 34 of the Act should be made applicable to the provisions of Section 17(1) read with Section 17(3A) in the manner that it would give the requisite benefit to the owners/claimants of the land rather than deprive them of both, their land and income, without any additional benefit despite non-compliance of the provisions of the Act. Thus, the owners/claimants should be entitled to receive, on the strength of these provisions and alike, the interest payable under the proviso to Section 34 i.e. interest at the rate of 15 per cent per annum from the date of expiry of the period of 15 days as stated under Section 17(1) and from taking of possession of the land from the owners/persons interested in the land till payment of compensation in terms of Section 17(3A) of the Act.

42. These conditions have to be satisfied cumulatively and not alternatively, to give rise to the liability to pay interest of 15 per cent from the date afore-stated. This approach that I am adopting is restricted in application to the acquisitions made by the Government in exercise of its emergency powers under Section 17 of the Act. Section 34 would otherwise operate in its own sphere and only after the lapse of the period specified in the proviso. The conclusion of the above discussion is that non-compliance of provisions of Section 17(1) read with Section 17(3A) would not render the acquisition proceedings invalid or void *ab initio* in law however, liability to pay interest at the rate of 15 per cent per annum would arise from the date and for the period afore-noticed.

Do the provisions of Section 11A apply to the acquisition proceedings commenced by the Government in exercise of its powers of urgency under Section 17 of the Act?

43. I have already noticed that Section 11A of the Act was introduced into the statute book by the Legislature vide Land Acquisition (Amendment) Act (68 of 1984). This provision was introduced primarily to provide safeguards and to secure the interests of owners/persons interested, whenever their land was acquired under the provisions of the Act. Section 11A of the Act reads as under :

> **"11A. Period within which an award shall be made.—** (1) The Collector shall make an award under section 11 within a period of two years from the date of the publication of the declaration and if no award is made within that period, the entire proceedings for the acquisition of the land shall lapse:
>
> Provided that in a case where the said declaration has been published before the commencement of the Land Acquisition (Amendment) Act, 1984, the award shall be made within a period of two years from such commencement.

> Explanation.-In computing the period of two years referred to in this section the period during which any action or proceeding to be taken in pursuance of the said declaration is stayed by an order of a Court shall be excluded."

44. A bare reading of the above provision shows that the Legislature places an obligation upon the Collector to make an award at the earliest. Wherever the award under Section 11 of the Act has not been made within two years from the date of publication of the declaration, the entire proceedings for acquisition of land shall lapse. Explanation to Section 11A of the Act further excludes from this period, any period during which any action or proceeding, to be taken in pursuance of the said declaration, is stayed by an order of a Court which had been in force. Exclusion of no other period is contemplated under this provision. Thus, a definite intention of the framers of law is clear that the award should be made at the earliest and, in any case, within a maximum period of two years from the declaration under Section 6 of the Act, if the acquisition proceedings are to survive. The acquisition under the Act being compulsory acquisition, a safeguard or right has been provided to the private party against the State. Thus, the statute imposes a duty upon the State to act within time and also provides for consequences that shall ensue in the event of default. These consequences are of a very serious nature, whereby the entire acquisition proceedings shall stand lapsed. This would render the land free from acquisition or any restriction and title over the land would stand reverted to the owners/persons interested.

45. I have already discussed in some detail the principles which will help the Court in determining whether a provision is directory or mandatory. It is clear from the substance of the language and from the intention of the legislature that the right created in favour of the citizen and the duties imposed on the State should be construed strictly. Section 11A of the Act provides for discharge of obligations within the specified time and there are serious consequences of such non-fulfillment.

This would clearly lead to the conclusion that the provisions of Section 11A of the Act are capable of strict construction and are mandatory in their application. In number of cases, including the case of *Mohan & Anr. v. State of Maharahtra* [(2007) 9 SCC 431], this Court has already held that Section 11A of the Act is mandatory. This view, with respect, and for the reasons recorded above, I follow.

46. A three-Judge Bench of this Court in the case of *Satendra Prasad Jain* (supra) went further to specifically consider the question as to whether the provisions of Section 11A of the Act were attracted and, if so, whether they should be strictly construed and where the possession of the acquired land is taken and it is vested in the Government under Section 17 of the Act, whether the acquisition proceedings could lapse in terms of Section 11A of the Act. Answering the question in the negative, the Court stated that the Government could not withdraw from the acquisition under Section 48 of the Act and claim the benefit of its own default in not making an award within the period of two years. The Court laid down the following dictum:

> **"15.** Ordinarily, the Government can take possession of the land proposed to be acquired only after an award of compensation in respect thereof has been made under Section 11. Upon the taking of possession the land vests in the Government, that is to say, the owner of the land loses to the Government the title to it. This is what Section 16 states. The provisions of Section 11-A are intended to benefit the landowner and ensure that the award is made within a period of two years from the date of the Section 6 declaration. In the ordinary case, therefore, when Government fails to make an award within two years of the declaration under Section 6, the land has still not vested in the Government and its title remains with the owner, the acquisition proceedings are still pending and, by virtue of the provisions of Section 11-A, lapse. When Section 17(1) is applied by reason of urgency, Government takes

> possession of the land prior to the making of the award under Section 11 and thereupon the owner is divested of the title to the land which is vested in the Government. Section 17(1) states so in unmistakable terms. Clearly, Section 11-A can have no application to cases of acquisitions under Section 17 because the lands have already vested in the Government and there is no provision in the said Act by which land statutorily vested in the Government can revert to the owner.
>
> **16.** Further, Section 17(3-A) postulates that the owner will be offered an amount equivalent to 80 per cent of the estimated compensation for the land before the Government takes possession of it under Section 17(1). Section 11-A cannot be so construed as to leave the Government holding title to the land without the obligation to determine compensation, make an award and pay to the owner the difference between the amount of the award and the amount of 80 per cent of the estimated compensation."

47. This judgment was followed by another Bench of this Court in the case of *Awadh Bihari Yadav & Ors. v. State of Bihar & Ors.* [(1995) 6 SCC 31], which held, "…we, therefore, hold that the land acquisition proceedings in the instant case did not lapse…".

48. The principle of law stated in *Satendra Prasad Jain* (supra) was again followed by this Court in the case of *P. Chinnanna & Ors. v. State of A.P. & Ors.* [(1994) 5 SCC 486] and *Pratap* (supra) and in the case of *Allahabad Development Authority v. Nasiruzzaman & Ors.* [(1996) 6 SCC 424], this Court held as under :

> "In the impugned judgment, it would appear that the learned Judges asked the counsel to verify whether the award came to be made within two years, as indicated. The counsel on verification had stated that the award was

not made within two years from the commencement of the Amendment Act, namely, 24-9-1984. Consequently, the declaration was given that the notification under Section 4(1) and the declaration under Section 6 stood lapsed. This question was examined by this Court in *Satendra Prasad Jain v. State of U.P.* and *Awadh Bihari Yadav v. State of Bihar* and held that Section 11-A does not apply to cases of acquisitions under Section 17 where possession was already taken and the land stood vested in the State. The notification under Section 4(1) and declaration under Section 6 do not lapse due to failure to make an award within two years from the date of the declaration. The view of the High Court is erroneous in law."

49. In a very recent judgment of a Division Bench of this Court, (to which, one of us, Asok Kumar Ganguly, J. was a member) in the case of *Banda Development Authority, Banda v. Moti Lal Agarwal & Ors.* [2011 (5) SCALE 173], this Court followed the aforesaid view with further clarification. Usefully, paragraphs 33, 36 and 38 of the said judgment can be referred to at this stage, which read as under :

"33. XXX XXX XXX

... v) If beneficiary of the acquisition is an agency/ instrumentality of the State and 80% of the total compensation is deposited in terms of Section 17(3A) and substantial portion of the acquired land has been utilized in furtherance of the particular public purpose, then the Court may reasonably presume that possession of the acquired land has been taken.

XXX XXX XXX

36. Once it is held that possession of the acquired land was handed over to the BDA on 30.6.2001, the view taken by the High Court that the acquisition proceedings had lapsed due to non-compliance of Section 11A cannot be sustained…...

XXX XXX XXX

38. In the result, the appeal is allowed. The impugned order is set aside and the writ petition filed by Respondent No. 1 is dismissed with cost quantified at Rs. 1,00,000/-. Respondent No. 1 shall deposit the amount of cost with the Appellant within a period of two months from today."

50. However, the learned counsel appearing for the appellant has placed reliance upon a judgment of this Court in the case of *Yusufbhai Noormohmed Nendoliya* v. *State of Gujarat* [(1991) 4 SCC 531] to contend that the provisions of Section 11A of the Act are applicable to the acquisition under Section 17 as well. For non-adherence to those provisions, the entire acquisition proceeding should be declared to have lapsed and the applicants should be entitled to their lands free from any encumbrance. Let me analyze this judgment to appreciate the contention raised by the counsel appearing for the appellants. In this case, the appellants were occupants of the lands sought to be acquired by the State of Gujarat for the purposes of establishing North Gujarat University and notification under Section 6 of the Act in respect of the said land was issued on 12th May, 1988. An interim order restraining the State from taking possession was granted by the Court. However, the Acquisition Officer proceeded to issue a notice under Section 9(1) of the Act and determined the compensation payable. As the award had not been made, the appellants therein had made a representation to the Government that the award had not been made within the period of two years mentioned under Section 11A of the Act and, therefore, the acquisition proceedings had lapsed. This plea was rejected. The appellants filed an application challenging the said decision, praying for a declaration that the acquisition proceedings had lapsed. The Division Bench of the Gujarat High Court took the view that the explanation to Section 11A is not confined to stay of making of the award pursuant to

notification under Section 6, but it is widely worded and covers in its sweep the entire period during which any matter or proceedings due to be taken are stayed by a competent Court. This decision was challenged before this Court. In other words, this Court, in *Yusufbhai* (supra), was primarily concerned with the interpretation of Explanation to Section 11A of the Act and was determining the period which needs to be excluded while computing the limitation period of two years provided for the making of an award. While rejecting the view taken to the contrary by a Single Judge of the Kerala High Court, this Court made a reference to taking of possession under Section 17 of the Act and held :

> "In the first place, as held by the learned Single Judge himself, where the case is covered by Section 17, the possession can be taken before an award is made and we see no reason why the aforesaid expression in the Explanation should be given a different meaning depending upon whether the case is covered by Section 17 or otherwise… The benefit is that the award must be made within a period of two years of the declaration, failing which the acquisition proceedings would lapse and the land would revert to the landholder…".

51. It is obvious from a bare reading of the above observation that the question of applicability of Section 11A to acquisition proceedings under Section 17 was not in issue before the Court. This controversy was neither argued nor was it even remotely necessary for the adjudication of the dispute between the parties. These observations are merely an *obiter* of the Court, which is made to support its conclusion in paragraph 8 of the judgment and cannot be treated as *ratio decidendi* of the judgment or a precedent for the proposition raised in the present case. The learned counsel attempted to argue that the expression 'whether the case is covered by Section 11 or otherwise' unequivocally states the principle of law that Section 11A is applicable to the present case. I am

unable to accept this contention as it is not an authority for the proposition. This controversy was never raised before the Bench. The argument raised on behalf of the appellants is, therefore, misplaced.

52. A half hearted attempt was also made by the learned counsel for the appellants to advance the argument that there is difference of opinion by equi Benches of this Court, in the case of *Satendra Prasad Jain* (supra) on the one hand and *Yusufbhai Noormohmed Nendolia* (supra) on the other and, therefore, this matter should be referred to a larger Bench. I am not impressed with this contention at all. There is no conflict. *Satendra Prasad Jain* (supra) lays down the law and on true application of the principle of *ratio decidendi,* it is a direct precedent for the proposition involved in the present case. I can squarely answer the questions of law arising in the present case with reference to the settled principles and, therefore, have no hesitation in rejecting this request made on behalf of the appellants.

53. Let me also examine the other reasons which will support the view taken by this Court in *Satendra Prasad Jain* (supra) and followed in subsequent cases referred above. Section 17(1) of the Act uses the expression 'though no such award has been made'. This clearly demonstrates that making of an award is not a *sine qua non* for issuance of a notification under Section 4(1) read with Section 17(1) of the Act or even taking possession in terms thereof. After publication of a notification under Section 4 read with Sections 17(1) and 17(4) of the Act, the authority is obliged only to publish a notice under Section 9(1) of the Act and comply with the provisions of Section 17(3A) before it can take possession within the stipulated period. *Once possession of the land is taken, it shall thereupon vest absolutely in the Government free from all encumbrances.* In other words, Section 17(4) itself is a permissible exception to the provisions of Section 11 of the Act and, therefore, the question of enforcing Section 11A against

proceedings under Section 17 would not arise. Under Section 16, the land shall vest in the Government free from all encumbrances only after the award is made and possession is taken. In contradistinction to this, under Section 17(1) the land shall vest absolutely in the Government free from all encumbrances even when no award is made and possession thereof is taken in terms of Sections 17(1) and 17(3A) of the Act. We have to give the language of Section 17(1) its plain meaning, within the field of its operation. Another reason in support of taking such a view is that, once such possession is taken and the land is so vested, the Act does not make any provision for re-vesting of land in the owners/persons interested. Reversion of title or possession of property acquired, which has vested in the Government or in the authority for whose benefit such lands are acquired, is unknown to the scheme of the Act. To introduce such a concept by interpretative process would neither be permissible nor proper.

Discussion on reverting back of land to the owners in terms of Section 48 of the Act

54. A Constitution Bench of this Court (to which I was a member) in the recent judgment in the case of *Offshore Holdings Pvt. Ltd. v. Bangalore Development Authority & Ors.* [(2011) 3 SCC 139], while dealing with the provisions of Sections 27 and 36 of the Bangalore Development Authority Act read with the provisions of the Land Acquisition Act and while referring to non-reversion of property to owners where it is vested in the Government, held as under :

> "Where, upon completion of the acquisition proceedings, the land has vested in the State Government in terms of Section 16 of the Land Acquisition Act, the acquisition would not lapse or terminate as a result of lapsing of the scheme under Section 27 of the BDA Act. An argument to the contrary cannot be accepted for the reason that on vesting, the land stands transferred and vested in the State/Authority free from all encumbrances and such status

> of the property is incapable of being altered by fiction of law either by the State Act or by the Central Act. Both these Acts do not contain any provision in terms of which property, once and absolutely, vested in the State can be reverted to the owner on any condition. There is no reversal of the title and possession of the State. However, this may not be true in cases where acquisition proceedings are still pending and land has not been vested in the Government in terms of Section 16 of the Land Acquisition Act."

55. As already discussed, no award is required to be made before the provisions of Section 17(1) can be invoked. Such an approach is further buttressed by another factor that is reflected under Section 17(3B) of the Act. The amount of 80 per cent of the estimated compensation deposited under Section 17(3A) of the Act is to be finally adjusted against the award made under Section 11 in terms of Section 17(3B) of the Act. A cumulative reading of these provisions clearly suggests that provisions of Section 11A of the Act can hardly be applied to the acquisition under Section 17 of the Act.

Another point which would support the view that I am taking is with reference to the provisions of Section 48 of the Act. Section 48 empowers the Government to withdraw from the acquisition of the land of which possession has not been taken. Where the Government withdraws from such an acquisition, it is its duty to determine the amount of compensation for the damages suffered by the owners as a consequence of the notice or any other proceeding taken thereunder, which amounts have to be paid as per provisions of Part III. Section 48, thus, is a clear indication that the power of the Government to withdraw the acquisition is subject to the limitation stated under Section 48 itself. The scheme of Section 48 can be summarized as follows:

> A. Except in cases provided under Section 36, the Government has the power to withdraw from the

acquisition of any land;

B. Provided the possession of such land had not been taken;

C. Government is liable to pay compensation for the damages suffered by the owner as a consequence of notice or any proceeding thereunder which have to be computed in accordance with the provisions of Part III.

56. There is no ambiguity in the language of Section 48 of the Act to give it any other interpretation except that the Government is not vested with the power of withdrawing from the acquisition of any land, of which the possession has been taken. Where the award has been made and possession has been taken, the land vests in the Government in terms of Section 16 of the Act. On the contrary, the land vests absolutely in the Government free from all encumbrances where award has not been made and only possession as contemplated under Section 17(1) of the Act has been taken. If the Government has no power to withdraw from acquisition of any land, the possession of which has been taken, then by no stretch of imagination can it be held that the Government will have the power to withdraw from the acquisition of any land where the land has vested in the Government or the land has been subsequently transferred in favour of an authority for whose development activity the lands were acquired. In the case of *Lt. Governor of Himachal Pradesh and Anr. v. Avinash Sharma* [(1970) 2 SCC 149], this Court took the view that once the notification under Section 17(1) of the Act is issued and land accordingly vested with the Government, the notification can neither be cancelled under Section 21 of the General Clauses Act nor can it be withdrawn in exercise of powers conferred by the Government under Section 48 of the Act. This Court in *Avinash Sharma's case* (supra) held as under:

"But these observations do not assist the case of the

appellants. It is clearly implicit in the observations that after possession has been taken pursuant to a notification under Section 17(1) the land is vested in the Government, and the notification cannot be cancelled under Section 21 of the General Clauses Act, nor can the notification be withdrawn in exercise of the powers under Section 48 of the Land Acquisition Act. Any other view would enable the State Government to circumvent the specific provision by relying upon a general power. When possession of the land is taken under Section 17(1), the land vests in the Government. There is no provision by which land statutorily vested in the Government reverts to the original owner by mere cancellation of the notification."

57. In another case titled *Rajasthan Housing Board and Others v. Shri Kishan and Others* [(1993) 2 SCC 84], this Court was concerned with a notification issued under Section 4 of the Act and also a notification issued a few days after the issuance of the first notification, under Section 17(4) of the Act. These were challenged on the ground that there was no urgency and so, the provisions of Section 5A of the Act could not be dispensed with and that there were structures on the land which could not have been acquired. An argument was also raised that the Government had intended and, in fact, issued letters de-notifying the lands acquired and, thus, they should be treated as having been de-notified as per the decision of the Government. In these circumstances, the Court held as under:

"26. We are of the further opinion that in any event the government could not have withdrawn from the acquisition under Section 48 of the Act inasmuch as the Government had taken possession of the land. Once the possession of the land is taken it is not open to the government to withdrawn from the acquisition. The very letter dated 24.2.1990 relied upon by the counsel for the petitioner recites that "before restoring the possession to the society the amount of development charges will have to be returned

back....” This shows clearly that possession was taken over by the Housing Board. Indeed the very tenor of the letter is, asking the Housing Board as to what development work they had carried out on the land and how much expenditure they had incurred thereon, which could not have been done unless the Board was in possession of the land. The Housing Board was asked to send the full particulars of the expenditure and not to carry on any further development works on that land. Reading the letter as a whole, it’ cannot but be said that the possession of the land was taken by the government and was also delivered to the Housing Board. Since the possession of the land was taken, there could be no question of withdrawing from the acquisition under Section 48 of the Land Acquisition Act, 1894.”

58. In the case of *Sanjeevanagar Medical & Health Employees’ Cooperative Housing Society v. Mohd. Abdul Wahab and Others* [(1996) 3 SCC 600], it was held that the acquired land had already been transferred to the society for the benefit of which the lands were acquired, by invoking the urgency clauses. The question of reverting acquired land had not arisen in this case directly, as the Court was primarily concerned with the contention that the notification issued under Section 4 was liable to be quashed. A question, with regard to inconsistency between the Central and the State Acts, was also raised. The Court, in paragraph 12 of the judgment, held that by operation of Section 16, land had been vested in the State free from all encumbrances and while referring to the judgment of this Court in *Satendra Prasad Jain* (supra) reiterated the principle that ‘Divesting the title to the land statutorily vested in the Government and reverting the same to the owner is not contemplated under the Act. Only Section 48 gives power to withdraw from acquisition that too before possession is taken.’

59. This principle was followed by another Bench of this Court in the case of *Bangalore Development Authority and*

Others v. R. Hanumaiah and Others [(2005) 12 SCC 508] wherein, it was held as follows:

“46. The possession of the land in question was taken in the year 1966 after the passing of the award by the Land Acquisition Officer. Thereafter, the land vested in the Government which was then transferred to CITB, predecessor-in-interest of the appellant. After the vesting of the land and taking possession thereof, the notification for acquiring the land could not be withdrawn or cancelled in exercise of powers under Section 48 of the Land Acquisition Act. Power under Section 21 of the General Clauses Act cannot be exercised after vesting of the land statutorily in the State Government.”

60. Similarly, even in the case of *National Thermal Power Corporation Limited v. Mahesh Dutta and Others* [(2009) 8 SCC 339], the Government had desired to withdraw lands from acquisition after the lands had vested in it, in exercise of its power under Section 48 of the Act. Rejecting the contention of the State in paragraph 16 of the judgment, the Court stated that ‘it is a well settled proposition of law that in the event the possession of the land, in respect whereof a notification had been issued, had been taken over, the State would be denuded of its power to withdraw from the acquisition in terms of Section 48 of the Act.’ The Court then went to the extent of expressing the view that the possession taken may be symbolic or actual.

61. I must notice that in the case of *U.P. Jal Nigam, Lucknow through its Chairman and Another v. Kalra Properties (P) Ltd., Lucknow & Others* [(1996) 3 SCC 124], a Bench of this Court had made a passing observation in paragraph 3 of the judgment:

“It is further settled law that once possession is taken by operation of Section 17(2), the land vests in the State free from all encumbrances unless a notification under Section 48(1) is published in the Gazette withdrawing from the

acquisition. Section 11A, as amended by the Act of 68 of 1984, therefore, does not apply and the acquisition does not lapse".

62. The aforesaid observations that the State may issue 'a notification under Section 48(1)' and this notification may be 'published in the Gazette withdrawing from the acquisition', are nothing but an *obiter* of the Court without any discussion thereto. The question whether the acquisition proceedings lapse or that the notification cancelling acquisition could be issued after the possession is taken, where the land has vested in the Government did not arise in that case. The Court was primarily concerned with three main questions:

1. What was the effect of possession of land subsequent to notification issued under Section 4(1) of the Act?

2. Whether the provisions of Section 11A of the Act would apply to the acquisition under Section 17(1) read with Section 17(4) of the Act? and

3. How the market value should be determined?

63. Firstly, if the said interpretation is given, it shall be contrary to the specific language of Section 48 of the Act. Secondly, the learned Judges did not refer to any judgment of this Court while making the observation that 'it is further settled law'. I have referred to the consistent view of this Court right from the year 1970 till 2011 and no judgment to the contrary has been brought to the notice of the Court. Thus, I must hold that the observations made in paragraph 3, as reproduced, are merely an *obiter* and not a binding precedent.

64. The lands which have been acquired under the provisions of Section 17 of the Act are incapable of being reverted to the owners/persons interested. The Act does not make any such provision and, thus, the Court is denuded of any such power. The Court must exercise its power within the framework of law, i.e., the provisions of the Act.

65. In the case of an ordinary acquisition, if the land has vested in the State Government then neither the Government nor the court can take recourse to the provisions of Section 48(1) of the Act, there the question of applying Section 11A of the Act to acquisition proceedings under Section 17 of the Act cannot arise, as it would tantamount to achieving something indirectly which would be impermissible to be achieved directly. For all the above reasons, I hold that Section 11A of the Act has no application to the acquisition proceedings under the provisions of Section 17 of the Act.

66. There is no dispute in the present case that the provisions of Section 11A of the Act have not been complied with. Admittedly, the notification under Section 4(1) read with Section 17(4) was published on 17th April, 2002, declaration under Section 6 was made on 22nd August, 2002 and the possession of the property was taken on 4th February, 2003. The award has been made on 9th June, 2008, much after the expiry of the prescribed period of two years under Section 11A of the Act. There being an admitted violation of the provisions of Section 11A of the Act, the natural consequence is that its rigours would be attracted. However, the most pertinent question that arises for consideration is: whether the provisions of Section 11A of the Act are applicable to the acquisition of land under Section 17 of the Act?

67. The main thrust of submissions on behalf of the appellants is that the provisions of Section 11A of the Act would be attracted even to the acquisition proceedings undertaken by the appropriate Government in exercise of powers vested in it under Section 17 of the Act. It is contended that Section 17 in the scheme of the Act is at parity to the normal and ordinary process of acquisition except that it is a power to be exercised in urgent basis. The other provisions like publication of notification under Section 4, declaration under Section 6, notice under Sections 9 and 12 and passing of award under Section 11 of the Act are argued to be essential features of

an acquisition made under Section 17 of the Act as well. Thus, it is submitted that the provisions of Section 11A of the Act would also apply to an acquisition made under Section 17 of the Act. If an award is not made within two years from the date of declaration under Section 6 of the Act, the acquisition proceedings should lapse irrespective of whether the acquisition had commenced under Section 4 by invoking powers of urgency or otherwise. It is argued that there is no justification, whatsoever, for excluding the application of Section 11A of the Act from acquisitions made under Section 17 of the Act. On the contrary, the contention on behalf of the respondents is that provisions of Section 11A of the Act have no application to the provisions of Section 17 of the Act. In fact, there is an apparent, though limited, conflict between these provisions. The very purpose and object of the Act would stand defeated if provisions of Section 11A of the Act are applied to the acquisitions under Section 17 of the Act.

68. I may now examine the scheme of the Act, with particular reference to the difference between acquisitions in exercise of emergent powers under Section 17 of the Act and the acquisitions made otherwise. In both the cases, notification under Section 4(1) has to be published in accordance with the provisions of the Act. Notification under Section 4 is a *sine qua non* for commencement of the acquisition proceedings and this has been the consistent view of this Court right from the case of *Narender Jeet Singh v. State of U.P.* [(1970) 1 SCC 125] wherein the Court clearly held that issuance of a notification under sub-section (1) of Section 4 is a condition precedent to exercise of any further powers under the Act and the notification issued under that provision should comply with the essential requirements of law under that provision. Thereafter, the owners/persons interested have to be given an opportunity to file objections as contemplated under Section 5A of the Act and after granting them hearing, a declaration under Section 6 of the Act has to be published. Subsequent to the publication of such a declaration, notice under Section 9(1) of

the Act has to be issued stating the intention of the Government to take possession of the land and that claims for compensation and for all interests in such land may be made to the competent authority. Following the procedure prescribed, an award has to be made under Section 11 of the Act awarding compensation for acquisition of the land with its complete details. Under the scheme of the Act, in the event of an ordinary acquisition in contradistinction to acquisition in exercise of emergent powers, if the award is not made within a period of two years from publication of the declaration under Section 6, the acquisition proceedings would lapse. In these proceedings, the possession of the land remains with the claimant/owners of the land and it is only when the award becomes final in terms of Section 12 of the Act, possession of the land is taken and the acquired land vests in the Government free from all encumbrances under Section 16 of the Act.

69. Where the lands are acquired in exercise of emergent powers of the State under Section 17 of the Act, a notification under Section 4(1) of the Act is issued and the notification itself refers to the provisions of Section 17(1) as well as Section 17(4) of the Act. A specific power is vested in the appropriate Government to declare that provisions of Section 5A would not be applicable to such acquisition. Therefore, there is no obligation upon the Collector/authority concerned to invite and decide upon objections in terms of Section 5A of the Act, prior to publication of a declaration under Section 6 of the Act. However, notice under Section 9(1) of the Act has to be published to completely and fully invoke the powers vested in the State for taking possession of the land, in terms of Section 17(1) of the Act. After the expiry of 15 days from such publication under Section 9(1), the possession of the land can be validly taken by the Government, whereupon the land would vest absolutely in the Government, free from all encumbrances. In other words, for proper computation of the specified period of 15 days, issuance of notification under Section 9(1) of the Act would be necessary, but it cannot be held to be mandatory

in its operation so as to render the execution proceedings invalid. In the case of *May George* (supra), a Bench of this Court has expressed the view that the notification under Section 9(1) of the Act as contemplated under Section 17(1) of the Act is not mandatory.

70. Before the Government takes possession of the land in exercise of its powers under Section 17(1) of the Act, it has to comply with the requirements of Section 17(3A) of the Act. The amount so paid, if falls short, and/or is in excess of compensation actually due to the land owners, the same shall be determined and adjusted while making the final award under Section 11 of the Act. It is evident that both these acquisitions have distinct schemes of acquisition. Section 17 of the Act itself refers to some other provisions, like Sections 5A, 9, 11, and 31 of the Act. Wherever such reference was considered necessary by the Legislature, it has been so made. Thus, there is no occasion for the Court to read into Section 17, the language of Section 11A of the Act which has not been provided by the Legislature; more so when doing so would destroy or frustrate the very object of the urgent acquisition. Marked distinction between the implementation of these two types of acquisition schemes contained in the Act is clearly suggestive that these schemes operate in their respective fields without any contradiction. Hence, the Court would adopt an interpretation which would further such a cause, rather than the one which will go contra to the very scheme of the Act.

In my considered view, it will be difficult for me to hold that the provisions of Section 11A of the Act, despite being mandatory, would apply to the scheme of acquisition contained under Section 17 of the Act.

Whether the Claimants can be granted any relief even on equitable grounds?

71. The facts, as already noticed by me above, are hardly in dispute. Admittedly, the possession of the land had been

taken on 4th February, 2002 and the Writ Petition No. 2225 was filed by the petitioners in the year 2006 i.e. after the possession has been taken. In terms of Section 17(1) of the Act, the land has been vested absolutely and free from all encumbrances in the Government. After vesting of the land, the development activity had been carried out over the years and it is informed that Sector 88, NOIDA is fully developed and operational.

72. Once the development activity has been completed in the entire sector, will it be equitable to release the lands from acquisition? Even if for the sake of argument, it is assumed that there is some merit in the contention raised on behalf of the appellant, the answer has to be in the negative. It is settled canon of equitable jurisdiction that the person who feels aggrieved by an action of the State should approach the Court without any unnecessary delay, particularly in cases such as the present one. While the notification under Section 4 read with Sections 17(1) and 17(4) of the Act was issued on 14th April, 2002 and possession taken on 4th February, 2003 the writ petitions in question were filed in August 2006, i.e., more than four years subsequent to the issuance of the notification under Section 4. It was contended that the cause of action to challenge the acquisition proceedings arose only after the period of two years had lapsed from the date of issuance of the notification. Even if that be so, still there is an unexplained and undue delay of more than two years in approaching the Court. This would itself disentitle the appellants to claim any equitable relief in the facts and circumstances of the present case.

73. I must not be understood to say that in every case of delay, *per se*, the Court would decline to exercise its jurisdiction if the party to the *lis* can otherwise be granted relief in accordance with law. This has to be decided keeping in view the facts and circumstances of a given case.

74. It is not in dispute and, in fact, can hardly be disputed that in the intervening period of nearly ten years, the acquired

areas have fully developed. Not only this, it is informed during the course of hearing that the award was finally made by the authorities on 9th June, 2008 and has been accepted by nearly 97.6 per cent of the owners whose lands were acquired vide the said notification. In other words, nearly all land owners have accepted the award and permitted the development activity to be carried out. This conduct of the owners as a whole would again be a factor which will weigh against the grant of any relief to the appellants. Huge amounts of money and resources of the State, as well as other bodies or persons have been invested on the development of this sector which is stated to be an industrial sector. It will be unjust and unfair to uproot such a developed sector on the plea raised by the present appellants. In this view, I am fully supported by the judgment of a Division Bench of this Court, to which my learned brother (Ganguly, J.) was a member, in the case of *Tamil Nadu Housing Board v. L. Chandrasekaran (Dead) by Lrs. & Ors.* [(2010) 2 SCC 786]. The Bench was primarily dealing with the question of re-conveyance of the acquired lands on the grounds of discrimination and arbitrariness. The High Court had passed a direction against the Board to re-convey the acquired land, which was held by this Court, on appeal, to be contrary to the provisions of Section 48 of the Act. This Court settled the point of law holding that it is not appropriate for the Court to quash the acquisition proceedings at the instance of one or two land owners, where the development had taken place and majority of the land owners had not challenged the acquisition. The Court, while relying upon the case of *A.S. Naidu v. State of Tamil Nadu* [(2010) 2 SCC 801] held as under:

> **"15.** The first issue which requires consideration is whether the order passed by this Court in *A.S. Naidu case* has the effect of nullifying the acquisition in its entirety. In this context, it is apposite to mention that neither the appellant Board nor have the respondents placed before the Court copies of the writ petitions in which the acquisition proceedings were challenged, order(s) passed by the High

Court and the special leave petitions which were disposed of by this Court on 21-8-1990[3] and without going through those documents, it is not possible to record a finding that while disposing of the special leave petitions preferred by A.S. Naidu and others, this Court had quashed the entire acquisition proceedings. So far as A.S. Naidu is concerned, he did not even make a prayer before the High Court for quashing the preliminary notification issued under Section 4(1) of the Act.

16. This is evident from the prayer made by him in Writ Petition No. 7499 of 1983, which reads as under:

> "For the reasons stated in the accompanying affidavit, it is most respectfully prayed that this Hon'ble Court may be pleased to issue a writ of *certiorari* or any other proceeding or any other appropriate writ or direction or order in the nature of a writ to call for the records of the first respondent relating to GOMs No. 1502, Housing and Urban Development Department dated 7-11-1978 published in the Tamil Nadu Government Gazette Extraordinary dated 10-11-1978 in Part II Section 2 on pp. 22 to 26 and quash the said notification issued under Section 6 of the Land Acquisition Act, 1894 insofar as it relates to the land in the petitioners' layout approved by the Director of Town Planning in LPDM/DTP/2/75 dated 7-3-1975 in Survey Nos. 254, 257, 258, 260, 268 and 271 in Mogapperi Village, No. 81, Block V, Saidapet Taluk, Chingleput District and render justice."

From the above reproduced prayer clause, it is crystal clear that the only relief sought by Shri A.S. Naidu was for quashing the notification issued under Section 6 insofar it related to the land falling in Survey Nos. 254, 257, 258, 260, 268 and 271 in Mogapperi Village, No. 81, Block V, Saidapet Taluk and in the absence of a specific prayer

having been made in that regard, neither the High Court nor this Court could have quashed the entire acquisition. This appears to be the reason why the Division Bench of the High Court, while disposing of Writ Appeals Nos. 676 of 1997 and 8-9 of 1998 observed that quashing of acquisition by this Court was only in relation to the land of the petitioner of that case and, at this belated stage, we are not inclined to declare that order dated 21-8-1990[3] passed by this Court had the effect of nullifying the entire acquisition and that too by ignoring that the appellant Board has already utilised portion of the acquired land for housing and other purposes. Any such inferential conclusion will have disastrous consequences inasmuch as it will result in uprooting those who may have settled in the flats or houses constructed by the appellant Board or who may have built their houses on the allotted plots or undertaken other activities.

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26. A glance at the impugned order shows that the Division Bench did not at all advert to the factual matrix of the case and the reasons incorporated in the Government's decision not to reconvey the acquired land to the respondents. The Division Bench also did not examine the correctness or otherwise of the order passed by the learned Single Judge and allowed the appeals preferred by the respondents simply by relying upon order dated 18-2-2000 passed in Writ Appeal No. 2430 of 1999 and that too without even making an endeavour to find out whether the two cases were similar. In our view, the direction given by the Division Bench to the appellant Board to reconvey the acquired land to the respondents is per se against the plain language of Section 48-B of the Act in terms of which only the Government can transfer the acquired land if it is satisfied that the same is not required for the purpose for which it was acquired or for any other public purpose. The appellant Board is not an authority

competent to transfer the acquired land to the original owner. Therefore, the Division Bench of the High Court could not have issued a mandamus to the appellant Board to reconvey the acquired land to the respondents. As a matter of fact, the High Court could not have issued such direction even to the Government because the acquired land had already been transferred to the appellant Board and the latter had utilised substantial portion thereof for execution of the housing scheme and other public purposes.

27. There is one more reason why the impugned judgment deserves to be set aside. Undisputedly, the land of the respondents forms part of large chunk which was acquired for execution of the housing scheme. The report sent by the appellant Board to the State Government shows that the purpose for which the land was acquired is still subsisting. The respondents had neither pleaded before the High Court nor was any material produced by them to show that the report which formed basis of the Government's decision not to entertain their prayer for reconveyance of the land was vitiated by mala fides or that any extraneous or irrelevant factor had influenced the decision-making process or that there was violation of the rules of natural justice. Therefore, the Division Bench of the High Court could not have exercised the power of judicial review and indirectly annulled the decision contained in communication dated 18-3-1999.

28. It need no emphasis that in exercise of power under Section 48-B of the Act, the Government can release the acquired land only till the same continues to vest in it and that too if it is satisfied that the acquired land is not needed for the purpose for which it was acquired or for any other public purpose. To put it differently, if the acquired land has already been transferred to other agency, the Government cannot exercise power under Section 48-B of the Act and reconvey the same to the original owner. In any case, the

Government cannot be compelled to reconvey the land to the original owner if the same can be utilised for any public purpose other than the one for which it was acquired."

75. I am of the considered view that what has been stated by the learned Judges in that case is squarely applicable, even on facts, to the present case. Firstly, there is no merit in the contentions of law raised by the appellants, which I have already rejected. Secondly, even on equity, the appellants have no case.

76. Before I part with this file, I cannot ignore one very important aspect which has come to my notice during the hearing of the case and which, as stated at the Bar, is an often repeated default on the part of the Government Departments causing undue inconvenience, harassment, hardship and ultimately resulting in the acquisition itself being inequitable against the land owners/persons interested therein. The declaration under Section 6 was made on 22nd August, 2002, the notice under Section 9(1) had been issued and possession of the land was taken on 4th February, 2003. In the normal course and as per the requirements of the provisions of Section 17(3A) read with Section 17(1), 80 per cent of the estimated compensation ought to have been paid to the owners of the land/persons interested, within that period prior to taking possession and/or, in any case, within a very limited and reasonable time. This I am only noticing subject to my finding that there is unequivocal statutory obligation upon the respondents to pay the amount prior to taking possession of the land in question. However, the award made on 9th June, 2008 would have otherwise vitiated the entire acquisition proceedings, but for the fact that, as held by me above and for reasons recorded supra that Section 11A does not apply to the acquisition made in exercise of emergent powers in terms of Section 17 of the Act. Still, to do things within a reasonable time is an obligation of the State, as is imposed by the Legislature itself and even otherwise as per the canons of proper governance, i.e., *vigilantibus, non dormientibus, jura subveniunt*, which means the laws assist those who are vigilant,

not those who sleep over their rights. According to Respondent No.2, they had deposited 10 per cent of the estimated compensation prior to issuance of notification under Section 4, i.e., 17th April, 2002 and 70 per cent of the amount was deposited with the Government on 8/14th July, 2002 by a cheque. The amount deposited was nearly Rs. 6,66,00,000/- and odd. For reasons best known to the State Government, this amount was not disbursed to the claimants until passing of the award. In other words, the amount was made available to the Government and its authorities for disbursement to the owner/claimants prior to (or soon after) taking of the possession, which was taken on 4th February, 2003, but still the claimants were deprived of their legitimate dues without any justification or reason. In order to show this, learned counsel appearing for respondent No.2 had even shown the records to the Court. It was also the duty of respondent No.2 to ensure that the payments were made to the claimants prior to taking of possession but, in any case, it was an unequivocal statutory obligation on the part of the State/Collector to ensure that the payments were made to the claimants in terms of Section 17(1) read with Section 17(3A) prior to taking of possession. No justification whatsoever had been advanced and can be advanced for such an intentional default and the casual attitude of the concerned officers/officials in the State hierarchy.

77. These authorities are instrumentalities of the State and the officers are empowered to exercise the power on behalf of the State. Such exercise of power attains greater significance when it arises from the statutory provisions. The level of expectation of timely and just performance of duty is higher, as compared to the cases where the power is executively exercised in discharge of its regular business. Thus, all administrative norms and principles of fair performance are applicable to them with equal force, as they are to the Government department, if not with a greater rigour. The well established precepts of public trust and public accountability are fully applicable to the functions which emerge from the

public servants or even the persons holding public office. In the case of *State of Bihar v. Subhash Singh* [(1997) 4 SCC 430], this Court, in exercise of the powers of judicial review, stated that the doctrine of 'full faith and credit' applies to the acts done by the officers in the hierarchy of the State. They have to faithfully discharge their duties to elongate public purpose.

78. The concept of public accountability and performance of functions takes in its ambit, proper and timely action in accordance with law. Public duty and public obligation both are essentials of good administration whether by the State or its instrumentalities. In the case of *Centre for Public Interest Litigation & Anr. v. Union of India & Anr.* [(2005) 8 SCC 202], this Court declared the dictum that State actions causing loss are actionable under public law. This is a result of innovation, a new tool with the courts which are the protectors of civil liberties of the citizens and would ensure protection against devastating results of State action. The principles of public accountability and transparency in State action are applicable to cases of executive or statutory exercise of power, besides requiring that such actions also not lack *bona fides*. All these principles enunciated by the Court over a passage of time clearly mandate that public officers are answerable for both their inaction and irresponsible actions. If what ought to have been done is not done, responsibility should be fixed on the erring officers; then alone, the real public purpose of an answerable administration would be satisfied.

79. The doctrine of 'full faith and credit' applies to the acts done by the officers. There is a presumptive evidence of regularity in official acts, done or performed, and there should be faithful discharge of duties to elongate public purpose in accordance with the procedure prescribed. Avoidance and delay in decision making process in Government hierarchy is a matter of growing concern. Sometimes delayed decisions can cause prejudice to the rights of the parties besides there being violation of the statutory rule. This Court had occasion

to express its concern in different cases from time to time in relation to such matters. In the case of *State of Andhra Pradesh v. Food Corporation of India* [(2004) 13 SCC 53], this Court observed that it is a known fact that in transactions of Government business, no one would own personal responsibility and decisions would be leisurely taken at various levels.

80. Principles of public accountability are applicable to such officers/officials with all their rigour. Greater the power to decide, higher is the responsibility to be just and fair. The dimensions of administrative law permit judicial intervention in decisions, though of administrative nature, which are *ex facie* discriminatory. The adverse impact of lack of probity in discharge of public duties can result in varied defects, not only in the decision making process but in the final decision as well. Every officer in the hierarchy of the State, by virtue of his being 'public officer' or 'public servant', is accountable for his decisions to the public as well as to the State. This concept of dual responsibility should be applied with its rigours in the larger public interest and for proper governance.

81. I find no justification, whatsoever, for the Government, despite deposit by the beneficiary, not to pay 80 per cent of the estimated compensation due to the claimants within the requisite time and not even within the reasonable time. It was breach of statutory and governance obligation of the State's officers/officials to pay the amount to the claimants after more than five years. It is expected of the State officers not to forget that these are compulsory acquisitions in exercise of State's power of eminent domain and the legislative intent behind providing safeguards and some benefits against such acquisition ought not to be frustrated by inaction and omissions on the part of the officers/officials. There being patent unexplained mistakes, omissions and errors, committed by the officers/officials in the State of Uttar Pradesh in dealing with this entire matter, I hereby impose cost of ' 1,00,000/- on the State Government which at the first instance shall be paid by

the State to the owners of the land, i.e., present appellants or persons situated alike. However this amount shall be recovered from the salary of all the officers/officials found guilty by the State which shall conduct an inquiry for that purpose in accordance with law. The inquiry shall be completed within a period of six months from today and a report shall be submitted to the Secretary General of this Court on the administrative side. Imperatively, it must follow that the Central Government and all State Governments must issue appropriate directions to ensure that there is no harassment, hardship or inequality caused to the owners/persons interested in the lands acquired by the State, in exercise of its powers of eminent domain under Section 17(1) of the Act. Wherever the payments are not made within time and appropriate steps are not taken to finalize the acquisition of the land, the concerned Government should take appropriate disciplinary action against the erring officers/ officials involved in and responsible for the process of acquisition.

82. I will prefer to record my conclusions and also answer the four legal questions ('A' to 'D') as framed in the judgment by my learned brother. They are as follows:

(A) I hold and declare that Section 11A of the Act has no application to the acquisition proceedings conducted under the provisions of Section 17 of the Act;

Once the acquired land has vested in the Government in terms of Section 16 or 17(1) of the Act, possession of which has already been taken, such land is incapable of being re-vested or reverted to the owners/persons interested therein, for lack of any statutory provision for the same under the Act.

(B) The provisions of Section 17(3A) of the Act, on their bare reading, suggest that the said provision is

mandatory but, as no consequences of default have been prescribed by the Legislature in that provision, thus, it will hardly be permissible for the Court to read into the said provision any drastic consequences much less lapsing of entire acquisition proceedings. In other words, default in complying with provisions of Section 17(3A) cannot result in invalidating or vitiating the entire acquisition proceedings, particularly when the possession of the acquired land has been taken and it has vested in the Government free from all encumbrances.

(C) Keeping in view the scheme of the Act, the provisions of Section 17 of the Act can be construed strictly but such interpretation must be coupled with the doctrine of literal and contextual interpretation, while ensuring that the object of the legislation is not defeated by such an interpretation. Strict compliance to the conditions contemplated under Section 17 of the Act should be given effect to but within the framework of the statute, without making any additions to the language of the section.

(D) Once the right to property ceases to be a Fundamental Right after omission of Articles 19(1)(f) of the Constitution of India, the addition of Articles 31A and 300A by the 44th Constitutional Amendment, 1978, cannot place the legal right to property at the same pedestal to that of a fundamental right falling under Chapter III of the Constitution. It has been clearly held by the Courts that the provisions of the Land Acquisition Act are not violative of Article 14 of the Constitution. The rights of the citizens and interest of the State can be balanced under the provisions of the Act, without any violation of the Constitutional mandate.

83. Besides answering the questions of law and stating

my conclusions as above, it is both appropriate and necessary to pass certain directive orders to ensure the maintenance of balance between the might of the State on the one hand and the rights of land owners on the other. It is, therefore, necessary to issue the following directions :

(i) The Government/acquiring authority shall be liable to pay interest at the rate of 15 per cent per annum with reference to or alike the provisions of Section 34 of the Act, after the expiry of 15 days from issuance of notification under Section 9(1) of the Act, and from the date on which the possession of the land is taken, till the amount of 80 per cent of the estimated compensation is paid to the claimants.

84. In the facts of the present case, it is clear that 80 per cent of the estimated compensation had been deposited by the beneficiary. However, it is no way clear on record that these amounts had actually been received by the owners/interested persons. Where the amounts have been paid beyond the period as stated in Section 17(3A), the claimants still would be entitled to the rate of interest afore-indicated. Interest should be computed from the date of the notification till the date of payment to the claimants. The Government is also liable to pay interest as afore-indicated on the balance amount determined upon making of an award in accordance with Section 11 of the Act.

(ii) The Central Government and all the State Governments shall issue appropriate and uniform guidelines, within 8 weeks from today, to ensure that the land owners and the persons interested in the lands cquired by the State or its instrumentalities are not put to any undue harassment, hardship and inequity because of inaction and omission on the part of the acquiring authority, in cases of urgent acquisition under Section 17 of the Act. The

Government should ensure timely action for acquisition and payment of compensation in terms of the provisions of the Act, particularly Section 17(3A) of the Act, as explained in this judgment.

(iii) Wherever the Government exercises its power under Section 17(1) of the Act and there is default in deposit of the amount in terms of Section 17(3A) of the Act, as explained in this judgment, the concerned Government shall take appropriate disciplinary action against the erring officers/officials including making good the loss caused to the Government revenue on account of the liabilities towards interest or otherwise, because of such undue delay on the part of such officers/officials;

(iv) In this case, the claimants would be entitled to the cost of Rs. 1,00,000/- (Rupees one lakh only) which shall be deposited at the first instance by the State Government of Uttar Pradesh and then would be recovered from the salaries of the defaulting/erring officers/officials in accordance with law. The inquiry shall be completed within a period of six months from today and a report shall be submitted to the Secretary General of this Court on the administrative side immediately thereafter.

In result, the appeal is accordingly dismissed with the above directions.

O R D E R

In view of the divergence of opinion on conclusions and also on various legal questions discussed in two separate judgments by us, the matter is required to be placed before the Hon'ble the Chief Justice of India for reference to a larger Bench to resolve the divergent views expressed in both the judgments and to answer the questions of law framed.

N.J. Matter Referred to Larger Bench.