MOHAN SINGH
v.
STATE OF BIHAR
(Criminal Appeal No.663 of 2010)

AUGUST 26, 2011

[ASOK KUMAR GANGULY AND DEEPAK VERMA, JJ.]

Penal Code, 1860:

s.302 – Murder – Threatening calls received by the informant for extortion of money and threat to his brother's life allegedly made by the appellant – Informant identified the voice as that of the appellant – Informant's brother and father shot at resulting in death of his brother – Trial court convicting appellant for conspiracy of murder and extortion of money – High Court upheld the same – On appeal, held: Courts below considered the evidence of the two investigating officers, apart from the evidence of informant and the other witnesses and the materials on record before coming to the conclusion that appellant was guilty – The fact that the name of registered allottees of the SIM cards of these mobile phones could not be traced was not relevant in this connection – Evidence of informant that he knew the voice of the appellant was not challenged – Evidence of investigating officer that eight calls were recorded between the mobiles of the appellant and his conspirator was also not challenged – Substantive evidence was placed to prove the meeting of minds and criminal conspiracy between the appellant and conspirator about the murder of the victim – There is no reason to interfere with the concurrent finding – Conviction upheld.

Appeal:

Concurrent findings of courts below – Appeal before Supreme Court – Scope of interference – Held: After a

concurrent finding by two courts normally the Supreme Court in an appeal against such finding is slow and circumspect to upset such finding unless Supreme Court finds the finding to be perverse.

Plea – Fresh plea – Plea relating to errors in framing of charge/misjoinder of charge raised before the Supreme Court for the first time – Held: Such plea is not normally considered by the Supreme Court.

Code of Criminal Procedure, 1973:

ss.211 to 215 – If the ingredients of the section charged with are obvious and implicit, conviction under such head can be sustained irrespective of the fact whether the said section has been mentioned or not in the charge – Omission or defect in framing of charge would not disable the criminal court from convicting the accused for the offence which is found to have been proved on the evidence on record.

ss.211 to 215 – Framing a charge – Purpose of – Held: Is to give intimation to the accused of clear, unambiguous and precise notice of the nature of accusation that the accused is called upon to meet in the course of a trial – In the instant case from the evidence led by the prosecution the charge of murder was brought home against the appellant – The accused had clear notice of what was alleged against him and he had adequate opportunity of defending himself against what was alleged against him – No prejudice was caused to him nor was there any failure of justice for non-mentioning of s.302 IPC in the charge since all the ingredients of the offence were disclosed – In the charge it was clearly mentioned that the accused has committed the murder – By mentioning that the accused has committed the murder all the ingredients of the charge were mentioned and the requirement of s.211, sub-section (2) was complied with.

The prosecution case was that the informant received

phone calls from the appellant few days prior to the incident of murder demanding RS.50,000/- and threatening him that non fulfillment of the demand of money would result in dire consequences. On the fateful day, informant received a call from his driver to the effect that the informant's brother and father were shot at while they were in their shop and that both were taken to hospital. The brother of the informant died. The informant was told that the shots were fired by one 'LS' and 'NS'. The informant lodged complaint wherein he stated that his family knew the appellant and 'LS' from an earlier incident in 2004, when on the occasion of Durga Puja, similar demand was made and a complaint was made about that incident at the police station and that he identified the voice of the telephone caller as that of the appellant. These statements were supported by the informant's father and the other brother.

The trial court found the appellant guilty. On appeal, the High Court upheld the conviction on the ground that the informant himself and his family knew the appellant and 'LS' from before.

In the instant appeal, it was contended for the appellant that he cannot be convicted under Section 120-B, IPC and given the sentence of rigorous imprisonment for life in view of the charges framed against the appellant.

Dismissing the appeal, the Court

HELD: 1. Admittedly, no complaint of any prejudice was raised by the appellant either before the trial court or in the High Court or in the course of examination under Section 313 Cr.P.C. These points were raised before this Court for the first time. In a case where points relating to errors in framing of charge or even misjoinder of charge are raised before this Court for the first time, such grievances are not normally considered by this Court. The

purpose of framing a charge is to give intimation to the accused of clear, unambiguous and precise notice of the nature of accusation that the accused is called upon to meet in the course of a trial. There is no doubt that in the instant case from the evidence led by the prosecution the charge of murder was brought home against the appellant. The accused had clear notice of what was alleged against him and he had adequate opportunity of defending himself against what was alleged against him. No prejudice was caused to him for non-mentioning of Section 302 I.P.C. in the charge since all the ingredients of the offence were disclosed. The appellant had full notice and had ample opportunity to defend himself against the same and at no earlier stage of the proceedings, the appellant had raised any grievance. An overall consideration of the facts and circumstances of this case would show that the appellant did not suffer any prejudice nor was there any failure of justice. In the charge it was clearly mentioned that the accused-appellant has committed the murder. By mentioning that the accused has committed the murder all the ingredients of the charge were mentioned and the requirement of Section 211, sub-section (2) was complied with. [Paras 13, 14, 16, 23, 25, 28, 29] [338-G-H; 339-A; 339-F; 343-F; 344-E; 345-B-E]

V.C. Shukla v. State Through C.B.I. **1980 Suppl SCC 92;** *K. Prema S. Rao and another v. Yadla Srinivasa Rao and others* **(2003) 1 SCC 217: 2002 (3) Suppl. SCR 339;** *Dalbir Singh v. State of U.P.* **(2004) 5 SCC 334 – followed.**

Willie (William) Slaney v. State of Madhya Pradesh **(1955) 2 SCR 1140;** *Tulsi Ram and others v. State of Uttar Pradesh* **AIR 1963 SC 666: 1963 Suppl. SCR 382;** *State of Andhra Pradesh v. Cheemalapati Ganeswara Rao and another* **AIR 1963 SC 1850: 1964 SCR 297;** *Rawalpenta Venkalu and another v. The State of Hyderabad* **AIR 1956 SC**

171; *State of Uttar Pradesh v. Paras Nath Singh* **(2009) 6 SCC 372: 2009 (8) SCR 85;** *Annareddy Sambasiva Reddy and others v. State of Andhra Pradesh* **(2009) 12 SCC 546: 2009 (6) SCR 755 – relied on.**

Mangal Singh and others v. State of Madhya Bharat **AIR 1957 SC 199 – referred to.**

2. The appellant was in jail at the time of the commission of the offence. His involvement in the whole episode was argued for only on the evidence of PW.4 who is said to have identified his voice on the basis of some telephone calls. These are essentially questions of fact and after a concurrent finding by two courts normally this Court in an appeal against such finding is slow and circumspect to upset such finding unless this Court finds the finding to be perverse. However, on the legal issue one thing is clear that identification by voice has to be considered by this Court carefully and on this aspect some guidelines have been laid down by this Court in the case of **Kirpal Singh*. PW.4 in his evidence clearly stated that the appellant gave him a phone call asking for money on 23.7.2005 and again on 25.7.2005 when the appellant threatened him of dire consequences for not paying the money. PW.4 also stated in his evidence that he got an ID caller installed in his phone and he informed the police of the phone number of the caller which was of the appellant. PW.4 also stated in his evidence that he had direct talks with the appellant at hospital chawk prior to the incident when he used to demand money from him and other shopkeepers at the time of Durga Puja and Saraswati Puja and that he can identify the voice of the appellant. The first I.O. of the case (PW.6) in his evidence also stated that during investigation, mobile No.9835273765 of the appellant was found and mobile No.9431428630 of 'LS' was also found. PW. 8, the other I.O. of the case stated that on 23.7.2005, four calls were made between the mobile phones of 'LS' and the

appellant. Then six more calls were made by 'LS' to the appellant on 3.08.2005, i.e. on the day of the incident itself. The printout details of these phone calls were produced before the Court. So both the trial court and High Court considered the evidence of PW.6 and PW.8, apart from the evidence of PW.4 and the other witnesses and the materials on record before coming to the conclusion. The fact that the name of registered allottees the SIM cards of these mobile phones could not be traced is not relevant in this connection. The evidence of PW.4 that he knows the voice of the appellant or that the mobile no. 9835273765 was not that of the appellant was not challenged. The evidence of PW.8 that on 3.8.2005 eight calls were recorded between the mobiles of the appellant and his conspirator 'LS' was also not challenged. There was enough evidence to furnish reasonable ground to believe that both the appellant and 'LS' had conspired together for committing the offence. The substantive evidence was placed to prove the meeting of minds and criminal conspiracy between the appellant and 'LS' about the murder of the victim. There is any reason to interfere with the concurrent finding. There was no reason to take a view different from the one taken by the High Court. [Paras 30-33, 35, 37, 40, 42] [345-F-H; 346-A; 346-F-H; 347-A-D; 348-C-D; 349-A; 350-A-F]

Kirpal Singh v. The State of Uttar Pradesh* **AIR 1965 SC 712: 1964 SCR 992 – relied on.

Nilesh Dinkar Paradkar v. State of Maharashtra **(2011) 4 SCC 143;*Inspector of Police,*** *Tamil Nadu v. Palanisamy alias Selvan* **(2008) 14SCC 495: 2008 (14) SCR 126 – distinguished.**

Saju v. State of Kerala **(2001) 1 SCC 378: 2000 (4) Suppl. SCR 621;***Yogesh alias Sachin Jagdish Joshi v. State of Maharashtra* **(2008) 10SCC 394: 2008 (6) SCR 1116 – held inapplicable.**

S. Arul Raja v. State of Tamil Nadu **(2010) 8 SCC 233;** *Mohd. Khalid v. State of West Bengal* **(2002) 7 SCC 334: 2002 (2) Suppl. SCR 31 – referred to.**

Case Law Reference:

AIR 1957 SC 199	**referred to**	**Para 14**
1980 Suppl SCC 92	**followed**	**Para 16**
(1955) 2 SCR 1140	**relied on**	**Para 19, 20**
1963 Suppl. SCR 382	**relied on**	**Para 21**
1964 SCR 297	**relied on**	**Para 22**
AIR 1956 SC 171	**relied on**	**Para 23**
2002 (3) Suppl. SCR 339	**followed**	**Para 24**
(2004) 5 SCC 334	**followed**	**Para 25**
2009 (8) SCR 85	**relied on**	**Para 26**
2009 (6) SCR 755	**relied on**	**Para 27**
1964 SCR 992	**relied on**	**Para 32, 33**
(2011) 4 SCC 143	**distinguished**	**Para 34**
2008 (14) SCR 126	**distinguished**	**Para 35**
2000 (4) Suppl. SCR 621	**held inapplicable**	**Para 36**
2008 (6) SCR 1116	**held inapplicable**	**Para 38**
(2010) 8 SCC 233	**referred to**	**Para 40**
2002 (2) Suppl. SCR 31	**referred to**	**Para 41**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 663 of 2010.

From the Judgment & Order dated 03.09.2008 of the High Court of Patna in Criminal Appeal No. 1138 of 2007.

V. Sivasubramanian, Md. Azam Ansari, Mohan Kumar, Roshni Singh, Sachin Das, Tanmaya Mehta (for Gopal Singh), Anshul Narayan (for Prem Prakash) for the appearing parties.

The Judgment of the Court was delivered by

GANGULY, J. 1. This criminal appeal has been preferred from the judgment of the High Court in Criminal Appeal (DB) No. 1338 of 2007, dated 3.9.2008, whereby the High Court upheld the judgment and order of conviction passed by the learned Additional Sessions Judge, Fast Track Court–IV, Motihari, East Champaran in Sessions Trial No. 101/16 of 2006/2007. The learned Sessions Court held the appellant guilty of criminal conspiracy for murder under sections 120B of IPC and of extortion under section 387 of IPC and sentenced him to undergo rigorous imprisonment for life and was fined for Rs.25,000/- for the offence of criminal conspiracy for murder under section 120B, in default of which he was to further undergo simple imprisonment for 1 year. He was further sentenced for seven years rigorous imprisonment under section 387 IPC and was fined Rs.5,000/-, in default of which to undergo simple imprisonment for six months.

2. The facts of the case are that the informant Shri Vikas Kumar Jha gave a *fardbeyan* to the effect that at about 5.00 P.M. on 23.7.2005, he had received a call on his telephone number 06252-239727, inquiring about his elder brother Shri Anil Kumar Jha. The informant stated before the police that his elder brother, the owner of a medical store, on the said date had been out of town. He submitted that he had communicated the same to the caller. Upon such reply, the caller disclosed himself as Mohan Singh, the appellant herein, and asked the informant to send him Rs.50,000/-. The informant submitted that he had similar conversations with the caller three to four times in the past. However, he then received another telephone call

on 25.7.2005 from a cell phone number 9835273765. The caller threatened him that since the demand of money had not been fulfilled, the informant should be ready to face the consequences.

3. Upon his elder brother's return, the informant had narrated the events to him. However, his elder brother did not take the threat seriously.

4. On 3.8.2005, at about 9.00 P.M. when the informant was at a place called Balua Chowk, he had received a call from his driver Shri Dhanai Yadav on his cell phone to the effect that informant's elder brother and their father, Shri Sureshwar Jha, had been shot at while they were in their medical store, and that both of them had been rushed to Sadar Hospital. On reaching Sadar Hospital, the informant saw the dead body of his elder brother. He was intimated by the people there that his father had been shifted to another hospital called Rahman's Nursing Home. He was also told that the shots had been fired by one Laxmi Singh and Niraj Singh. Having heard this, the informant rushed to Rahman's Nursing Home, where his injured father told him that while Niraj Singh cleared the medical store of all the other people, Laxmi Singh had fired shots at him and Anil Kumar Jha with an A.K. 47 rifle, before fleeing from the scene. After narrating such events, his father became unconscious.

5. The informant further stated that his family had actually known the appellant and Laxmi Singh from an earlier incident in 2004, when on the occasion of Durga Puja, the two had sent a messenger to Anil Kumar Jha's medical store, demanding Rs.50,000/- or to face death in the alternative. He submitted that pursuant to this, they had preferred a complaint before the police, and that the matter was *sub judice*. He further stated that he had actually met the appellant once prior to the telephone calls when the latter had asked for money, as contribution for celebrations of Sarswati Puja and Durga Puja. The informant thus stated that his father and brother had been

attacked by Laxmi Singh and Niraj Singh at the instance of Mohan Singh for not having paid the extortion money. The informant said so on the identification of the voice of the telephone caller as that of the appellant. He, however, did not follow up the calls made on 23rd and 25th of July, 2005 either with the appellant in person, or with the authorities of Motihari jail where the appellant was in fact lodged at the time of the calls. These statements of the informant were supported by the informant's father Sureshwar Jha, and his other brother Sunil Kumar Jha.

6. On the basis of this *fardbeyan,* Motihari Town Police Station Case No.246/2005 was registered on 3.8.2005 against the appellant Mohan Singh, Laxmi Singh, Niraj Singh and others. The investigating officer submitted that he had known the appellant to have as many as seven criminal cases for murder, kidnapping for ransom and loot, pending against him. However, he submitted that he had received the phone number attributed to the appellant only from the informant. Though he submitted that as many as nine calls had been made between the phone numbers attributed to the appellant and Laxmi Singh, and that he had retrieved the records of calls made by the number attributed to the appellant and that of the informant, he had not been able to establish as to who were the registered owners of the SIM cards.

7. The learned Sessions Court in the course of trial took note of the fact that identities of the registered owners of the said SIM cards had not been established by the police, but it did not give much emphasis on this on the grounds that the informant's family had known the appellant and Laxmi Singh long enough and had known about their common intention to extort money. On these findings the learned Sessions Court found the appellant guilty.

8. On appeal the learned Division Bench upheld the conviction inter alia on the grounds that the informant himself

and his family had known the appellant and Laxmi Singh from before.

9. Even though the High Court in the impugned judgment held that identification by voice and gait is risky, but in a case where the witness identifying the voice had previous acquaintance with the caller, the accused in this case, such identification can be relied upon. The High Court also held that direct evidence in a conspiracy is difficult to be obtained. The case of conspiracy has to be inferred from the conduct of the parties. The High Court relied upon the evidence of the informant, PW.4 and on Exts. 9 and 10 where the conversation between PW.4 and the appellant was recorded. The High Court also relied upon the evidence of PW.1 Dhanai Yadav, who was sitting inside the medical store of the deceased Anil Kumar Jha at the time of the incident. PW.1 was a witness to the incident of Laxmi Singh firing shots at the deceased and his father Sureshwar Jha. The High Court also relied upon the evidence of PW.2 Surehswar Jha, the injured witness. The High Court found that the evidence of PW.2 and 4 is unblemished and their evidence cannot be discarded. The High Court also relied upon the evidence of PW.4 as having identified the voice of the appellant.

10. On appreciation of the aforesaid evidence, the High Court came to the conclusion that Mohan Singh was performing one part of the act, and Laxmi Singh performed another part, both performing their parts of the same act. Thus the case of conspiracy was made out.

11. Assailing such finding of the Sessions Court which has been affirmed by the High Court, the learned Counsel appearing for the appellant argued that the appellant cannot be convicted under section 120-B and given the sentence of rigorous imprisonment for life in view of the charges framed against the appellant.

12. In order to appreciate this argument, the charges framed against the appellant are set out below:

> "FIRST - That you, on or about the day of at about or during the period between 23.7.05 & 3.8.05 agreed with Laxmi Narain Singh, Niraj Singh & Pankaj Singh to commit the murder of Anil Jha, in the event of his not fulfilling your demand, as extortion of a sum of Rs.50,000/- and besides the above said agreement you did telephone from Motihari Jail to Vikash Jha in pursuance of the said agreement extending threat of dire consequences if the demand was not met and then on 3.8.05 the offence of murder punishable with death was committed by your companions Laxmi Narain Singh and Niraj Singh and you thereby committed the offence of criminal conspiracy to commit murder of Anil Jha and seriously injured Sureshwar Jha and thereby committed an offence punishable under Section 120-B of the Indian Penal Code, and within my cognizance.
>
> SECONDLY - That you, during the period between 23.7.05 & 3.8.05 at Hospital gate Motihari P.S., Motihari Town Dist. East Champaran, Put Vikash Jha in fear of death and grievous hurt to him and his family members in order to commit extortion on telephone and thereby committed an offence punishable under Section 387 of the Indian Penal Code, and within my cognizance and I hereby direct that you be tried by me on the said the charge.
>
> Charges were read over and explained in Hindi to the accused and the accused pleaded not guilty as charged. Let him be tried."

13. Admittedly, no complaint of any prejudice by the appellant was raised either before the trial Court or in the High Court or in the course of examination under Section 313 Cr.P.C.

14. These points have been raised before this Court for the first time. In a case where points relating to errors in framing of charge or even misjoinder of charge are raised before this Court for the first time, such grievances are not normally considered by this Court. Reference in this connection may be made to the decision of a three-Judge Bench of this Court in the case of *Mangal Singh and others v. State of Madhya Bharat* reported in AIR 1957 SC 199. Justice Imam delivering a unanimous opinion of the Court held in paragraph 5 at page 201 of the report as follows:-

> "It was, however, urged that there had been misjoinder of charges. This point does not seem to have been urged in the High Court because there is no reference to it in the judgment of that Court and does not seem to have been taken in the Petition for special leave. The appellants cannot, therefore, be permitted to raise this question at this stage."

15. However, instead of refusing to consider the said grievance on the ground of not having been raised at an earlier stage of the proceeding, we propose to examine the same on its merits.

16. The purpose of framing a charge is to give intimation to the accused of clear, unambiguous and precise notice of the nature of accusation that the accused is called upon to meet in the course of a trial. (See decision of a four-Judge Bench of this Court in *V.C. Shukla v. State Through C.B.I.,* reported in 1980 Supplementary SCC 92 at page 150 and paragraph 110 of the report). Justice Desai delivering a concurring opinion, opined as above.

17. But the question is how to interpret the words in a charge? In this connection, we may refer to the provision of Section 214 of the Code. Section 214 of the Code is set out below:

> **"214. Words in charge taken in sense of law under which offence is punishable**. In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable."

18. The other relevant provisions relating to charge may be noticed as under:

> "**211. Contents of charge.**- (1) Every charge under this Code shall state the offence with which the accused is charged.
>
> (2) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.
>
> (3) If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.
>
> (4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.
>
> (5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.
>
> (6) The charge shall be written in the language of the Court.
>
> (7) If the accused, having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the

subsequent offence, the fact date and place of the previous conviction shall be stated in the charge; and if such statement has been omitted, the Court may add it at any time before sentence is passed.

215. Effect of errors. No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.

464. Effect of omission to frame, or absence of, or error in, charge. (1) No finding sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction."

19. While examining the aforesaid provisions, we may keep in mind the principles laid down by Justice Vivian Bose in *Willie (William) Slaney v. State of Madhya Pradesh* reported in (1955) 2 SCR 1140. At page 1165 of the report, the learned judge observed:-

> "We see no reason for straining at the meaning of these plain and emphatic provisions unless ritual and form are to be regarded as of the essence in criminal trials. We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues of escape for the guilty and afford no protection to the innocent."

20. The aforesaid observation of Justice Vivian Bose in *William Slaney* (supra) has been expressly approved subsequently by this Court in *V.C. Shukla* (supra).

21. Reference in this connection may be made to the decision of this Court in the case of *Tulsi Ram and others v. State of Uttar Pradesh* reported in AIR 1963 SC 666. In that case in paragraph 12 this Court was considering these aspects of the matter and made it clear that a complaint about the charge was never raised at any earlier stage and the learned Judges came to the conclusion that the charge was fully understood by the appellants in that case and they never complained at the appropriate stage that they were confused or bewildered by the charge. The said thing is true here. Therefore, the Court refused to accept any grievance relating to error in the framing of the charge.

22. Subsequently, in the case of *State of Andhra Pradesh v. Cheemalapati Ganeswara Rao and another* reported in AIR 1963 SC 1850, this Court also had to consider a similar grievance. Both in the case of **Tulsi Ram** (supra) as also in the case of **Cheemalapati** (supra) the charges were of conspiracy. The same is also a charge in the instant case.

Repelling the said grievance, the learned Judges held that the object in saying what has been set out in the first charge was only to give notice to the accused as to the ambit of the conspiracy to which they will have to answer and nothing more. This Court held that even assuming for a moment that the charge is cumbersome but in the absence of any objection at the proper time and in the absence of any material from which the Court can infer prejudice, such grievances are precluded by reason of provision of Section 225 of the Cr.P.C. Under the present Code it is Section 215 which has been quoted above.

23. Reference in this connection may also be made in the decision of this Court in *Rawalpenta Venkalu and another v. The State of Hyderabad* reported in AIR 1956 SC 171 at para 10 page 174 of the report. The learned Judges came to the conclusion that although Section 34 is not added to Section 302, the accused had clear notice that they were being charged with the offence of committing murder in pursuance of their common intention. Therefore, the omission to mention Section 34 in the charge has only an academic significance and has not in any way misled the accused. In the instant case the omission of charge of Section 302 has not in any way misled the accused inasmuch as it is made very clear that in the charge that he agreed with the others to commit the murder of Anil Jha. Following the aforesaid ratio there is no doubt that in the instant case from the evidence led by the prosecution the charge of murder has been brought home against the appellant.

24. In *K. Prema S. Rao and another v. Yadla Srinivasa Rao and others* reported in (2003) 1 SCC 217 this Court held that though the charge specifically under Section 306 IPC was not framed but all the ingredients constituting the offence were mentioned in the statement of charges and in paragraph 22 at page 226 of the report, a three-Judge Bench of this Court held that mere omission or defect in framing of charge does not disable the criminal court from convicting the accused for the offence which is found to have been proved on the evidence

on record. The learned Judges held that provisions of Section 221 Cr.P.C. takes care of such a situation and safeguards the powers of the criminal court to convict an accused for an offence with which he is not charged although on facts found in evidence he could have been charged with such offence. The learned Judges have also referred to Section 215 of the Cr.P.C., set out above, in support of their contention.

25. Even in the case of *Dalbir Singh v. State of U.P.,* reported in (2004) 5 SCC 334, a three-Judge Bench of this Court held that in view of Section 464 Cr.P.C. it is possible for the appellate or revisional court to convict the accused for an offence for which no charge was framed unless the court is of the opinion that the failure of justice will occasion in the process. The learned Judges further explained that in order to judge whether there is a failure of justice the Court has to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself. If we follow these tests, we have no hesitation that in the instant case the accused had clear notice of what was alleged against him and he had adequate opportunity of defending himself against what was alleged against him.

26. In *State of Uttar Pradesh v. Paras Nath Singh* reported in (2009) 6 SCC 372 this Court, setting out Section 464 of Cr.P.C., further held that whether there is failure of justice or not has to be proved by the accused. In the instant case no such argument was ever made before the Trial Court or even in the High Court and we are satisfied from the materials on record that no failure of justice has been occasioned in any way nor has the appellant suffered any prejudice.

27. In *Annareddy Sambasiva Reddy and others v. State of Andhra Pradesh* reported in (2009) 12 SCC 546 this court again had occasion to deal with the same question and referred to Section 464 of Cr.P.C. In paragraph 55 at page 567 of the

report, this Court came to the conclusion that if the ingredients of the section charged with are obvious and implicit, conviction under such head can be sustained irrespective of the fact whether the said section has been mentioned or not in the charge. The basic question is one of prejudice.

28. In view of such consistent opinion of this Court, we are of the view that no prejudice has been caused to the appellant for non-mentioning of Section 302 I.P.C. in the charge since all the ingredients of the offence were disclosed. The appellant had full notice and had ample opportunity to defend himself against the same and at no earlier stage of the proceedings, the appellant had raised any grievance. Apart from that, on overall consideration of the facts and circumstances of this case we do not find that the appellant suffered any prejudice nor has there been any failure of justice.

29. In the instant case, in the charge it has been clearly mentioned that the accused-appellant has committed the murder of Anil Jha. By mentioning that the accused has committed the murder of Anil Jha all the ingredients of the charge have been mentioned and the requirement of Section 211, sub-section (2) has been complied with. Therefore, we do not find any substance in the aforesaid grievance of the appellant.

30. Now the only other point on which argument has been made on behalf of the appellant is that in the instant case appellant was in jail at the time of the commission of the offence. It has been submitted that his involvement in the whole episode has been argued for only on the evidence of PW.4 who is said to have identified his voice on the basis of some telephone calls.

31. These are essentially questions of fact and after a concurrent finding by two courts normally this Court in an appeal against such finding is slow and circumspect to upset such finding unless this Court finds the finding to be perverse.

32. However, on the legal issue one thing is clear that identification by voice has to be considered by this Court carefully and on this aspect some guidelines have been laid down by this Court in the case of *Kirpal Singh v. The State of Uttar Pradesh* reported in AIR 1965 SC 712. In dealing with the question of voice identification, construing the provisions of Section 9 of the Indian Evidence Act, this Court held:

> "…It is true that the evidence about identification of a person by the timbre of his voice depending upon subtle variations in the overtones when the person recognising is not familiar with the person recognised may be somewhat risky in a criminal trial. But the appellant was intimately known to Rakkha Singh and for more than a fortnight before the date of the offence he had met the appellant on several occasions in connection with the dispute about the sugarcane crop…."
>
> (para 4, page 714 of the report)

33. Relying on such identification by voice this Court held in *Kripal Singh* (supra) that it cannot come to the conclusion that the identification of the assailant by Rakkha Singh was so improbable that this Court would be justified in disagreeing with the opinion of the Court which saw the witness and formed its opinion as to its credibility and also of the High Court which considered the evidence against the appellant and accepted the testimony (see para 4, page 714 of the report). The same principles will apply here. PW.4 in his evidence clearly stated that the appellant gave him a phone call asking for money on 23.7.2005 and again on 25.7.2005 when the appellant threatened him of dire consequences for not paying the money. PW.4 also stated in his evidence that he got an ID caller installed in his phone and he informed the police of the phone number of the caller which is of the appellant. PW.4 also stated in his evidence that he had direct talks with the appellant at hospital chawk prior to the incident when he used to demand money from him and other shopkeepers at the time of Durga

Puja and Saraswati Puja. PW.4 specifically stated that he can identify the voice of Mohan Singh. The first I.O. of the case (PW.6) in his evidence also stated that during investigation mobile No.9835273765 of Mohan Singh was found and mobile No.9431428630 of Laxmi Singh was also found. P.W. 8, the other I.O. of the case stated that on 23.7.2005, four calls were made between the mobile phones of Laxmi Singh and Mohan Singh. Then six more calls were made by Laxmi Singh to Mohan Singh on 3.08.2005, i.e. on the day of the incident itself. The printout details of these phone calls were produced before the Court. So both the Trial Court and High Court considered the evidence of PW.6 and PW.8 who were the investigating officers in this case, apart from the evidence of PW.4, other witnesses and the materials on record before coming to the conclusion. The fact that the name of registered allottees the SIM cards of these mobile phones could not be traced is not relevant in this connection. This Court finds that from para 19 onwards of the judgment by the High Court these aspects have received due consideration.

34. The learned counsel for the appellant relied on some judgments in support of his contention that in the facts of this case voice identification cannot be accepted. The learned counsel relied on a judgment of this Court in the case of *Nilesh Dinkar Paradkar v. State of Maharashtra* reported in (2011) 4 SCC 143. In that case the voice in the telephone was tapped and then the voice was recorded in a cassette and the cassette was then played to identify the voice. Therefore, there is a substantial factual difference with the facts in the case of *Nilesh* (supra) and the facts of the present case. Apart from that in *Nilesh* (supra), the High Court acquitted A1 to A4 and this Court finds that the evidence against Nilesh was identical. Therefore, this Court held that the conclusion of the High court in acquitting Accused 1, 2, 3 and 4 has virtually "destroyed the entire substratum of the prosecution case" (see para 28 of the report). Since that decision was passed on tape recorded version of

the voice, the principles decided in that case, even though are unexceptionable, cannot be applied to the present case.

35. The other case on which reliance was placed by the learned counsel for the appellant was in the case of *Inspector of Police, Tamil Nadu v. Palanisamy alias Selvan* reported in (2008) 14 SCC 495. In that case this Court held that identification from voice is possible but in that case no evidence was adduced to show that witnesses were closely acquainted with the accused to identify him from his voice and that too from very short replies. Therefore, this case factually stands on a different footing. In the instant case the evidence of PW.4 that he knows the voice of the appellant was not challenged nor was it challenged that the mobile no. 9835273765 is not that of the appellant. Nor has the evidence of PW.8 been challenged that on 3.8.2005 eight calls were recorded between the mobiles of the appellant and his conspirator Laxmi Singh.

36. The next decision on which reliance was placed by the learned counsel for the appellant was rendered in the case of *Saju v. State of Kerala* reported in (2001) 1 SCC 378. In *Saju* (supra) this Court explained the principles of Section 10 of the Evidence Act, as follows:-

> "**Evidene Act, 1872 – Sec.10 – Condition for applicability of**
>
> Act or action of one of the accused cannot be used as evidence against the other. However, an exception has been carved out under Section 10 of the Evidence Act in the case of conspiracy. To attract the applicability of Section 10 of the Evidence Act, the court must have reasonable ground to believe that two or more persons had conspired together for committing an offence. It is only then that the evidence of action or statement made by one of the accused could be used as evidence against the other."

37. If we apply the aforesaid principles to the facts of the present case it is clear that there is enough evidence to furnish reasonable ground to believe that both the appellant and Laxmi Singh had conspired together for committing the offence. Therefore, the principles of this case do not help the appellant.

38. Learned counsel for the appellant also relied upon the decision of this Court in the case of *Yogesh alias Sachin Jagdish Joshi v. State of Maharashtra* reported in (2008) 10 SCC 394. In paragraph 25 at page 402 of the report this Court laid down the following principles:-

> "Thus, it is manifest that the meeting of minds of two or more persons for doing an illegal act or an act by illegal means is sine qua non of the criminal conspiracy but it may not be possible to prove the agreement between them by direct proof. Nevertheless, existence of the conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. But the incriminating circumstances must form a chain of events from which a conclusion about the guilt of the accused could be drawn. It is well settled that an offence of conspiracy is a substantive offence and renders the mere agreement to commit an offence punishable, even if an offence does not take place pursuant to the illegal agreement."

39. In view of the aforesaid principles, this Court finds that no assistance can be drawn from the aforesaid decision to the case of the appellant in this case.

40. Reliance was also placed on the decision of this Court in the case of *S. Arul Raja v. State of Tamil Nadu* reported in (2010) 8 SCC 233. In that case this Court held that mere circumstantial evidence to prove the involvement of the accused is not sufficient to meet the requirements of criminal conspiracy and meeting of minds to form a criminal conspiracy has to be proved by placing substantive evidence. In the instant case, as

discussed above, substantive evidence was placed to prove the meeting of minds between the appellant and Laxmi Singh about the murder of the victim. In evidence which has been noted hereinabove in the earlier part of the judgment it clearly shows that there is substantial piece of evidence to prove criminal conspiracy.

41. Reliance was also placed by the learned counsel for the appellant on the decision of this Court in the case of *Mohd. Khalid v. State of West Bengal* reported in (2002) 7 SCC 334. In that case, this court held that offence of conspiracy can be proved by either direct or circumstantial evidence. In paragraph 24 at page 354 of the report the following observations have been made:-

> "Conspiracies are not hatched in the open, by their nature, they are secretly planned, they can be proved even by circumstantial evidence, the lack of direct evidence relating to conspiracy has no consequence."

42. For the reasons discussed above, this Court does not find that there is any reason to interfere with the concurrent finding in the instant case. This Court, therefore, does not find any reason to take a view different from the one taken by the High Court.

43. The appeal is dismissed and the conviction of the appellant under Section 120B of IPC for life imprisonment is affirmed.

D.G. Appeal dismissed.

RAKESH SHARMA & ORS.
v.
STATE OF M.P. & ORS.
(Civil Appeal Nos. 7520-23 of 2011)

AUGUST 30, 2011

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

Constitution of India, 1950 – Article 226 – Allegations of illegal encroachments/constructions by Municipal Corporation on footpaths and public streets in the market – Notices to shopkeepers that they were in illegal occupation of the front portion of their shop – Filing of public interest litigation and writ petitions – High Court disposed of the writ petitions and issued various directions to the Municipal Corporation for construction of a new market complex – Legality of – Held: High Court did not overstep its legitimate and legal jurisdiction while continuing to pass order after order constituting a Committee to supervise the construction of the shopping complex – Such directions can be issued by the High Court while exercising its powers under Article 226 – High Court passed various orders on the basis of consensus of the parties, more particularly, with the consent of the shop keepers – Committee was appointed and a direction was issued for providing alternate place to shopkeepers till new construction was completed in the existing place – Also, the High Court took into consideration the objections and suggestions of the Director, Town and Country Planning Department; the Commissioner, Municipal Corporation; and the Principal Secretary, Housing Development – The directions by the High Court safeguards not only the interest of the Municipal Corporation, general public but also all the shopkeepers who are running their business in the market – Thus, directions issued in the final order by the High Court cannot be faulted with – Town planning – Urban Development.

The State Government constructed 'G' market in Gwalior with 250 shops. The shop covering 60 sq.ft. size was given to 252 incumbents of the market. Each shop covers 60 sq.ft. space plus 30 sq.ft. verandah, in total 90 sq.ft. area. It is alleged that there was encroachment and erection of wooden stalls by the Municipal Corporation over the land of the Madhya Pradesh Housing Board in 'N' Market. A public interest litigation was filed. The High Court directed the Municipal Corporation to remove the said structures and issued several directions. Pursuant thereto, the Municipal Corporation issued notices to the appellants alleging that they were in illegal occupancy of the front portion of their shops and directed them to remove the alleged encroachments. The shopkeepers of 'G' Market and others filed writ petitions before the High Court. Thereafter, Special Leave Petitions were filed and the same were disposed of, by directing the High Court to dispose of the writ petitions. The High Court passed various orders and thereafter, disposed of the writ petitions and issued various directions to the Municipal Corporation, Gwalior for construction of a new market complex. Therefore, the appellants filed the instant appeals.

The question which arose for consideration in these appeals whether the High Court overstepped its legitimate and legal jurisdiction while continuing to pass order after order constituting a Committee to supervise the construction of the shopping complex and any such directions can at all be issued by the High Court while exercising its powers under Article 226 of the Constitution of India.

Dismissing the appeals, the Court

HELD: 1.1 It is abundantly clear that from time to time, on different occasions with the consent of the parties, the construction of new Gandhi Market was

discussed and a Committee was constituted after the order dated 20.04.2007. The High Court, on different occasions, took into consideration the objections and suggestions of the Director, Town and Country Planning Department, the Commissioner, Municipal Corporation, Principal Secretary, Housing Development and passed an order on 18.05.2007. The same order has been reiterated in the subsequent order dated 20.07.2007. [Paras 24 and 25] [369-E-G; 370-D]

1.2 If the various orders passed by the High Court are analysed, it would not be possible to conclude that the High Court over stepped its limit while giving directions in para 8 of the impugned order. The High Court rightly observed that it is the duty and responsibility of the Public Department of the State Government, Municipal Corporation to take all endeavour to save the town of Gwalior from encroachments and also easing the public utility system. The materials placed by the Municipal Corporation clearly show that Gandhi Market which is primarily a cloth market is established in the year 1952 is now in a very haphazard condition causing difficulty in the movement of public as well as of vehicles. It was highlighted that in the day time as well as in the evening busy time, it takes hours together for the vehicles to pass from that area. Photographs were also shown to the Court. It is impossible for the public to even walk on the street. The shop keepers are dumping their products upon the street which is not permissible. The public are prevented from using the foot path/pavement meant for them. In such circumstances, a decision was taken to construct a multi-level parking-cum-commercial complex. In this process of construction, it was planned to shift temporarily the present shop keepers to some other nearby places. It is further seen that the present commercial area of the appellants/shop keepers is 60 sq. ft. which has been converted by encroaching the area of

verandah and converted the same into 90 sq. ft area. The new shop of 60 sq. ft. size is to be given to 252 present incumbents of Gandhi Market. It is highlighted that to construct the building to the height of 12.5 metres having 3 layers of basement for parking, the ground floor shall have 252 shops which shall be allotted to the present incumbents of Gandhi Market and other floors shall be at the disposal of Municipal Corporation, Gwalior. [Paras 26 and 27] [370-G-H; 371-A-F]

1.3 In view of the various orders passed by the High Court on the basis of consensus of the parties, more particularly, with the consent of the shop keepers, a Committee was appointed and a direction was issued for providing alternate place to the shop keepers till new construction being completed in the existing place and all of them were assured of accommodation in the ground floor of the new market complex, the ultimate directions issued in the final order dated 18.01.2008 by the High Court cannot be faulted with. [Para 28] [371-G-H; 372-A]

1.4 Admittedly, one application was rejected on 05.05.2006 and it is not clear how the other applications were kept pending even after disposal of main writ petitions. About the amount deposited by the shop keepers, both the senior counsel appearing for the Municipal Corporation submitted that the said amount was not towards adjustment of construction charges but the same would be adjusted towards future licence fees. In the light of the same, there is no substance in the contention relating to filing of applications about various orders passed by the High Court. The counsel for the Municipal Corporation rightly pointed out that even after the so-called applications, the consent to the process of a new market place continued and this is evident from the orders of the High Court dated 02.03.2007, 20.04.2007 and 04.05.2007. It is also brought to the notice that some

applications that were made in June/July to recall the order dated 04.05.2007 were not pressed. In view of the same, the claim of the appellants cannot be accepted. [Para 29] [372-B-F]

1.5 Various directions in the impugned order of the High Court cannot be faulted with. It safeguards not only the interest of the Municipal Corporation, general public but also all the 252 shop keepers who are running their business in the Gandhi Market. Further, it was not disputed before the High Court that Gandhi Market became quite old and market is fully congested and there is no space for parking. That was the reason the High Court specifically recorded the finding in para 7 of the judgment which is endorsed. Though an argument was advanced that the permission granted by Joint Director, Town and Country Planning, Gwalior in his proceeding dated 05.12.2007 to the Commissioner, Municipal Corporation, Gwalior regarding reconstruction of Gandhi Market, Gwalior was objected to by the Director and further approval of the State Government is required, inasmuch as the Joint Director is the officer competent, there is hope and trust that no fresh construction would be carried out without the authority of the person concerned and contrary to the statutory provisions/ regulations. [Para 31] [372-H; 373-A; 373-D-F]

1.6 The respondents, particularly, the Municipal Corporation, Gwalior and the officers concerned are directed to implement the directions of the High Court within the parameters of the statutory provisions considering the interest of the general public as well all the shop keepers of the existing market. [Para 32] [373-G-H; 374-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7520-7523 of 2011.

From the Judgment & Order dated 18.01.2008 of the High Court of Judicature of Madhya Pradesh, Jabalpur, Bench at Gwalior in Writ Petition No. 1873, 1878 and 2101 of 2003 and 310 of 1999.

Sunil Gupta, K.K. Venugopal, Rajiv Dhawan, Nisha Bagchi, Anupam Srivastava, Vikas Mehta, M.P. Jha, P.D. Bidua, Ram Ekbal Roy, Harshvardhan Jha, Vikas Upadhyay, B.S. Banthia for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1 . Leave granted.

2. These appeals are directed against the judgment and final order dated 18.01.2008 passed by the High Court of Judicature of Madhya Pradesh, Jabalpur, Bench at Gwalior in Writ Petition Nos. 1873, 1878 and 2101 of 2003 and 310 of 1999 whereby the High Court disposed of the writ petitions and issued various directions to the Municipal Corporation, Gwalior in paragraph 8 of the impugned order for construction of a market complex known as “New Gandhi Market Building”.

3. **Brief facts:**

(a) According to the appellants-shopkeepers, after the partition of the country, in the year 1952, the Government constructed Gandhi Market in Gwalior with 250 shops and allotted them to the appellants herein, who were migrated to India from Pakistan at the time of partition, as tenants/licensees. Each shop covers 60 sq.ft. space + 30 sq.ft. Verandah, in total 90 sq.ft. area and has in front a 5 ft. wide footpath and then a public road. In the year 1975, notice was issued by the Municipal Corporation of Gwalior to the shopkeepers proposing to increase the rent from Rs.7/- to Rs.220/- per month. However, on 18.03.1977, the State of Madhya Pradesh as well as the Municipal Corporation, Gwalior agreed to increase the rent only by 7% from the original rent and also

clarified that the enhanced rent would cover area in front of the shops and no additional charges were to be paid in that respect. On 24.05.1994, the Municipal Corporation passed Resolution No.40 by which, area of the shop was treated as 90 sq. ft. including the verandah.

(b) On 28.02.1999, a public interest litigation petition, being Writ Petition No. 310 of 1999 was filed by a lawyer, G.S. Tomar, against encroachment and erection of wooden stalls by the Municipal Corporation over the land of the Madhya Pradesh Housing Board in Nazar Bagh Market, which is described as "the heart of the city". By order dated 15.12.2000, the High Court directed that the said structures erected by the Municipal Corporation would be removed. The petition was listed before the Division Bench on various dates and several directions were issued by the High Court. Thereafter, on 04.02.2003, the High Court directed the Municipal Corporation to furnish information regarding the steps being taken to remove encroachments on public streets. In May/June, 2003, the Municipal Corporation issued notices to the appellants alleging that they were in illegal occupancy of the front portion of their shops and directed them to remove the alleged encroachments with the threat for demolition of offending construction, if any. Consequently, the shopkeepers of Gandhi Market filed petitions before the High Court praying that they have not made any encroachment of the Verandah. The shopkeepers of various markets also filed writ petitions before the High Court. All the petitions were directed to be listed along with Writ Petition No. 310 of 1999.

(c) During the pendency of the writ petitions, the High Court, by order dated 04.07.2003, appointed District Judge (Vigilance) as a Local Commissioner in respect of the illegal encroachments and constructions and directed the Municipal Corporation to continue with the removal of encroachment from the footpaths and public streets which were identified by the District Judge (Vigilance). It further directed that objections, if

any, would be submitted to the District Judge.

(d) Against the order dated 04.07.2003, some of the shopkeepers of other markets filed Special Leave Petition No. 12446 of 2003 before this Court wherein this Court issued notice and stayed the demolition until further orders.

(e) On 25.08.2003, the Local Commissioner submitted his report before the High Court and the High Court directed that it may not be open to the parties to raise any further objections to the report. Against the said order, the appellants herein filed S.L.Ps. before this Court which were directed to be tagged with the earlier S.L.P.(C) No. 12446 of 2003. This Court disposed of all the petitions on 25.10.2004 by directing the High Court to dispose of the writ petitions as expeditiously as possible after taking into consideration the objections of the appellants and directed to maintain the status quo as on that date till the disposal of the writ petitions.

(f) On 19.01.2005, the High Court directed the Municipal Corporation to submit a plan and map for development of Gandhi Market as a shopping complex having first and second floor and a parking area. As the appellants agreed to pay Rs.1 lakh each in four instalments for construction of the first floor shops, the High Court further directed that the amounts deposited by the shopkeepers would be kept in a separate fund by the Corporation and its use would be considered at the time of final hearing.

(g) On 08.07.2005, the High Court directed that since the shopkeepers have not deposited the remaining three instalments, they shall pay the same and clarified that in default, the Municipal Corporation is at liberty to remove the shopkeepers who are not willing to deposit their instalments. On 24.03.2006, the High Court further directed that the Municipal Corporation shall auction the shops excluding verandah by an auction notice for the Court to know the actual rental value and submit the price offered and the valuation

report of each shop. In pursuance of the said order, the Municipal Corporation published notice but no one applied for the same.

(h) Against the order dated 24.03.2006, the shopkeepers filed applications before the High Court for recalling the order and for refund of the amount deposited by them with interest and the same were dismissed by the High Court on 05.05.2006. Since the shopkeepers were not willing for the reconstruction of the market, the petitions were directed to be listed along with W.P.(C) No. 310 of 1999. The Commissioner was also required to give a proposal for reconstruction. By the impugned order dated 18.01.2008, the High Court disposed of all the writ petitions with various directions as found in paragraph 8 of the impugned order.

(i) Aggrieved by the said order, the appellants-shop keepers have filed these appeals by way of special leave petitions before this Court.

4. Heard Mr. Sunil Gupta, learned senior counsel for the appellants, Mr. K.K. Venugopal and Dr. Rajiv Dhavan, learned senior counsel for the Municipal Corporation, Gwalior and Mr. Vikas Upadhyay, learned counsel for the State of M.P.

5 According to Mr. Sunil Gupta, learned senior counsel for the appellants, several interim orders and the impugned final order of the High Court are wholly outside the legitimate scope and jurisdiction of PIL as stipulated in various decisions of this Court. He further contended that the directions of the High Court by which the appellants-shopkeepers have to vacate their legally rented shops for construction of a new 7-storey shopping complex in their place are opposed to and outside the legitimate jurisdiction of a writ court under Article 226 of the Constitution. He also contended that the High Court over-stepped its jurisdiction while continuing to pass order after order constituting a Committee to supervise the construction of shopping complex and requiring various authorities to

facilitate by sanctioning necessary permission and so on.

6. On the other hand, Mr. K.K. Venugopal and Dr. Rajiv Dhavan, learned senior counsel for the Municipal Corporation submitted that at every stage even at the time of passing various directions, the appellants consented the same and taking note of the interest of all the shopkeepers and for the convenience of the general public making provision for parking etc., the High Court issued various directions which are not only consented by the shopkeepers but also in consonance with the decisions of the Town and Country Planning Department as well as the State Government. They also submitted that by the impugned directions, the appellants-shopkeepers are not going to loose anything, on the other hand, the Municipal Corporation has assured that they will be provided alternate accommodation till the completion of the fresh construction and after new construction, they will be provided convenient shops in the ground floor itself with more facility for parking, accordingly, they prayed for dismissal of all the above appeals as devoid of any merits.

7. We have carefully considered the rival submissions, impugned order of the High Court including various orders passed, statutory provisions and all other relevant materials.

8. In order to consider the issues raised above, it is relevant to note the ultimate directions issued by the High Court. It is useful to mention that the High Court has considered the issue not only in the PIL filed by an advocate of the local Bar but also heard and decided three writ petitions filed by 252 shopkeepers having their business in the market in question.

9. The following directions in paragraph 8 of the impugned order are relevant. They are as follows:

> "8. As we have directed through interim orders and the Town and Country Planning vide order dated 5.12.2007 has granted permission for construction of new shopping

complex of seven storeys, with three underground storeys of parking area, in the interest of all, this petition and connected petitions are disposed of finally with the following directions:

1. That now the respondent No.2 Municipal Corporation shall construct new Gandhi Market Building as per the permission granted by the Town and Country Planning Department, Gwalior as well as by the State Government.

2. That the aforesaid construction shall be supervised by the Committee constituted by this Court vide interim order dated 20.4.2007. Committee and Corporation will ensure the construction of the new building for the commercial market and will see that the tenders are invited timely and agency is fixed for the purpose of construction. Whenever agency shall be fixed by the Corporation for the purpose of construction, then after entering into agreement with the agency but before issuing the work order, the Committee will give notice to the shopkeepers for vacating the shops and within a period of two months, shopkeepers shall vacate the shops. The shopkeepers will not raise any objection on any alternative site granted by the Municipal Corporation for running the business and will not delay in vacating the shops. After taking over the possession, the agency will start the work and see that the construction upto ground floor level is completed within a period of one year and thereafter shops are allotted to the old shopkeepers positively within a period of 18 months on the outer limit.

3. That the ground floor shops shall be allotted to the shopkeepers, those who will deposit the balance

amount of three instalments and shall also enter into an agreement with the Corporation.

4. That the Corporation shall be free to allot the shops of first, second and third floor on fair and auction basis under the supervision of the Committee. Other terms and conditions of the allotment shall be settled by the Corporation and the Committee. So far as the participation of the representatives of the shopkeepers in the Committee, that shall be limited only for the ground floor shop.

5. Municipal Corporation shall be free to fix the fresh rent/licence fee of the new shops, which shall be allotted to the existing shopkeepers. The Commissioner, Municipal Corporation and Committee shall submit quarterly progress report in the Court."

10. The whole controversy involved in these appeals is about the order dated 18.01.2008 passed by the High Court in the said writ petitions. The question for consideration before this Court is whether the High Court overstepped in its legitimate and legal jurisdiction while continuing to pass order after order constituting a Committee to supervise the construction of the shopping complex and any such directions can at all be issued by the High Court while exercising its powers under Article 226 of the Constitution of India.

11. The Municipal Corporation, Gwalior before the High Court as well as in this Court furnished necessary details about their stand. It is seen that a Writ Petition No. 310 of 1999 filed by Advocate G.S. Tomar was pending consideration in which the encroachment caused on the public way belonging to the M.P. Housing Board in Najar Bagh market situated at Maharaj Bada where the Municipal Corporation raised certain wooden stall pucca structure and was going to auction the same but subsequently under the orders of the Court in miscellaneous

petitions, the petitioner confined the issue only to the question relating to encroachment in Gandhi Market, Gwalior. It was stated in the writ petition that the shopkeepers of Gandhi Market have encroached upon the verandah which was constructed in front of the shops for the use of public and the prayer was made that the aforesaid verandah which has been encroached upon by the shopkeepers may be removed. While so, in the other writ petitions, all the shopkeepers have stated that they have not made any encroachment of the verandah. When, on earlier occasion, this Court was approached by the parties with regard to certain interim directions, this Court requested the High Court to dispose of the main writ petitions at an early date. Pursuant to the same, all the writ petitions were heard on several occasions and before passing a final order, several interim orders/directions were issued.

12. At the foremost, Mr. Gupta submitted that they were not parties in the writ petition filed as PIL, hence without affording opportunity, various directions have been issued. Inasmuch as almost all the shop keepers have filed three writ petitions conveying their stand and admittedly all those writ petitions were heard along PIL (Writ Petition No. 310 of 1999), the said objection is liable to be rejected.

Consent by the shop keepers:

13. Though Mr. Gupta, learned senior counsel for the appellants vehemently contended that the High Court has exceeded its jurisdiction while considering the writ petitions filed under Article 226, Mr. K.K. Venugopal and Dr. Rajiv Dhavan, learned senior counsel for the Municipal Corporation while refuting the above contention pointed out that several orders were passed by the High Court on the basis of the consent given by the shopkeepers. On 09.01.2005, the High Court passed the following order:

> "During course of arguments, counsel for the petitioners suggested that each shop keeper will deposit Rs. One Lac with the Municipal Corporation, Gwalior in four monthly installments, First Installment shall be paid next month and thereafter other installments shall be paid every month in the Municipal Corporation.
>
> Counsel for the Municipal Corporation submits that they will prepare a map for development of Gandhi Market and will prepare a good shopping complex having first and second floor. Plan shall also include parking area. It is also suggested by the Municipal Corporation that the shopping complex shall be prepared in such a manner that existing shop keepers will not be dispossessed till first floor is completed. However, exact plan will be submitted by them within one month.
>
> Petitioners have also agreed that they will not keep of their goods on the footpath and the footpath will be kept clear. They have further agreed that there shall be no encroachment on the footpath including hangings on the footpath. Respondents shall ensure that no vehicles are parked on the footpath.
>
> Counsel for the petitioners also submitted that they will move an application before the Apex Court for extension of time for decision of the petition.
>
> It is, therefore, directed that the amount so deposited by the shopkeepers shall be kept in a separate fund by the Municipal Corporation and its use shall be considered at the time of final hearing."

14. Again on 19.01.2005, the High Court passed the following order:

> "Shopkeepers of Gandhi Market have discussed the matter amongst themselves and have decided to deposit Rs. One Lac each with Municipal Corporation which shall be deposited by them in four equal monthly installments. Similarly, shop keepers of Victoria Market and the market

nearby the Town Hall have agreed to deposit Rs. 50,000/- each in two installments with Municipal Corporation, Gwalior.

It is directed that the amount so deposited by the shop keepers shall be kept in a separate fund by the Municipal Corporation and its use shall be considered at the time of final hearing.

Respondent- Municipal Corporation has submitted that they will prepare a plan for development of these markets as a shopping complex with the assistance of Town Planner and ensure that there is no traffic congestion in the area and shall also prepare parking place so that citizens have no inconvenience on the public streets.

Shop keepers have assured that there will be no encroachment on the footpath and the respondents will be at liberty to remove the encroachment, if found on the footpath. They shall also ensure that footpath is not obstructed by any vehicle.

Counsel for the petitioners before the Apex Court submit they will be moving an application in the Apex Court for extension of time for disposal of the petition.

As prayed, list this petition for further orders next month alongwith other connected petitions."

15. Thereafter, the High Court, on 11.03.2005, passed the following order:

"Shri Bhardwaj stated that as per undertaking given by the shop keepers of Gandhi Market an amount of Rs. 62,27,000/- has been deposited with the Municipal Corporation, Gwalior. Counsel for the shop keepers submits that efforts are being made to pay future installments. He further submits that if the map prepared

by the Municipal Corporation for development and beautification of the market, as ordered earlier by this Court, is produced and after going through the map, shop keepers will be in a position to raise further funds and deposit other installments as undertaken by them earlier. Shri Bidua, counsel for the Municipal Corporation, Gwalior has informed that the finalization of map is at the final stage and is likely to be finalized by the end of next week. He submits that plan for development will be ready within a week or ten days.

Since there is likelihood of amicable settlement in the matter, we post this case after two weeks. On that date, map approved by the Municipal Corporation for development of Gandhi Market shall be produced in the Court for perusal.

Shri Bhardwaj has mentioned that in view of further development in the case they have already approached the Apex Court for extension of time for deciding the petitions as the dispute is being settled between the Municipal Corporation and the shop keepers. He has also stated that there is every possibility that the application for extension of time will be heard in the next week."

16. From the above orders, it is clear that with the consent of the parties, the order of construction of new market was passed and maps were prepared.

17. Again, by order dated 06.05.2005, the High Court has specifically mentioned "the scheme for development of the market shall also be finalized in consultation with the shopkeepers". The same reads as under:-

"Today counsel for Municipal Corporation intimated that maps for Gandhi Market have been prepared by the Architect and accepted by Municipal Corporation.

Said maps be shown to the shop keepers or representatives of shop keepers. The scheme for development of the market shall also be finalized in consultation with the shop keepers.

Counsel for the parties state that they will sit together and negotiate the matter."

18. Thereafter, on 08.07.2005, the High Court passed the following order:

"As agreed by the shopkeepers on 19.01.2005, that they will deposit Rs. One lac with the Municipal Corporation, Gwalior in four equal monthly instalments, they have deposited only one instalment and remaining three instalments at the rate of Rs.25,000/- per month have not been deposited. Maps have been prepared by the Municipal Corporation which have been shown to the representatives of the shopkeepers. Now the shopkeepers state that all the shopkeepers want to see the maps and CD prepared for construction of the market. Municipal Corporation has no objection in showing the entire plan to them. However, the shopkeepers are directed to deposit the second instalment within fifteen days and thereafter remaining instalments be paid in equal instalments every fifteen days and after deposit of second instalment those shop keepers who have deposited the second instalment will be entitled to see the maps CDs and, the Municipal Corporation will be at liberty to remove those shop keepers who are not willing to deposit their instalments. However, before passing any order of removal, Municipal Corporation shall examine their encroachments and other factors and submit report before this Court."

19. The same order has been reiterated on 24.03.2006 which is as follows:-

"Shopkeepers are not ready to honour their offer given

before this Court and they are not prepared to pay the amount of premium as agreed by them on 19.01.2005. They have deposited only one installment of Rs. 25,000/- and they have not deposited the remaining three installments. Though, vide order dated 08.07.2005, the shopkeepers were directed to deposit the second installment, but they have not done so, which shows that the shopkeepers are not willing to cooperate and now they have applied for exemption.

In the circumstances, petition is required to be heard finally.

In the meantime, the Municipal Corporation shall auction the shops, which shall not be finalized, so that the court will be in a position to know the actual rental value of each shop. The auction shall be for the area of shop only and the encroached verandah shall not be auctioned which shall be clarified in the auction notice and the Corporation will be at liberty to remove the encroached area.

List the petition finally before appropriate Bench, as prayed for by the counsel for the petitioners, in the week commencing 1st May, 2006. It is directed that before the date of hearing, Municipal Corporation shall submit the price offered for each shop and the State shall also submit the valuation report of each shop."

20. On 09.02.2007, the Court recorded that:

"Shri Bidua (counsel for Respondent No.2) prays for time to submit verification report of the photographs filed by Shri V.K. Bharadwaj counsel for intervenors and shopkeepers and to submit report about closing of verandah against the shops."

21. Again, on 02.03.2007, the High Court passed a brief order which is as follows:

"With the consent of the parties, it is directed that Shri

Sharma, Commissioner, Municipal Corporation will complete the inviting process of tenders for the construction of new market building at the place of old Gandhi Market on or before 09.03.2007."

22. The order dated 20.04.2007 is very relevant which reads as under:-

"For the construction of new market building at the place of old Gandhi Market, the shop keepers have consented." "Today, the Municipal Corporation has filed a compliance report". With a view to complete the project and to remove the day to day hurdles with the consent of the parties, we constitute a Committee comprising of ….."

23. The following noting in the order dated 04.05.2007 by the High Court is also relevant which reads as under:-

"Shri Raja Sharma, learned counsel appearing for the shop keepers submitted that the shop keepers will not raise any objection before the Committee regarding the construction of the market."

24. It is abundantly clear that from time to time, on different occasions with the consent of the parties, the construction of new Gandhi Market was discussed and a Committee was constituted after the order dated 20.04.2007.

25. The High Court, on different occasions, took into consideration the objections and suggestions of the Director, Town and Country Planning Department, the Commissioner, Municipal Corporation, Principal Secretary, Housing Development and passed an order on 18.05.2007 which is as follows:-

"Today progress report along with minutes of the meeting of the Committee dated 14.05.2007 has been filed, which is taken on record and Corporation has also produced copy of letter dated 15.05.2007 written by Joint Director,

Town and Country Planning Department to the Director for seeking permission from the State. It is submitted that the Architect has already submitted map as per advice of the Joint Director, Town and Country Planning Department and the matter has been referred to the Government for permission. So far as the question of permission upto the height of 24 meter is concerned, that shall be obtained by the Municipal Corporation and not by the Contractor. The Committee has fixed the next date of meeting of 5th June, 2007. List this case on 6th July, 2007. In the meantime, the State Government shall take a decision on the permission and the Committee shall also finalize the map and issue the tenders for fixing the agency etc. During this period every effort should be made to complete the formalities and process of inviting tenders should also be started so that the construction plan may be prepared. Next progress report shall be submitted on 6th July, 2007.

The same order has been reiterated in the subsequent order dated 20.07.2007. On 27.07.2007, the High Court passed the following which reads thus:-

"It is directed that Shri Batham will continue to co-ordinate between the authorities and will see that the inspection and report is submitted by the School of Planning and Architecture, New Delhi as early as possible and the consent is obtained from the Department of Town and Country Planning as well as the State Government. He will also submit the reply of the queries and fulfill all the conditions which are necessary for the approval of the project. The Corporation is directed to submit the further progress report on 10.08.2007.

26. If we analyze the above-mentioned and various other orders, it would not be possible to conclude that the High Court over stepped its limit while giving directions in para 8 of the impugned order. As rightly observed by the High Court, it is the

duty and responsibility of the Public Department of the State Government, Municipal Corporation to take all endeavour to save the town of Gwalior from encroachments and also easing the public utility system. The materials placed by the Municipal Corporation clearly show that Gandhi Market which is primarily a cloth market is established in the year 1952 is now in a very haphazard condition causing difficulty in the movement of public as well as of vehicles. It was highlighted that in the day time as well as in the evening busy time, it takes hours together for the vehicles to pass from that area. Photographs were also shown to us. It is impossible for the public to even walk on the street. The shop keepers are dumping their products upon the street which is not permissible. The public are prevented from using the foot path/pavement meant for them. In such circumstances, a decision was taken to construct a multi-level parking-cum-commercial complex. In this process of construction, it was planned to shift temporarily the present shop keepers to some other nearby places.

27. It is further seen that the present commercial area of the appellants/shop keepers is 60 sq. ft. which has been converted by encroaching the area of verandah and converted the same into 90 sq. ft area. The new shop of 60 sq. ft. size is to be given to 252 present incumbents of Gandhi Market. It is highlighted that to construct the building to the height of 12.5 metres having 3 layers of basement for parking, the ground floor shall have 252 shops which shall be allotted to the present incumbents of Gandhi Market and other floors shall be at the disposal of Municipal Corporation, Gwalior.

28. In view of the various orders passed by the High Court on the basis of consensus of the parties, more particularly, with the consent of the shop keepers, a Committee was appointed and a direction was issued for providing alternate place to the shop keepers till new construction being completed in the existing place and all of them were assured of accommodation in the ground floor of the new market complex, we are of the

view that the ultimate directions issued in the final order dated 18.01.2008 by the High Court cannot be faulted with.

29. The next submission of Mr. Gupta relates to applications filed by the appellants before the High Court for recalling the order dated 24.03.2006 and also seeking clarification on the same order as well as another application for refund of the amount deposited. Admittedly, one application was rejected on 05.05.2006 and it is not clear how the other applications are kept pending even after disposal of main writ petitions. About the amount deposited by the shop keepers, both the senior counsel appearing for the Municipal Corporation submitted that the said amount was not towards adjustment of construction charges but the same would be adjusted towards future licence fees. In the light of the same, there is no substance in the contention relating to filing of applications about various orders passed by the High Court. As rightly pointed out by Dr. Rajiv Dhavan, learned senior counsel for the Municipal Corporation even after the so-called applications, the consent to the process of a new market place continued and this is evident from the orders of the High Court dated 02.03.2007, 20.04.2007 and 04.05.2007. It is also brought to our notice that some applications that were made in June/July to recall the order dated 04.05.2007 were not pressed. In view of the same, we are unable to accept the claim of the learned senior counsel for the appellants.

30. In view of our factual conclusion based on the materials placed by both the parties as well as various orders of the High Court, we feel that there is no need to advert to various decisions relied on by the learned senior counsel for the appellants.

31. In the light of the above discussion, we are satisfied that various directions in para 8 of the impugned order of the High Court cannot be faulted with and according to us it safeguards not only the interest of the Municipal Corporation, general public but also all the 252 shop keepers who are

running their business in the Gandhi Market. Further, it was not disputed before the High Court that Gandhi Market became quite old and market is fully congested and there is no space for parking. That was the reason the High Court specifically recorded a finding in para 7 that:

> "….. under changed circumstances that all the parties including the shop keepers have agreed for construction of new Gandhi Market building in the place of old Gandhi Market building. This Court has already in the interest of all the parties and the citizens of Gwalior City, directed through interim orders for construction of a new market building and has also constituted a Committee to see that new Gandhi Market building is constructed and after construction, the existing shop keepers were also settled therein. …. …."

We fully endorse the above view. Though an argument was advanced that the permission granted by Joint Director, Town and Country Planning, Gwalior in his proceeding dated 05.12.2007 to the Commissioner, Municipal Corporation, Gwalior regarding reconstruction of Gandhi Market, Gwalior was objected to by the Director and further approval of the State Government is required, inasmuch as the Joint Director is the officer competent, we hope and trust that no fresh construction would be carried out without the authority of the person concerned and contrary to the statutory provisions/regulations, accordingly, we reject the said contention also.

32. Under these circumstances, we are unable to agree with any one of the submissions made by the appellants, on the other hand, we are in entire agreement with the stand of the respondents and reasonings and conclusion arrived at by the High Court. We direct the respondents, particularly, the Municipal Corporation, Gwalior and the officers concerned to implement the directions of the High Court within the parameters of the statutory provisions considering the interest of the general public as well all the shop keepers of the existing

market. In view of the disposal of the civil appeals, Municipal Corporation is free to proceed with the construction as directed in the impugned order of the High Court and in the light of the above observations, as early as possible, and we also direct that all the directions of the High Court shall be adhered to. It is further directed that as soon as construction up to ground floor level is completed along with the required parking facilities at the basement level those shops are to be allotted to the old shop keepers in the Gandhi Market within a period of six months after completion of such construction, unless an individual shop keeper becomes ineligible for the known reason.

33. Consequently, all the appeals fail and are accordingly dismissed. In view of the same, interim stay granted by this Court on 17.10.2008 shall stand vacated. No order as to costs.

N.J. Appeals dismissed.

AJIT SINGH
v.
STATE OF PUNJAB
(Criminal Appeal No. 2094 of 2008)

SEPTEMBER, 01 2011

[HARJIT SINGH BEDI AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860 – ss. 302, 304 Part I – Altercation between parties – Victim hurled abuses at appellant – Appellant asked his servant to get spade and thereafter inflicted blows on the neck of the victim – Victim taken to the hospital and after treatment for three days succumbed to her injuries – Appellant convicted u/s. 302 and sentenced to rigorous imprisonment for life whereas the servant, co-accused convicted u/s. 302/34 – High Court upheld the conviction and sentence of the appellant however, acquitted the co-accused – Appeal before Supreme Court – ***Held: Per Harjit Singh Bedi, J****: Appellant took undue advantage and acted in a cruel and unusual manner which exclude applicability of Exception 4 to s. 300, thus, his case falls within the ambit of s. 302 – Appellant's conviction u/s. 302 does not call for interference –* ***Per Gyan Sudha Misra, J****: Incident happened on the spur of the moment and was not a pre-meditated assault on the deceased and the appellant was deprived of the power of self-control on account of grave and sudden provocation, thus, the case would fall u/s. 304 Part I – Sentence of life imprisonment reduced to a period of ten years u/s. 304 Part I –* ***In view of divergence of opinion between the two Judges, matter referred to Larger Bench*** *– Reference to larger bench.*

According to the prosecution, over a minor issue appellant reprimanded 'LK' and her companion. As a result there was altercation between the parties and due to the same the appellant got provoked and asked his

servant 'AK' to bring spade. 'AK' brought the spade and the appellant inflicted two blows on 'LK'. PW 7 (son of 'LK') was present at the place of the incident. He raised an alarm and the entire village reached at the place of incident. Thereafter, 'LK' was taken to the hospital and after three days of the treatment, she died. PW 6 who was near the place of the incident lodged FIR. The trial court convicted the appellant u/s. 302 IPC and sentenced him to rigorous imprisonment for life; and 'AK' (co-accused) was convicted under Section 302/34 IPC. The High Court upheld the conviction and sentence of the appellant however, acquitted the co-accused. Therefore, the appellant filed the instant appeal.

Referring the matter to the larger Bench, the Court

PER: MISRA, J.

HELD: 1.1 In so far as the genesis and manner of occurrence and the factum of death of 'LD' is concerned, the findings recorded by the courts below that the deceased 'LD' died in the manner and at the place as alleged by the prosecution, is accepted [Para 7] [385-F-G]

1.2 From the prosecution story itself it emerges that when the deceased was cutting the grass for fodder in the field of the appellant, the appellant was not armed with any weapon and it is only when the deceased hurled filthy abuses to the appellant, he directed his servant 'AK' to bring a *Kassi* and ordered him to catch hold of the deceased after which he gave two blows on the neck of the deceased as a result of which she died on the 4th day of the incident. Thus, on perusal of the evidence on record, it is clear that the incident happened on the spur of the moment and was not a premeditated assault on the deceased. Nevertheless, the appellant had inflicted grievous injury on the neck of the deceased but she did

not die instantly and was taken to the hospital where treatment was given to her for three days and finally she succumbed to the injury. Thus, it can be logically and reasonably inferred that the accused-appellant although inflicted grievous injury on the neck of the deceased and gave two blows, the assault was not the result of pre-planning or pre-meditated assault and the same did not result in instantaneous death of the deceased but she was taken to the hospital for treatment where she succumbed to the injury after four days of the incident. [Paras 11 and 12] [487-D-G]

1.3 The appellant no doubt inflicted the injury on the deceased with the intention of causing such bodily injury which could result in her death and in that view of the facts and circumstance, knowledge will have to be attributed to him that he inflicted injury on the deceased to cause death of the victim which was sufficient in the ordinary course of nature to cause death. In that event, he although will have to be held guilty of the offence of murder in view of the ingredients of the offence given out under Section 300 I.P.C., it cannot be ruled out that the case of the appellant in view of the genesis and manner of occurrence would fall under exception 4 of Section 300 and thus, would be liable for conviction under Section 304 Part-I for the reason that it cannot be held with certainty that he undoubtedly had the intention to kill and not merely to cause grievous hurt. [Para 13] [387-H; 388-A-C]

Patel Rasiklal Becharbhai Vs. *State of Gujarat* **AIR 1992 SC 1150 – referred to.**

1.4 In order to hold whether an offence would fall under Section 302, or 304 Part-I, I.P.C., the courts have to be extremely cautious in examining whether the same falls under Section 300 I.P.C. which states whether a

culpable homicide is a murder, or it would fall under its five exceptions which lays down when culpable homicide is not murder and in this category further lays down that culpable homicide is not murder if the offender whilst deprived of the power of self-control by giving sudden provocation causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident. [Para 14] [388-E-G]

1.5 While examining the case of the appellant in the light of the settled legal position that culpable homicide would not amount to murder if the offender was deprived of the power of self-control on account of grave and sudden provocation, the appellant's case will have to be treated to be a case falling under the 4th exception of Section 300 and thus, would be a case under Section 304 Part I, I.P.C. for more than one reason deduced from the evidence on record. In the first place, the deceased had been cutting grass for fodder in the field of the appellant and when the appellant reprimanded the deceased and her companion not to spoil his crop, the deceased started altercation with the appellant and abused him which provoked the appellant to order his companion 'AK' (since acquitted) to bring *Kassi* (spade) which instruction was carried out by 'AK' and thereafter, the appellant inflicted two blows on the deceased 'LD'. However, she did not die instantly and was taken to the hospital where she underwent treatment for four days and finally succumbed to the injuries. From this it can be safely inferred that although the appellant had the intention and knowledge to cause grievous injury on the deceased which could have resulted into the death of the deceased, yet it cannot be inferred without doubt that the intention of the appellant was necessarily to cause death and not merely to cause grievous hurt as he did not inflict repeated blows on the deceased and the deceased in fact had survived for four days after the assault. It has also

come in evidence that PW-6/informant had chased the appellant but the appellant did not pursue by entering into further scuffle with the prosecution party. Besides this, the case of the prosecution regarding common intention to commit murder already stands negatived by the High Court as the plea of common intention to commit murder is no longer existing since the co-accused was acquitted of the charge under Section 302/34 I.P.C. by the High Court. Thus, the common intention to kill the deceased will have to be treated as missing in the prosecution case and only individual liability of the appellant giving fatal blows would determine whether the charge would be sustained under Section 302 I.P.C. or it would fall under Section 304 Part-I I.P.C. [Para 15] [388-G-H; 389-A-H]

1.6 On an analysis of the case of the prosecution in the light of the evidence on record, the appellant's conviction and sentence under Section 302 I.P.C. cannot be sustained but considering the intensity and gravity of the assault which led finally to the death of the victim, he would certainly be held guilty under Section 304 Part-I, I.P.C. and thus, it is just and appropriate to set aside the conviction and sentence of the appellant under Section 302 I.P.C. and the same is altered to under Section 304 Part I, I.P.C. The sentence of life imprisonment shall be reduced to a period of ten years under Section 304 Part-I, I.P.C. [Para 16] [390-A-C]

PER: BEDI, J.

1. Exception 4 s. 300 IPC presupposes several conditions for its applicability; they being (i) that the incident happened without premeditation, (ii) in a sudden fight, (iii) in the heat of passion, (iv) upon a sudden quarrel and (v) without the offender having taken undue advantage or acted in a cruel or unusual manner. [Para 2] [390-G-H; 391-A]

2. The appellant took undue advantage and has acted in a cruel and unusual manner which excludes the applicability of Exception 4. The facts show that there had been a sudden quarrel between the appellant and the deceased (a woman and therefore, the weaker sex) and after she was immobilized he had caused as many as nine injuries on her person. All the injuries are on the face or neck of the deceased and that injury Nos. (i), (iii), (iv), (viii) and (ix) were very extensive leading to her death. It cannot be said that the case could be covered by Exception 4 to Section 300 IPC in the facts brought out in the course of the evidence. The case clearly falls within the ambit of Section 302 IPC and the appellant's conviction under Section 302 calls for no interference. [Paras 1, 2 and 3] [390-E-F; 391-A-B; 392-C-D]

Case Law Reference:

Per: Misra, J.

AIR 1992 SC 1150 Referred to Para 13

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2094 of 2008.

From the Judgment & Order dated 11.03.2008 of the High Court of Punjab & Haryana at Chandigarh in Crl. Appeal No. 300-DB of 1999.

Amarendra Sharna, Vinay Kumar Garg, Sanchit Guru, Sumesh Chandra Jha for the Appellant.

Kuldip Singh, R.K. Pandey, H.S. Sandhu, K.K. Pandey, Mohit Mudgil for the Respondent.

The Judgment of the Court was delivered by

GYAN SUDHA MISRA, J. 1. The Indian Penal Code was enacted in the year 1860 under which the offences within the

territory of India have been tried ever since it was enacted dealing with countless number of cases leading either to acquittal or conviction. Yet, the task of the decision making authorities/courts whether an offence of culpable homicide is murder or culpable homicide does not amount to murder in the prevailing facts and circumstances of the case is a perennial question with which the courts are often confronted. We are well aware in view of Section 300 of the I.P.C. that all murders are culpable homicide but all culpable homicide does not amount to murder and this leads the courts quite frequently to consider as to whether an accused charged of an offence of culpable homicide is guilty of murder or he has committed culpable homicide not amounting to murder. When the evidence discloses a clear case of murder or makes out a finding of culpable homicide not amounting to murder, the task of the courts to record conviction or acquittal is generally an easy one. But this task surely becomes an undaunted one when the accused commits culpable homicide/murder but the circumstances disclose many a times that it is done without premeditation or pre-planning, may be to cause grievous hurt, yet it is so grave in nature that it results into death and the role of the factum causing death without premeditation becomes a secondary consideration due to which the decision of the courts in such cases often hinges on discretion while considering whether the case would fall under Section 302 I.P.C. or it would be under 304 Part I or even Part II, I.P.C.

2. On a plain reading of Sections 299, 300, 302 and 304 of the Indian Penal Code, it appears that a given case can be conveniently classified into two categories viz. culpable homicide amounting to murder which is 302 I.P.C. or culpable homicide not amounting to murder which is 304 I.P.C. But when it comes to the actual application of these two sections in a given case, the courts are often confronted with a dilemma as to whether a case would fall under Section 302 I.P.C. or would fall under Section 304 I.P.C. Many a times, this gives rise to conflicting decisions of one court or the other giving rise to the

popular perception among litigants and members of the Bar that a particular court is an acquitting court or is a convicting one. This confusion or dilemma often emerges in a case when the question for consideration is whether a given case would fall under Section 302 I.P.C. or 304 I.P.C. when it is difficult to decipher from the evidence whether the intention was to cause merely bodily injury which would not make out an offence of murder or there was clear intention to kill the victim making out a clear case of an offence of murder.

3. In the instant appeal by special leave, once again the aforesaid situation arises which has been preferred against the judgment and order dated 11.3.2008 passed by the Division Bench of the High Court of Punjab and Haryana in Criminal Appeal No.300-DB of 1999 whereby the High Court had been pleased to dismiss the appeal and thus upheld the order of the Additional Sessions Judge, Hoshiarpur convicting the appellant-Ajit Singh for offence under Section 302, I.P.C. sentencing him to undergo rigorous imprisonment for life as also to pay a fine of Rs.2,000/- in default of which he is to undergo further imprisonment for six months. However, the High Court while upholding the conviction and sentence of the appellant herein under Section 302 I.P.C., was pleased to acquit the co-accused-Anil Kumar of the charge and conviction under Section 302/34 I.P.C.

4. The prosecution case recorded in the First Information Report which led to the conviction of the appellant-Ajit Singh was lodged on 22.10.1996 on the basis of the complaint made by Jagdish Kumar, PW-6 who stated that he was running a private middle school in village Terkiana and on the date of the incident he was not feeling well due to stomach upset and hence had come home early at about 12.30 noon. He (PW-6) further stated that he had gone to attend the call of nature towards the field of the accusedappellant Ajit Singh who had planted Kinnu plants in his field. One Laxmi Devi (the deceased) and her son Rajiv @ Raju (PW- 7) along with Nirmal Kaur were

cutting fodder in the field of the appellant-Ajit Singh where Ajit Singh and his servant Anil Kumar were also working. According to the informant PW-6, the appellant was having an altercation with the deceased Laxmi Devi as the appellant complained that she had caused damage to his field which the PW-6 heard while he was proceeding towards the field. Soon the appellant and the deceased started abusing each other due to which the appellant got enraged and asked his servant Anil Kumar to bring *Kassi* (spade) to finish them once for all. At this Anil Kumar brought the *Kassi* (spade) with which he was digging the plants. But the deceased Laxmi Devi continued hurling abuses. The appellant-Ajit Singh is then alleged to have taken the *Kassi* from Anil Kumar and asked him to catch hold of her so that he may do away with her life. The deceased was given a push due to which she fell down on the ground in a straight posture and Anil Kumar caught her by her arms. Ajit Singh is then alleged to have given two blows with the *Kassi* (spade) on the neck of the deceased after which Nirmal Kaur and Rajiv raised alarm. PW-6 thereafter claims to have run towards the appellant but the appellant went towards his kothi situated in the garden along with spade smeared with blood and Anil Kumar too ran away from the spot. Further case of the prosecution is that the body of the Laxmi Devi (deceased) was smeared with blood and Rajiv- PW-7 ran towards government colony raising alarm as a consequence of which the entire village collected at the place of incident and a conveyance was arranged on which the deceased was taken to Civil Hospital, Dasuya and PW-6 also went to the police station to lodge the formal report. But S.I. Samsher Singh (PW-15) met him on the way and recorded his statement on the basis of which a formal First Information Report was lodged for offence under Section 307/34, I.P.C. and PW-15 took up the investigation. Subsequently, as Laxmi Devi died, the case was converted into a case under Section 302/34, I.P.C.

5. The doctor who conducted post-mortem found the following injuries on the body of the deceased:

"(i) 6 cm long stitched wound bearing 13 black cotton stitches on front left side of bearing part of neck extending from the middle of left lower jaw up to middle of neck, muscle deep and obliquely placed.

(ii) 3 cm long stitched wound bearing 7 black cotton stitches placed obliquely and 2 cm below injury no.1 on its lateral half and muscle deep.

(iii) 7 cm long stitched wound bearing 9 black cotton stitches on front and right side of neck, 4 cm below middle of lower jaw, obliquely placed and muscle deep.

(iv) 6 cm long stitched wound bearing 12 black cotton stitches placed horizontally on front of neck in the middle and lateral side extending across the middle and 1 cm to the right on dissection, underlying subcutaneous tissue and muscle are clear cut and gapping was present. Underlying laryngopharynx was repaired with the nylon stitches. On removal of stitches the wound was 5 cm x 2 cm surrounding muscle on the lateral side were also cut.

(v) 3 cm long curved stitched wound on left side and 2 cm below injury No.4 wearing 4 black cotton stitches and was skin deep.

(vi) Brownish scabbed linear superficial abrasion 6 cm long on left side of neck and 1 cm below injury no.5.

(vii) Brownish scabbed linear curved abrasion 6 cm long and 2 cm below injury No. 6.

(viii) Incised wound 3 cm x 2 cm in the lower part of the neck in the mid line. 6 cm above upper end of sternum underlying muscle cut and there is hole 1.5 cm x 1.5 cm in the interior wall of trachea (Tracheotomy wound).

(ix) 5 cm long stitched wound on the lateral half of right eyebrow wearing 5 stitches on dissection margins were clear cut and it was bone deep."

In the opinion of the doctor the cause of death was due to throat cut injury, cerebral edema and nasal ganlia which were ante mortem and sufficient to cause the death in the ordinary course of nature.

6. After compliance of the due formalities of investigation, submission of charge sheet and committal proceeding, the trial of the two accused persons was conducted by the Additional Sessions Judge, Hoshiarpur who was pleased to convict the appellant and the co-accused Anil Kumar (since acquitted) under Section 302/34 I.P.C. and sentenced them as already indicated hereinafter. As already stated, the conviction and sentence of the appellant Ajit Singh was maintained under Section 302 I.P.C. but the co-accused Anil Kumar was acquitted. Hence, this appeal has now been preferred by the sole appellant Ajit Singh and this court is seized with consideration of the question whether the conviction and sentence of the accused-appellant Ajit Singh is fit to be sustained or not.

7. In so far as the genesis and manner of occurrence and the factum of death of deceased Laxmi Devi is concerned, the counsel for the parties have been heard at some length and the evidence have been scrutinized but I am unable to accept the contention that the incident did not take place in the manner as alleged by the prosecution and I fully agree with the findings recorded by the courts below that the deceased Laxmi Devi died in the manner and at the place as alleged by the prosecution.

8. The only ground which now needs to be considered in this appeal is whether on the existing facts and circumstances emerging out of the genesis, manner and place of occurrence, the conviction of the appellant is fit to be sustained under

Section 302, I.P.C. or it would be a case of conversion of conviction and sentence under Section 304 Part- I of the I.P.C. Although, we are all aware of the ingredients of Section 300 defining culpable homicide amounting to murder, it would be worthwhile to recollect the exceptions therein specially exception 4 to Section 300 I.P.C. which lays down when culpable homicide does not amount to murder and may be quoted for facility of reference:

> **"Exception 4 to Section 300.** –Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

9. It is undoubtedly true that application of exception 4 depends upon the facts and evidence in a given case and although there are innumerable case laws and commentaries on the subject, the courts more often than not have to keep wondering into the wilderness of facts as to whether a given case would fall under Section 302, I.P.C. or would fall under Section 304 Part-I or II of the I.P.C.

10. The question under the facts of this case once again arises whether the conviction of the appellant-Ajit Singh is fit to be sustained under Section 302 of the I.P.C. or it would be a fit case of altering the conviction and sentence from 302 I.P.C. to 304 Part-I. In this context, it is noticed that the deceased Laxmi Devi and her son Rajiv @ Raju PW-7 along with Nirmal Kaur were cutting fodder from the field of appellant-Ajit Singh when Ajit Singh and Laxmi Devi started quarrelling with each other as Ajit Singh complained that they have been illegally entering into his field for cutting fodder causing damage to his field and spoiling the Kinnu crops. Even as per the case of the prosecution, the deceased started to abuse Ajit Singh which provoked him to order his servant Anil Kumar to bring *Kassi* (spade) to finish them. The place of incident thus admittedly is of Ajit Singh wherein Ajit Singh ordered Anil Kumar to bring

Kassi and then asked him to catch hold of Laxmi Devi so that he may do away with her life. Ajit Singh after giving the deceased a push, is alleged to have given two blows on the neck of the deceased at which the informant PW-7 raised an alarm shouting **"mar ditta mar ditta"** . PW-6 thereafter chased the appellant who is said to have run towards the accused-appellant but the appellant went towards his kothi situated in the same garden along with the spade smeared with blood and his servant Anil Kumar (since acquitted) also ran away from the spot. The deceased thereafter was taken to the hospital and after three days of treatment died on 25.10.1996 at about 4.35 p.m.

11. Thus, from the prosecution story itself it emerges that when the deceased was cutting the grass for fodder in the field of Ajit Singh, Ajit Singh was not armed with any weapon and it is only when the deceased hurled filthy abuses to the appellant, he directed his servant Anil Kumar to bring a *Kassi* and ordered him to catch hold of the deceased after which he gave two blows on the neck of the deceased as a result of which she died on the 4th day of the incident.

12. Thus on perusal of the evidence on record, it is clear that the incident happened on the spur of the moment and was not a premeditated assault on the deceased. Nevertheless, the appellant had inflicted grievous injury on the neck of the deceased but she did not die instantly and was taken to the hospital where treatment was given to her for three days and finally she succumbed to the injury. Hence, it can be logically and reasonably inferred that the accused-appellant although inflicted grievous injury on the neck of the deceased and gave two blows, the assault was not the result of pre-planning or pre-meditated assault and the same did not result in instantious death of the deceased but she was taken to the hospital for treatment where she succumbed to the injury after four days of the incident.

13. Thus, the appellant no doubt inflicted the injury on the

deceased with the intention of causing such bodily injury which could result in her death and in that view of the facts and circumstance, knowledge will have to be attributed to him that he inflicted injury on the deceased to cause death of the victim which was sufficient in the ordinary course of nature to cause death. In that event, he although will have to be held guilty of the offence of murder in view of the ingredients of the offence given out under Section 300 of the I.P.C., it cannot be ruled out that the case of the appellant in view of the genesis and manner of occurrence would fall under exception 4 of Section 300 and hence would be liable for conviction under Section 304 Part-I for the reason that it cannot be held with certainty that he undoubtedly had the intention to kill and not merely to cause grievous hurt. In support of this view, it would be relevant to refer to the case of *Patel Rasiklal Becharbhai* Vs. *State of Gujarat*, AIR 1992 SC 1150, wherein this Court had been pleased to hold that inflictment of the injury on the vital part of the body with the agricultural instrument by the enraged accused in a sudden quarrel cannot be held to have been caused intentionally.

14. In order to hold whether an offence would fall under Section 302, or 304 Part-I of the I.P.C., the courts have to be extremely cautious in examining whether the same falls under Section 300 of the I.P.C. which states whether a culpable homicide is a murder, or it would fall under its five exceptions which lays down when culpable homicide is not murder and in this category further lays down that culpable homicide is not murder if the offender whilst deprived of the power of self-control by giving sudden provocation causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

15. While examining the case of the appellant in the light of the settled legal position that culpable homicide would not amount to murder if the offender was deprived of the power of self-control on account of grave and sudden provocation, I am of the view that the appellant's case will have to be treated to

be a case falling under the 4th exception of Section 300 and hence would be a case under Section 304 Part I of the Indian Penal Code for more than one reason deduced from the evidence on record. In the first place, the deceased Laxmi Devi had been cutting grass for fodder in the field of the appellant-Ajit Singh and when Ajit Singh reprimanded the deceased and her companion not to spoil his Kinnu crop, the deceased started altercation with the appellant and abused him which provoked the appellant-Ajit Singh to order his companion Anil Kumar (since acquitted) to bring *Kassi* (spade) which instruction was carried out by Anil Kumar and thereafter Ajit Singh inflicted two blows on the deceased Laxmi Devi. However, she did not die instantly and was taken to the hospital where she underwent treatment for four days and finally succumbed to the injuries. From this it can be safely inferred that although the appellant-Ajit Singh had the intention and knowledge to cause grievous injury on the deceased which could have resulted into the death of the deceased, yet it cannot be inferred without doubt that the intention of the appellant-Ajit Singh was necessarily to cause death and not merely to cause grievous hurt as he did not inflict repeated blows on the deceased and the deceased in fact had survived for four days after the assault. In addition to this, it has also come in evidence that PW-6/informant had chased the appellant but the appellant did not pursue by entering into further scuffle with the prosecution party. Besides this, the case of the prosecution regarding common intention to commit murder already stands negatived by the High Court vide the impugned judgment and order as the plea of common intention to commit murder is no longer existing since the co-accused Anil Kumar was acquitted of the charge under Section 302/34 I.P.C. by the High Court. Thus, the common intention to kill the deceased will have to be treated as missing in the prosecution case and only individual liability of the appellant giving fatal blows will determine whether the charge would be sustained under Section 302 I.P.C. or it would fall under 304 Part-I of the I.P.C.

16. On an analysis of the case of the prosecution in the light of the evidence on record, I am clearly of the view that the appellant's conviction and sentence under Section 302, I.P.C. cannot be sustained but considering the intensity and gravity of the assault which led finally to the death of the victim Laxmi Devi he would certainly be held guilty under Section 304 Part-I, I.P.C. and hence I deem it just and appropriate to set aside the conviction and sentence of the appellant under Section 302, I.P.C. and the same is altered to his conviction under Section 304 Part I, I.P.C. Accordingly, the sentence of life imprisonment shall be reduced to a period of ten years under Section 304 Part-I of the I.P.C. Thus, the appeal stands partly allowed to this extent.

HARJIT SINGH BEDI, J.

1. I concur with the judgment of my learned sister to the extent that the appellant's conviction ought to be affirmed. I am, however, unable to accept that the case could be covered by Exception 4 to Section 300 in the facts which have been brought out in the course of the evidence. Exception 4 reads thus:

> "Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

2. It will be seen that this Exception presupposes several conditions for its applicability; they being (i) that the incident happened without premeditation, (ii) in a sudden fight, (iii) in the heat of passion, (iv) upon a sudden quarrel and (v) without the offender having taken undue advantage or acted in a cruel or unusual manner. I am of the opinion that the appellant herein has taken undue advantage and has acted in a cruel and unusual manner which excludes the applicability of Exception 4. The facts show that there had been a sudden quarrel between the appellant and the deceased (a woman and

therefore the weaker sex) and after she had been immobilized he had caused as many as nine injuries on her person. The injuries are re-produced herein below:

"(i) 6 cm long stitched wound bearing 13 black cotton stitches on front left side of bearing part of neck extending from the middle of left lower jaw up to middle of neck, muscle deep and obliquely placed.

(ii) 3 cm long stitched wound bearing 7 black cotton stitches placed obliquely and 2 cm below injury no.1 on its lateral half and muscle deep.

(iii) 7 cm long stitched wound bearing 9 black cotton stitches on front and right side of neck, 4 cm below middle of lower jaw, obliquely placed and muscle deep.

(iv) 6 cm stitched wound bearing 12 black cotton stitches placed horizontally on front of neck in the middle and lateral side extending across the middle and 1 cm to the right on dissection, underlying subcutaneous tissue and muscle are clear cut and gapping was present. Underlying laryngopharynx was repaired with the nylon stitches. On removal of stitches the wound was 5 cm x 2 cm surrounding muscle on the lateral side were also cut.

(v) 3 cm long curved stitched wound on left side and 2 cm below injury No.4 wearing 4 black cotton stitches and was skin deep.

(vi) Brownish scabbed linear superficial abrasion 6 cm long on left side of neck and 1 cm below injury No.5.

(vii) Brownish scabbed linear curved abrasion 6 cm long and 2 cm below injury No.6.

(viii) Incised wound 3 cm x 2 cm in the lower part of the neck in the mid line. 6 cm above upper end of sternum underlying muscle cut and there is hole 1.5 cm x 1.5 cm in

the interior wall of trachea (Tracheotomy wound).

(ix) 5 cm long stitched wound on the lateral half of right eyebrow wearing 5 stitches on dissection margins were clear cut and it was bone deep."

3. We see that all the injuries are on the face or neck of the deceased and that injury Nos. (i), (iii), (iv), (viii) and (ix) were very extensive leading to her death. To my mind, the case clearly falls within the ambit of Section 302 of the IPC and the appellant's conviction under this provision calls for no interference. The Criminal Appeal is dismissed.

O R D E R

In view of the divergence in views, the Registry is directed to place the matter before the Hon'ble Chief Justice of India for placing the matter before a larger Bench.

N.J. Matter referred to Larger Bench.

BIHAR STATE ELECTRICITY BOARD

v.

THE PATNA ELECTRIC SUPPLY CO. LTD. & ORS.

(I.A. No. 5. Civil Appeal No. 2630 of 1982)

SEPTEMBER 01, 2011

[ALTAMAS KABIR, D.K. JAIN AND MARKANDEY KATJU, JJ.]

SETTLEMENT: *Settlement of dues – Respondent no.1 (PESCO) taken over by appellant (BSEB) – Dispute regarding payment of compensation to PESCO by BSEB in respect of the assets of PESCO – Supreme Court directed BSEB to pay PESCO the purchase price on the basis of book value – Non-compliance of directions for payment by BSEB – Interlocutory application – Supreme Court directed that net amount of compensation payable to PESCO worked out to Rs. 135.45 lakhs and out of the said amount, a sum of Rs. 99.72 lakhs was already paid by BSEB to PESCO – Under the directions of the Supreme Court, the balance amount of Rs. 35.74 lakhs paid by BSEB to the Bank of India to liquidate the dues of PESCO – A further sum of Rs. 36.59 lakhs shown as liability in the accounts of PESCO – The amount of Rs. 36.59 lakhs paid by PESCO to the Bank of India – Interlocutory application disposed of with direction that PESCO was entitled to Rs. 36.59 lakhs if it had made the payment on that account to the Bank – Whether PESCO was entitled to receive from the BSEB the sum of Rs. 36.59 lacs – Held: PESCO is entitled to recover the said sum from BSEB, since it has been able to prove that the amount had been paid by it to the Bank.*

CIVIL APPELLATE JURISDICTION : I.A. No. 5.

IN

Civil Appeal No. 2630 of 1982.

From the Judgment & Order dated 22.07.1981 of the Calcutta High Court in appeal from Appellate Order No. 16 of 1980.

Gaurab Banerjee, ASG, Navin Prakash, Puneet Jain, Sushil Kumar Jain, Bina Gupta, Gopal Prasad, Gopal Singh, Chandan Kumar for the appearing parites.

The following order of the Court was delivered

O R D E R

1. After the respondent No.1, Patna Electric Supply Company Limited (PESCO), was taken over by the appellant, Bihar State Electricity Board (BSEB), certain disputes arose regarding payment of compensation by BSEB to PESCO in respect of the assets of PESCO. This resulted in litigation and ultimately in C.A. No.2630 of 1982 this Court, while granting leave, directed that BSEB would pay to PESCO the purchase price on the basis of book-value in accordance with the provisions of the Indian Electricity Act, 1910. Since payments were not made by BSEB to PESCO in terms of the said directions, PESCO filed I.A. No.5 for appropriate directions to be given to BSEB in this regard.

2. On 8.1.2005, after noting that what was payable by BSEB to PESCO was the book-value and not the market value of the assets of PESCO, this Court, after taking into consideration the submissions of the respective parties, came to the conclusion that the net amount of compensation payable to PESCO worked out to Rs. 135.45 lakhs. Out of the said amount, a sum of Rs. 99.72 lakhs had already been paid by BSEB to PESCO, leaving a balance amount of Rs. 35.74 lakhs payable by BSEB to PESCO. It was also noted that under the directions of this Court the balance amount of Rs. 35.74 lakhs had been paid by BSEB to the Bank of India to liquidate the dues of PESCO.

3. In addition to the above, a further sum of Rs. 36.59 lakhs was shown as liability in the accounts of PESCO. It was noted

that it was not the case of BSEB that the said amount had been paid by it to the aforesaid Bank. On the other hand, it was noted that it was PESCO's case that this amount had been paid by it to the Bank of India and in support thereof a 'No Objection Certificate' dated 21.3.2001 issued by the Bank in favour of PESCO had been placed on record. On the basis of the aforesaid calculations and the submissions made on behalf of the respective parties, I.A. No.5 was disposed of with the following observations :

(1) The amount of consumer dues calculated while arriving at the book value of the assets of PESCO cannot be questioned by BSEB at this stage;

(2) PESCO is entitled to the sum of Rs.36.59 lakhs provided it has made the payment on that account to the Bank; and

(3) PESCO is entitled to interest in the manner above stated on filing requisite material on record along with an affidavit showing payment of interest.

4. Thereafter, the matter was taken up on several occasions to enable PESCO to prove that such payment had actually been made by PESCO to the Bank of India on account whereof the said amount was shown as a liability in PESCO's accounts. On 26.3.2009, the Bank of India, Kolkata Main Branch, was directed to supply the statements relating to the cash credit account maintained by PESCO for the period commencing from 1973 till the closure of the account. Leave was given to the appellant to respond to the same once the statements were made available by the Bank. Ultimately, on 30.9.2010 it was submitted on behalf of the Bank that the information, as was required to be given, had been filed by way of separate affidavits and leave was also granted to file an additional affidavit to place on record certain other documents.

5. The first affidavit affirmed on behalf of the Bank on 31.10.2006 mentions a final settlement arrived at between the

Bank and PESCO, to the tune of Rs. 45.93 lakhs and with the interest accrued thereupon the amount became Rs. 48.34 lakhs. According to the Bank records, the said amount was paid by PESCO between 15.1.2001 to 19.12.2001. The second affidavit affirmed on behalf of the Bank indicates that the balance as was outstanding in the Cash Credit Account of PESCO, as on 5.2.1974, was Rs. 37,26,137.77. It was also made clear that a sum of Rs. 84,08,363/- had been received by the Bank, out of which BSEB had paid Rs. 38.74 lakhs and PESCO had paid Rs. 48,34,363/-. It is, therefore, clear that the Bank received two amounts, one from BSES and the other from PESCO. It is also clear that the amount of Rs. 35.74 lakhs paid by BSEB, which was the balance of the book-value of the assets of PESCO, was pursuant to the directions given by the Court on account of the fact that the said amount had initially been paid by PESCO. It is also clear that the other amount of Rs. 48,34,363/- was paid by PESCO to the Bank and was the Cash Credit amount of PESCO's account with Bank of India, and which amount, together with interest, was payable to PESCO in terms of the order passed by this Court on 8.11.2005.

6. This was in effect the substance of the submissions made by Mr. Puneet Jain, learned Advocate, appearing for PESCO. On the other hand, learned Additional Solicitor General, Mr. Gaurav Banerjee, submitted that once the total dues of PESCO had been assessed at Rs. 135.46 lakhs and the entire amount had been paid, including a sum of Rs. 35.74 lakhs paid by BSEB to the Bank, nothing further remained outstanding to be paid to PESCO.

7. We have carefully considered the submissions made on behalf of the respective parties and it is necessary to put an end to the controversy regarding the amount which PESCO is entitled to receive from the BSEB on account of its take over by the BSEB.

8. The figure of Rs. 135.46 lakhs was arrived at by this Court upon deducting all the liabilities from the book-value of

the assets of PESCO, after taking into consideration the ad hoc payments made by BSEB to PESCO to the tune of Rs. 99.72 lakhs between 1.4.1974 and 8.2.1980. This Court concluded that the net amount payable to PESCO was Rs. 35.74 lakhs, which, in fact, was due from PESCO to the Bank and which amount was ultimately liquidated by BSEB. The dues in relation to the said sum of Rs. 135.46 lakhs, therefore, stood concluded on such payments being made. Further this Court also took notice of the sum of Rs. 36.59 lakhs in the liabilities column 7 of PESCO's account and the same was shown against cash credit with Bank of India. Ultimately, as indicated hereinbefore, this Court held that PESCO was also entitled to the sum of Rs. 36.59 lakhs, provided such payment had been paid by PESCO to the Bank.

9. One of the affidavits filed on behalf of the Bank, as referred to hereinabove, clearly indicates that the said sum of Rs. 48,34,363/-, had been paid by PESCO to the Bank. The third affidavit affirmed on behalf of the Bank on 30.9.2010, contains an annexure being a letter addressed to PESCO by the Bank of India certifying that PESCO had paid to the Bank a sum of Rs. 48,34,363/- between 15.1.2001 to 19.12.2001 towards final settlement of dues to the Bank.

10. Accordingly, in terms of the order dated 8.11.2005, PESCO is entitled to recover the said sum from BSEB, since it has been able to prove that the amount had been paid by it to the Bank. Consequently, the directions given on 5.4.2011 for reimbursement of the aforesaid amount to PESCO, together with interest @ 6 per cent per annum, from 19.12.2001 till the date of the order, in view of what has been discussed hereinabove, does not require any elaboration. The application for direction, is therefore, disposed of in terms of the order passed by this Court on 15.4.2011. The payment, if not made, shall be made within one month from the date of communication of this order.

D.G. I.A. dispose of.

CHANDIGARH ADMININISTRATION THROUGH THE DIRECTOR PUBLIC INSTRUCTIONS (COLLEGES), CHANDIGARH'

v.

USHA KHETERPAL WAIE AND ORS.

(Civil Appeal No. 7570 of 2011)

SEPTEMBER 02, 2011

[R.V. RAVEENDRAN AND MARKANDEY KATJU, JJ.]

CHANDIGARH EDUCATIONAL SERVICE (GROUP A GAZETTED) GOVERNMENT ARTS AND SCIENCE COLLEGE RULES, 2000: Appellant-Chandigarh Administration notified 2000 Rules which were framed in consultation with UPSC and sent to the Government of India for being issued in the name of President of India – Pending consideration of the Rules, the impugned advertisement in terms of 2000 Recruitment Rules issued prescribing Ph.D. as eligibility criteria for appointment to the post of Principal – Validity of the advertisement – Held: At the time of notifying 2000 Rules, appellant had no inkling that there would be inordinate delay or the Rules may not be notified by the President – The appellant had the clear intention to enforce the 2000 Rules in future as they had been made in consultation with UPSC, in accordance with the UGC guidelines and the Rules were sent to the Central Government for being notified by the President and the matter was pending consideration for a few months when the advertisement was issued – Therefore, the advertisement in terms of 2000 Recruitment Rules was valid – Even in the absence of valid rules, it cannot be said that the advertisement was invalid – In exercise of its executive power, the appellant could issue administrative instructions from time to time in regard to all maters which were not governed by any statute or rules made under the Constitution or a statute.

ADMINISTRATIVE LAW: Executive action – Judicial review of – Held: Courts and tribunals can neither prescribe the qualifications for any recruitment nor entrench upon the power of the concerned authority so long as the qualifications prescribed by the employer is reasonably relevant and has a rational nexus with the functions and duties attached to the post and are not violative of any provision of Constitution, statute and Rules – Chandigarh Educational Service (Group A Gazetted) Government Arts and Science College Rules, 2000.

SERVICE LAW: Selection – Mode of selection – Held: It is for the rule-making authority or the appointing authority to prescribe the mode of selection and minimum qualification for any recruitment.

The appellant framed and notified the "Chandigarh Educational Service (Group A Gazetted) Government Arts and Science College Rules, 2000 by notification dated 29.3.2000 published in the Gazette dated 1.4.2000. The said Rules were framed in consultation with the Union Public Service Commission (UPSC) and sent to the Government of India for being issued in the name of the President of India. As per the said Rules, the appointment to the posts of Principal in Government Arts and Science Colleges was 25% by direct recruitment and 75% by promotion. The said rules prescribed the educational qualification of Ph.D. for appointment to the post of Principal by direct recruitment. The appellant advertised a post of Principal (which was falling vacant on 31.7.2001) on 14.7.2001 prescribing the following eligibility criteria as per the said Rules: "Educational and other qualifications required for direct recruits: Essential: (i) A Doctorate degree or equivalent with at least 55% marks at the Master's Degree level from a recognized university or equivalent; (ii) 12 years teaching experience of degree classes in a college affiliated to a university or equivalent.

Respondents 1 to 4 had joined UT Colleges (Arts & Science) cadre in 1969 and 1970 and were serving as lecturers in the Government Arts and Science Colleges. None of them possessed a Ph.D. degree. They filed OA before the Central Administrative Tribunal challenging the said Recruitment Rules and the advertisement dated 14.7.2001, as unconstitutional and for a direction that they along with other eligible candidates from the UT cadre should be considered for promotion to the said post. The Tribunal allowed the application and held that in the absence of any recruitment rules prescribing such qualification, Ph.D. degree was not an eligibility requirement for the post of Principal. The Tribunal, therefore, quashed the advertisement dated 14.7.2001 inviting applications for the post of Principal and directed the appellant to fill the vacancy according to law, keeping in view the eligibility criteria and the past practice till the Rules were framed and notified by the competent authority. The said order of the Tribunal was challenged by the appellant before the High Court. The High Court dismissed the writ petition. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1.1. The High Court rejected the advertisement on the ground that the regular rules were not notified by the President of India even after five years, when the High Court decided the matter. But what was relevant to test the validity of the advertisement, was the intention of the appellant when the advertisement was issued. At that time, the appellant had the clear intention to enforce the Recruitment Rules in future as they had been made in consultation with UPSC, in accordance with the UGC guidelines and the Rules had been sent to the Central Government for being notified by the President and the matter was pending consideration for

a few months when the advertisement was issued. The appellant at that time had no inkling that there would be inordinate delay or the Rules may not be notified by the President. Therefore, the advertisement in terms of the Chandigarh Educational Service (Group A Gazetted) Government Arts and Science College Rules, 2000 was valid. [Para 10] [410-C-E]

1.2. Even in the absence of valid rules, it cannot be said that the advertisement was invalid. In exercise of its executive power, the appellant could issue administrative instructions from time to time in regard to all matters which were not governed by any statute or rules made under the Constitution or a statute. In fact it is the case of the respondents that the appellant had issued such instructions on 20.8.1987 directing that the lecturers from UT cadre should be promoted as principals. In fact, the administrator of appellant had issued a notification on 13.1.1992 adopting the corresponding Punjab Rules to govern the service conditions of its employees. If so, the administrator of appellant could issue fresh directions in regard to qualifications for recruitment. The Recruitment Rules made by the Administrator were duly notified. Though they were not rules under Article 309, they were nevertheless valid as administrative instructions issued in exercise of executive power, in the absence of any other Rules governing the matter. Once the recruitment rules, made by the Administrator, were notified, they became binding executive instructions which would hold good till the rules were made under Article 309. Therefore, the advertisement issued in terms of the said Recruitment Rules was valid. [Para 11] [410-F-H; 411-A-B]

Abraham Jacob vs. Union of India **1998 (4) SCC 65: 1998 (1) SCR 780;** *Vimal Kumari vs. State of Haryana* **1998 (4) SCC 114: 1998 (1) SCR 658 – relied on.**

2. The Tribunal and High Court also committed an

error in holding that the appellant could not prescribe the qualifications of Ph.D. for the post of principal merely because earlier the said educational qualification was not prescribed or insisted. The Recruitment Rules were made in consultation with UPSC, to give effect to the UGC guidelines which prescribed Ph.D. degree as the eligibility qualification for direct recruitment of Principals. In fact, even the Punjab Educational Service (College Grade (Class I) Rules, 1976 prescribed Ph.D. degree as a qualification. In several States, Ph.D. is a requirement for direct recruitment to the post of a college Principal. When the said qualification is not unrelated to the duties and functions of the post of Principal and is reasonably relevant to maintain the high standards of education, there is absolutely no reason to interfere with the provision of the said requirement as an eligibility requirement. It is now well settled that it is for the rule-making authority or the appointing authority to prescribe the mode of selection and minimum qualification for any recruitment. Courts and tribunals can neither prescribe the qualifications nor entrench upon the power of the concerned authority so long as the qualifications prescribed by the employer is reasonably relevant and has a rational nexus with the functions and duties attached to the post and are not violative of any provision of Constitution, statute and Rules. In the absence of any rules, under Article 309 or Statute, the appellant had the power to appoint under its general power of administration and prescribe such eligibility criteria as it is considered to be necessary and reasonable. Therefore, it cannot be said that the prescription of Ph.D. is unreasonable. [Para 12] [411-C-G; 412-A-B]

J. Rangaswamy vs. Government of Andhra Pradesh **1990 (1) SCC 288;** *P.U. Joshi vs. Accountant General* **2003 (2) SCC 632: 2002 (5) Suppl. SCR 573 – relied on.**

3. The Tribunal and the High Court have held that in the years 1989 and 1991, the Tribunal had accepted the earlier administrative instructions dated 20.8.1987 which required the UT cadre employees to be considered for the post has to be followed. The fact that at that time Ph.D. degree was not insisted upon does not mean that for all times to come, Ph.D. degree could not be insisted. Ph.D. degree was made a qualification because UGC guidelines required it for direct recruitment post and the UPSC approved the same. Therefore, merely because on some earlier occasions, the posts of Principal were filled by UT cadre lecturers without Ph.D. degree, it cannot be argued that the Ph.D. degree cannot be prescribed subsequently. [Para 13] [412-B-D]

4. The Tribunal and High Court were not justified in holding that 1976 Punjab Rules were not applicable on the ground that no material had been placed to show that they were followed while appointing a principal in the past. The fact that the appellant had issued a notification dated 13.1.1992 adopting the corresponding Punjab Rules governing the conditions of service of its employees, is not disputed. Therefore, when appellant acted in accordance with the said directions, it is not necessary to consider whether there were any occasion between 1992 to 2001 to invoke the said rules or whether they were in fact invoked. The notification dated 13.1.1992 could not have been brushed aside in the manner done by the Tribunal and the High Court. [Para 14] [412-E-G]

5. The original application filed by respondents 2 to 5 before the Tribunal is dismissed. The prayer that Chandigarh Administration should be directed to fill the vacancies of Principals in accordance with the eligibility criteria as was prevalent prior to the issue of the notification dated 14.7.2001, is rejected. The notification

prescribing educational qualification of doctorate degree or equivalent with 55% marks at the Master's Degree Level examination or 12 years teaching experience of degree classes in a college affiliated to any university or equivalent is upheld as validly prescribing the qualifications for filling the post by direct recruitment. [Para 15] [412-H; 413-A-B]

Case Law Reference:

1998 (1) SCR 780	**relied on**	**Para 10**
1998 (1) SCR 658	**relied on**	**Para 10**
1990 (1) SCC 288	**relied on**	**Para 12**
2002 (5) Suppl. SCR 573	**relied on**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7570 of 2011.

From the Judgment & Order dated 26.10.2005 of the High Court of Punjab and Haryana at Chandigarh in Civil Writ Petition No. 16798-CAT of 2003.

Kamini Kaiswal for the Appellant.

P.N. Puri, Dhiraj, Reeta Dawan Puri, Binu Tamta, Sushma Suri for the Respondents.

The Judgment of the Court was delivered by

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

2. There are four Government Arts and Science colleges in Union Territory of Chandigarh. Till 1988, the Chandigarh Administration, appellant herein, used to fill the vacancies of the post of Principal of the Arts and Science colleges by deputation from neighbouring States of Punjab and Haryana. When the post of Principal in Government College for Boys, Sector 11, Chandigarh was due to fall vacant on 29.2.1988 on

superannuation of a deputationist, two UT cadre lecturers filed an application before the Central Administrative Tribunal, Chandigarh, seeking a direction that UT cadre lecturers from the Government Arts & Science Colleges should be considered for the post of Principal instead of taking someone on deputation from the neighbouring states. The said application was ultimately disposed of with a direction to the Chandigarh Administration to consider the case of the applicants and other lecturers of UT cadre who may fall within the zone of consideration as may be determined by a competent authority, for regular appointment to the post of Principals of the Government Arts & Science colleges, on the basis of relevant criteria, and appoint those who were found suitable. In pursuance of the said order, the Chandigarh Administration fixed 30 years experience as Lecturer as the eligibility criterion for promotion of lecturers to the post of Principal, though at that time (1989-90) there were no lecturer with 30 years experience in the cadre. As no UT cadre lecturer possessed such experience, again deputationists were appointed as Principals in the said colleges.

3. Feeling aggrieved, the UT cadre lecturers again approached the Tribunal and their applications were allowed by the Tribunal by order dated 12.1.1991, quashing the order prescribing 30 years experience as also the order appointing deputationists. Thereafter, whenever vacancies arose, it is stated that the appellant promoted UT cadre lecturers as Principals. It may be mentioned that persons so promoted did not possess a Ph.D. degree.

4. By notification dated 13.1.1992, Chandigarh Administration adopted the corresponding Service Rules of Punjab with effect from 1.4.1991 to govern the conditions of service of its employees, where it had no rules governing the matter. The effect of it was that the provisions of Punjab Educational Service (College Grade) (Class I) Rules, 1976 (as amended in 1983 (for short '1976 Punjab Rules') became

applicable in regard to the recruitment of candidates to UT college cadre. Under the said 1976 Punjab Rules, the qualification and experience for appointment to the service was as under: *For direct recruitment* : (a) MA, first division or high second division (50%) in relevant subject or an equivalent degree of a foreign university with eight years teaching experience; (b) Ph.D. with eight years teaching experience; *By promotion* : Experience of working as a lecturer for a minimum period of eight years.

5. When matters stood thus the Administrator, Chandigarh Administration, framed and notified the "Chandigarh Educational Service (Group A Gazetted) Government Arts and Science College Rules, 2000 (for short 'Recruitment Rules') vide notification dated 29.3.2000 published in the Gazette dated 1.4.2000. The said Rules were framed in consultation with the Union Public Service Commission ('UPSC' for short) and sent to the Government of India for being issued in the name of the President of India. As per the said Rules, the appointment to the posts of Principal in Government Arts and Science Colleges was 25% by direct recruitment and 75% by promotion. The said rules prescribed the educational qualification of Ph.D. for appointment to the post of Principal by direct recruitment. The appellant advertised a post of Principal (which was falling vacant on 31.7.2001) on 14.7.2001 prescribing the following eligibility criteria as per the said Rules :

> "Educational and other qualifications required for direct recruits : Essential: (i) A Doctorate degree or equivalent with at least 55% marks at the Master's Degree level from a recognized university or equivalent; (ii) 12 years teaching experience of degree classes in a college affiliated to a university or equivalent."

6. Respondents 1 to 4 had joined UT Colleges (Arts & Science) cadre in 1969 and 1970 and were serving as lecturers in the Government Arts & Science Colleges. None of them possessed a Ph.D. degree. They filed OA No.684/CH/2001

before the Central Administrative Tribunal challenged the said Recruitment Rules and the advertisement dated 14.7.2001, as unconstitutional and for a direction that they along with other eligible candidates from the UT cadre should be considered for promotion to the said post. It was contended that the Administrator of the Union Territory had no power to make the said Recruitment Rules, as it was only the President of India who was competent to frame such rules under Article 309 of the Constitution of India. They also contended that on earlier occasions the appellant had promoted lecturers as Principals without insisting upon the qualification of Ph.D.; and that though they did not possess Ph.D. degree, having regard to the eligibility criteria earlier being applied, they were eligible for being considered for the post of Principals, and the Chandigarh Administration should fill the vacancies of Principals, by applying the eligibility criteria which was prevalent prior to the making of the said recruitment rules.

7. The appellant, in its statement of objections filed before the Tribunal conceded that the "power to notify the recruitment rules for Class I Posts vested with the President of India". The appellant stated that they had forwarded the Recruitment Rules to the government of India under cover of letter dated 21.9.2001, to notify the said Rules under the name of President of India, and such notification was awaited. They contended that pending publication of the Rules, they could resort to recruitment in terms of the draft Rules on the basis of administrative instructions. The appellant also contested the application by contending that the post in question was required to be filled under the direct recruitment quota, and none of the applicants were eligible as they did not possess Ph.D. degree, which was the qualification prescribed by the university Grants Commission ('UGC' for short) and approved by the UPSC, and therefore none of them could be considered for appointment to the said post.

8. The said application (OA No.648 – CH of 2001) was

allowed by the Tribunal, by order dated 22.4.2002. The Tribunal held that in the absence of any recruitment rules prescribing such qualification, Ph.D. degree was not an eligibility requirement for the post of Principal. The Tribunal held that UGC guidelines would not apply as the Rules providing for 25% by direct recruitment was not in force; and that even if the new rules were to be duly framed, such Rules would apply only to future vacancies and not to the vacancies which arose on 31.7.2001. The Tribunal held that in the absence of any Rules, it was appropriate to take guidance from its earlier judgments dated 12.9.1989 and 12.11.1991 which accepted the administrative instructions dated 20.8.1987 permitting UT cadre lecturers to be promoted as Principals, even though they did not possess any Ph.D. degree. The Tribunal also rejected the contention of the appellant that as per notification dated 13.1.1992, the 1976 Punjab Rules became applicable under which 75% of the posts had to be filled by promotion and 25% by direct recruitment with Ph.D as an eligibility requirement, on the ground that no material was placed to show that the said 1976 Punjab Rules were ever followed for appointing Principals in UT of Chandigarh. The Tribunal therefore quashed the advertisement dated 14.7.2001 inviting applications for the post of Principal and directed the appellant to fill the vacancy according to law, keeping in view the eligibility criteria and the past practice till the Rules are framed and notified by the competent authority. The said order of the Tribunal was challenged by the appellant before the High Court. The High Court dismissed the writ petition by impugned order dated 26.10.2005, affirming the findings of the Tribunal.

9. Feeling aggrieved, the appellant has filed this appeal by special leave raising the following contentions: (i) When appellant has framed the draft Rules in consultation with UPSC and had been placed the Rules before the central government, for being notified under the name of the President of India, pending such notification of the Rules, it was entitled to invite applications for the post of Principal in terms of the said Rules

by treating them as draft rules under consideration. (ii) The Tribunal and the High Court could not substitute the eligibility requirements prescribed by the appellant. (iii) The Tribunal and the High Court could not have ignored the notification dated 13.1.1992 adopting the corresponding Punjab Rules to govern the service of its employees wherever there were no rules of the Chandigarh Administration. (iv) The 1976 Punjab Rules were applicable, and in terms of it, the advertisement for filling one post of Principal by direct recruitment by prescribing the eligibility requirement of Ph.D was valid. The appellant also pointed out that another bench of the Tribunal by order dated 3.8.1995 in OA No.844-CH of 1994 has clearly held that the 1976 Punjab Rules would apply to recruitment/employment, having regard to the notification dated 13.1.1992 of the Chandigarh Administration adopting the Punjab Rules; and as there was a clear divergence between the two decisions of the Tribunal, the High Court could not have mechanically affirmed the decision of the Tribunal that the 1996 Punjab Rules were inapplicable.

10. The first question for our consideration is whether the appellant could have prescribed in the advertisement, the educational qualifications for the post of Principal in terms of its 2000 Recruitment rules. The Administrator of the Chandigarh Administration made the Chandigarh Educational Service (Group A) Gazetted Government Arts & Science College Rules, 2000 vide notification dated 29.3.2000 and published it in the Gazette dated 1.4.2000. The said Rules were made in consultation with the UPSC, taking note of the UGC guidelines prescribing Ph.D. degree as an eligibility criteria for the post of Principals to be filled by direct recruitment. The Rules were sent to the Central Government for being notified in the name of the President of India and were pending consideration. It is in these circumstances the appellant advertised the post in terms of the said Rules, by prescribing the educational qualification of Ph.D. for direct recruitment to the post of Principal. In *Abraham Jacob vs. Union of India* [1998 (4) SCC

65], this Court held that where draft rules have been made, an administrative decision taken to make promotions in accordance with the draft rules which were to be finalized later on, was valid. In *Vimal Kumari vs. State of Haryana* [1998 (4) SCC 114], this Court held that it is open to the Government to regulate the service conditions of the employees for whom the rules were made, even if they were in their draft stage, provided there is a clear intention on the part of the Government to enforce those rules in the near future. In this case, the High Court however rejected the advertisement on the ground that the regular rules were not notified by the President of India even after five years, when the High Court decided the matter. But what is relevant to test the validity of the advertisement, was the intention of the appellant when the advertisement was issued. At that time, the appellant had the clear intention to enforce the Recruitment Rules in future as they had been made in consultation with UPSC, in accordance with the UGC guidelines and the Rules had been sent to the Central Government for being notified by the President and the matter was pending consideration for a few months when the advertisement was issued. The appellant at that time had no inkling that there would be inordinate delay or the Rules may not be notified by the President. Therefore, the advertisement in terms of the 2000 Recruitment rules was valid.

11. Even in the absence of valid rules, it cannot be said that the advertisement was invalid. In exercise of its executive power, the appellant could issue administrative instructions from time to time in regard to all matters which were not governed by any statute or rules made under the Constitution or a statute. In fact it is the case of the respondents that the appellant had issued such instructions on 20.8.1987 directing that the lecturers from UT cadre should be promoted as principals. In fact, the administrator of appellant had issued a notification on 13.1.1992 adopting the corresponding Punjab Rules to govern the service conditions of its employees. If so, the administrator of appellant could issue fresh directions in

regard to qualifications for recruitment. The Recruitment Rules made by the Administrator were duly notified. Though they were not rules under Article 309, they were nevertheless valid as administrative instructions issued in exercise of executive power, in the absence of any other Rules governing the matter. Once the recruitment rules, made by the Administrator, were notified, they became binding executive instructions which would hold good till the rules were made under Article 309. Therefore, the advertisement issued in terms of the said Recruitment Rules was valid.

12. The Tribunal and High Court also committed an error in holding that the appellant could not prescribe the qualifications of Ph.D. for the post of principal merely because earlier the said educational qualification was not prescribed or insisted. The Recruitment Rules were made in consultation with UPSC, to give effect to the UGC guidelines which prescribed Ph.D. degree as the eligibility qualification for direct recruitment of Principals. In fact, even the 1976 Punjab Rules prescribed Ph.D. degree as a qualification. In several States, Ph.D. is a requirement for direct recruitment to the post of a college Principal. When the said qualification is not unrelated to the duties and functions of the post of Principal and is reasonably relevant to maintain the high standards of education, there is absolutely no reason to interfere with the provision of the said requirement as an eligibility requirement. It is now well settled that it is for the rule-making authority or the appointing authority to prescribe the mode of selection and minimum qualification for any recruitment. Courts and tribunals can neither prescribe the qualifications nor entrench upon the power of the concerned authority so long as the qualifications prescribed by the employer is reasonably relevant and has a rational nexus with the functions and duties attached to the post and are not violative of any provision of Constitution, statute and Rules. [See *J. Rangaswamy vs. Government of Andhra Pradesh* - 1990 (1) SCC 288 and *P.U. Joshi vs. Accountant General* - 2003 (2) SCC 632]. In the absence of any rules, under Article

309 or Statute, the appellant had the power to appoint under its general power of administration and prescribe such eligibility criteria as it is considered to be necessary and reasonable. Therefore, it cannot be said that the prescription of Ph.D. is unreasonable.

13. The Tribunal and the High Court have held that in the years 1989 and 1991, the Tribunal had accepted the earlier administrative instructions dated 20.8.1987 which required the UT cadre employees to be considered for the post has to be followed. The fact that at that time Ph.D. degree was not insisted upon, does not mean that for all times to come, Ph.D. degree could not be insisted. Ph.D. degree was made a qualification because UGC guidelines required it for direct recruitment post and the UPSC approved the same. Therefore, merely because on some earlier occasions, the posts of Principal were filled by UT cadre lecturers without Ph.D. degree, it cannot be argued that the Ph.D. degree cannot be prescribed subsequently.

14. The Tribunal and High Court were not justified in holding that 1976 Punjab Rules were not applicable on the ground that no material had been placed to show that they were followed while appointing a principal in the past. The fact that the appellant had issued a notification dated 13.1.1992 adopting the corresponding Punjab Rules governing the conditions of service of its employees, is not disputed. Therefore when appellant acted in accordance with the said directions, it is not necessary to consider whether there were any occasion between 1992 to 2001 to invoke the said rules or whether they were in fact invoked. The notification dated 13.1.1992 could not have been brushed aside in the manner done by the Tribunal and the High Court.

15. In view of the above, we allow this appeal and set aside the order dated 22.4.2002 of the Tribunal and the order dated 26.10.2005 of the High Court. The original application (OA No.648 – CH of 2001) filed by respondents 2 to 5 before the Tribunal is dismissed. The prayer that Chandigarh

Administration should be directed to fill the vacancies of Principals in accordance with the eligibility criteria as was prevalent prior to the issue of the notification dated 14.7.2001, is rejected. The notification prescribing educational qualification of doctorate degree or equivalent with 55% marks at the Master's Degree Level examination or 12 years teaching experience of degree classes in a college affiliated to any university or equivalent is upheld as validly prescribing the qualifications for filling the post by direct recruitment.

D.G. Appeal allowed.

ARSHAD JAMIL

v.

STATE OF UTTARAKHAND & ORS.

(Civil Appeal No. 7721 of 2011)

SEPTEMBER 7, 2011

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

Service law – Termination of service – Post of civil judge reserved under category of Other Backward Classes for residents of State of Uttrakhand – Selection of appellant on basis of caste certificate issued by Tehsildar, Roorkee – Cancellation of caste certificate by Tehsildar since the appellant obtained the caste certificate by showing himself a resident of Roorkee in a mischievous manner, while he was actually a permanent resident of Muzaffarnagar – Writ petition by the appellant – Order of Tehsildar canceling the caste certificate, quashed by the High Court on the ground of violation of principles of natural justice – Pursuant thereto appellant given opportunity, on basis thereof he filed replies and by order dated 1.9.2005, the Tehsildar cancelled the caste certificate – Thereafter, termination of services of the appellant – Writ petition challenging the termination order – Direction by the High Court to re-instate the appellant but denial of payment of any salary or allowances for the period he did not actually work – Another writ petition filed challenging the order dated 1.9.2005 canceling the caste certificate which was dismissed – On appeal, held: There was sufficient documentary evidence on record to prove that the appellant was ordinarily resident of Muzzaffaragar, U.P. – His name was included in the electoral roll of Muzaffarnagar in the year 1993 – Despite his claim that he was residing in Roorkee, there is no documentary evidence except for municipal record issued in 2003 showing him as tenant in

Roorkee – There is no contemporaneous document prior to the issuance of caste certificate showing and justifying his claim that he was ordinarily a resident of Roorkee – Tehsildar cancelled the caste certificate by a detailed order giving cogent and valid reasons thereof – Thus, there is no infirmity in the order of the High Court upholding the order of the Tehsildar canceling the caste certificate of the appellant – Termination order of the appellant is upheld – Social status certificate.

The Uttrakhand Public Service Commission issued an advertisement inviting applications for recruitment to the post of Civil Judge whereby only residents of the State of Uttrakhand were entitled to the benefit of reservation under the category of Other Backward Classes. (OBCs). The said candidates had to produce a caste certificate in terms of the format attached thereto certifying as to ordinarily resident of the State. The appellant obtained a caste certificate, issued by the Tehsildar, Roorkee. The appellant was selected for the post of Civil Judge against a reserved category post meant for (OBCs). Thereafter, on basis of a complaint that the appellant is a permanent resident of Muzaffarnagar, detailed inquiry was carried out. It was found that the appellant had obtained the caste certificate by showing himself a resident of Roorkee in a mischievous manner, while he was actually a permanent resident of Muzaffarnagar. The Tehsildar, Roorkee cancelled the caste certificate issued to the appellant by the order dated 02.03.2005. The appellant filed a writ petition challenging the legality and the validity of the order. The High Court quashed the said order on the ground of violation of principles of natural justice, with liberty to the Tehsildar to issue notice to the appellant and to give reasonable opportunity to file his objections against the proposal to cancel the caste certificate. Subsequent thereto, the appellant was given an opportunity and he

filed replies. The Tehsildar, Roorkee by order dated 1.9.2005 canceled the caste certificate issued to the appellant. Meanwhile, the appellant filed a writ petition before the High Court challenging the order terminating his service and the same was allowed directing the reinstatement of the appellant with continuity of service without any break, but without any salary or allowances for the period for which he had not actually worked. The writ petition challenging the order dated 1.9.2005 canceling the caste certificate was dismissed holding that the appellant cannot get the benefit of being OBC status in the State of Uttrakhand as he is a permanent resident of Muzaffarnagar, UP; and that he obtained a false certificate of being resident of Roorkee, Uttrakhand. Therefore, the instant cross-appeals were filed.

Allowing the appeal filed by the State and dismissing the appeals filed by the Civil Judge, the Court

HELD: 1.1 Although, the power and the jurisdiction of this Court in the matter of re-appreciation of evidence is restricted and also keeping in mind the well-settled principles that the scope of judicial review of administrative action is very restricted and limited and, therefore, the Court should be slow in interfering with the finding of facts arrived at by the High Court. [Para 31] [430-G-H]

1.2 On considering the evidence on record and the documents, it is found that the appellant received his education in Muzaffarnagar except for a period when he studied in Mysore. He also obtained his Law Degree from Muzaffarnagar Law College. During the said period he was a resident of Muzaffarnagar which is established from the records available. The appellant thereafter obtained his graduation from the Law College at Muzaffarnagar, and got himself enrolled with the Bar

Council of Uttar Pradesh, Allahabad. He submitted his application on 01.12.1999 and he received the enrolment on 09.03.2000 in which also his address was shown as 225, Khalapur, District-Muzaffarnagar, U.P. His name as well as the names of his family members were included in the ration card which has been made in District-Muzaffarnagar. The said ration card however, came to be cancelled by the supply office in the year 2001, during card verification scheme for want of a photograph. Despite his claim that he was residing in Roorkee, there is no documentary evidence to prove the said fact except for a document which was placed on record, being municipal record, but issued in the year 2003 showing him as a tenant of 'FA' in Mohalla Shekhpuri for the period from 1998 to 2003. But if he was staying in Roorkee from the year 1998, there was no reason why other documentary evidence is not available in support of his contention that he was ordinarily a resident of Roorkee. His name came to be recorded in the electoral roll of Roorkee in the District-Haridwar only in the year 2003. The records show that the name of the appellant was included in the electoral roll of Muzaffarnagar in the year 1993 on the basis of door to door survey made by the election commissioner. Since he was found residing in Muzaffarnagar, his name was included in the voters list of Muzaffarnagar constituency. His name finds place in the electoral roll of Muzaffarnagar constituency for the year 1993, 1995, 1998 and 2003. The voter identity card of the appellant was also issued to him from the Muzaffarnagar Assembly constituency showing him to be a resident of House No. 225, Mohalla-Khalapur, District-Muzaffarnagar, U.P. The name of the appellant in the said voter list continued to be there till his father informed them in the year 2006 that his son is now residing in Roorkee and, therefore, his name is to be deleted from the voters list. The appellant submitted his application for being appointed for the post of Civil Judge [Junior

Division] alongwith the cast certificate issued to him on 29.6.2002. There is no contemporaneous document prior to the same showing and justifying his claim that he was ordinarily a resident of Roorkee. [Para 32] [431-B-H; 432-A-C]

1.3 Section 21 of the Representation of Peoples Act, 1950 lays down the procedure and method for the preparation and revision of electoral rolls in a constituency. Rule 7 of the Registration of Electors Rules, 1960 prove and establish that an electoral roll is prepared on the basis of enumeration done by the election staff after making a door to door verification and on the basis of the information disclosed by the family members and the house they visit. On the said disclosures made, the name of the appellant was included in the voters list of Muzaffarnagar upto 2003 and therefore, it cannot be said that he was not only ordinarily resident of Muzaffarnagar but a permanent resident thereof. In view of such authentic and sufficient documentary evidence on record to reject the claim of the appellant that he was an ordinarily resident of Roorkee, the findings recorded by the Tehsildar, Roorkee in his order dated 02.03.2005 and also those recorded by the High Court cannot be sought to be in any manner arbitrary, illegal or irrational. [Paras 33 and 34] [432-D-G]

Action Committee on Issue of Caste Certificate to SC and ST in theState of Maharashtra and Anr. v. Union of India and Anr. **(1994) 5 SCC 244 – referred to.**

1.4 The order which is passed by the Tehsildar whereby he had finally cancelled the caste certificate of the appellant, was a detailed order giving cogent reasons for the decision rendered. The said order cannot be termed as an order passed by him at anybody's behest or at the dictation of his superior officer. The said order

was passed independently exercising his own independent mind and upon detailed examination of the records. Therefore, it cannot be said that the same was passed at the dictation of the higher authority or that the same was passed for extraneous consideration is baseless and without any merit. [Para 36] [433-F-H]

1.5 The appellant failed to prove and establish that he is an ordinary resident of Roorkee in the year 2002 when he made an application for his appointment to the post of Civil Judge [Junior Division] and also when he applied for and obtained the caste certificate. The caste certificate was initially issued to him without making a proper and detailed inquiry, and the Tehsildar proceeded on the basis of certain observation of two persons. A caste certificate is a very important and substantial document and, therefore, while granting the same a proper inquiry is required to be made by the Tehsildar which appears to have been not done in the instant case, and the Tehsildar issued the said caste certificate to the appellant in a perfunctory manner and therefore, the same was cancelled by a detailed order giving cogent and valid reasons thereof. [Para 37] [434-A-C]

1.6 There is no infirmity in the judgment and order passed by the High Court, upholding the order of the Tehsildar canceling the caste certificate of the appellant. The order passed by the High Court setting aside the termination order of the appellant is set aside. [Paras 38 and 39] [434-D-F]

Case Law Reference:

(1994) 5 SCC 244 Referred to Para 35

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7721 of 2011.

From the Judgment & Order dated 13.08.2008 of the High

Court of Uttarakhand at Nainital in Writ Petition No. 408 of 2006 (S/B).

WITH

C.A. Nos. 7722 & 7723 of 2011.

L. Nageshwar Rao, N.P.S. Panwar, D.P. Chaturvedi, Rachana Srivastava, Ranchi Daga, Krutin Joshi, Abhinav Rao, Anuvrat Sharma, S.S. Shamshery, Jatinder Kumar Bhatia, D. Bharathi Reddy for the appearing parties.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. Leave Granted.

2. By this Judgment and Order, we propose to dispose of three appeals, arising out of SLP (C) No. 25203 of 2008 filed by the appellant herein against the order dated 13.8.2008, SLP (C) No. 8617 of 2006 filed by the State of Uttaranchal against the Judgment and Order dated 23.12.2005 and finally SLP (C) No. 9209 of 2006 filed by the appellant against the Judgment and Order dated 23.12.2005 passed by the High Court of Uttaranchal at Nainital.

3. In SLP (C) No. 25203 of 2008 filed by the appellant, the impugned Judgment and Order dated 13.8.2008 was challenged, whereby the High Court dismissed the writ petition filed by the appellant, praying for quashing the order passed by the respondent, cancelling the caste certificate issued to the appellant.

4. SLP (C) No. 8617 of 2006 was filed by the State of Uttaranchal against the Judgment and Order dated 23.12.2005, whereby the High Court issued a direction for reinstatement of the Arshad Jamil, whose service was terminated by an order dated 18.12.2004.

5. SLP (C) No. 9209 of 2006 was filed by the appellant herein, challenging the Judgment and Order dated 23.12.2005,

to the extent it denies the appellant payment of any salary or allowances for the period for which he had not actually worked.

6. Since the subject matters involved in these appeals are inter-connected and similar, all these appeals are being taken up for consideration together, and therefore, a common Judgment and Order is being passed.

7. The Uttrakhand Public Service Commission issued an advertisement in the year 2002 inviting applications for recruitment to the post of Civil Judge [Junior Division]. In the said advertisement, it was clearly mentioned that only residents of the State of Uttrakhand would be entitled to the benefit of reservation under the category of Other Backward Classes. The said advertisement also carried a proforma of the caste certificate to be submitted alongwith the application, wherein it required a certification as to "ordinarily resident" of the applicant. The appellant, herein, obtained a caste certificate, which was issued by the Thesildar, Roorkee to the effect the appellant is a resident of Roorkee and belongs to "Momin Ansari Caste". The said certificate was dated 29.06.2002.

8. A Memorandum was issued by the Government of Uttrakhand prescribing the format of the caste certificate which an applicant was required to submit in case he was seeking an appointment in the reserved category i.e. SC/ST/OBC. The appellant herein submitted his application offering his candidature for the post enclosing a caste certificate issued by the Tehsildar, Roorkee dated 29.06.02 and appeared in the written examination held for the purpose of recruitment to the aforesaid post of Civil Judge [Junior Division], and after being successful in the examination he was called for an interview on 26.7.2003 under letter dated 26.06.2003. The appellant was found successful and was selected for the post of Civil Judge [Junior Division], against a reserved category post meant for other backward classes, by an appointment order dated 18.9.2003.

9. The appellant was appointed as Civil Judge [Junior Division] on probation for a period of two years. The aforesaid appointment letter was issued, subject to the condition that the character, verification and report of the health examination of the concerned candidate should be satisfactory for judicial service. After he submitted his joining report, the appellant was posted as Civil Judge [Junior Division] at Purola, Utarkashi, Uttrakhand and assumed charge on 22.9.2003.

10. The District Magistrate, Haridwar received a letter issued by the Secretary, Public Service Commission, Uttaranchal, Haridwar informing him that a complaint had been received by the Commission against the appellant herein, wherein it was complained that Arshad Jamil is a permanent resident of House No. 156, Janshath House, Ansari Road, District – Muzaffarnagar, and that his name appeared at Sl No. 862 of part No. 141 of Electoral List of constituency No. 408 of Muzaffarnagar Legislative Assembly and that he is a Member of the Muzaffarnagar Bar Association. By the aforesaid letter sent on 15.09.2003, the District Magistrate was requested to inform the Commission on priority basis about the validity of the caste certificate of OBC issued to the appellant on 29.06.2002 so that the Commission could take a decision on the aforesaid complaint.

11. Pursuant to the aforesaid letter, an inquiry was conducted and the Tehsildar Roorkee submitted a report dated 09.07.2003, confirming that Arshad Jamil, son of Jamil Ahmed, resident of 7, Sheikhpuri, Roorkee, Haridwar has been residing at that place since 1991, and that he belonged to caste Momin Ansari, which comes in the list of other backward class in Uttaranchal. In the said report, it was also stated that it is possible, that prior to his stay in Roorkee he was staying in Muzaffarnagar. In the said report, it was also stated that Arshad Jamil was residing in Roorkee for about 12 years since his name appeared in the Municipality records as tenant. It was also stated that he was residing in Roorkee from 3.6.1998 to

2003 as a resident of Old House No. 24 and New Number 7, Sheikhpuri, Roorkee, Haridwar. It appears that a police report was also submitted on 8.12.2003, that the appellant has been residing at Roorkee since 1991.

12. A letter was sent by the District Magistrate dated 9.1.2004 to the Principal Secretary, Social Welfare Department, Uttaranchal Government, stating that the jurisdiction to cancel the caste certificate lies with the State Government and not with him. A show cause notice was issued to the appellant by the Chief Secretary, Government of Uttaranchal. Under his letter dated 13.5.2004, it was alleged that one Shri Abdul Kareem had submitted a complaint by his letter dated 12.1.2004 alleging that the appellant had succeeded in getting appointed in the Uttaranchal State Judicial Service on the basis of a fake caste and residence certificate, at the address of Sheikhpuri, Roorkee in collusion with the Tehsildar of Roorkee. In the said letter, it was also mentioned that an inquiry was made by the District Magistrate, Haridwar, who had informed the State Government that the appellant was a permanent resident of District Muzaffarnagar, Uttar Pradesh but he had produced a certificate of Other Backward Classes showing himself to be a permanent resident of Uttaranchal and therefore, was not entitled to get the benefit of OBC Caste in Uttarakhand, as he is a permanent resident of Uttar Pradesh. He was, therefore, asked to show cause as to why his appointment in the judicial service should not be cancelled for the aforesaid reason.

13. The appellant submitted his reply as against the aforesaid show cause notice on 20.7.2004. The contents of the aforesaid reply were considered but even thereafter another show cause notice appears to have been issued to the appellant on 18th September, 2004. The contents of the show cause notices and replies filed were considered by the State Government. On scrutiny thereof, it was found by the Government that the appellant was born in District Muzaffarnagar, UP and that he had also completed his education there. A Ration Card had been made in his name

and in the names of his family members in District Muzaffarnagar and he completed his law course being a student from Muzaffarnagar. He also got himself enrolled in the Muzaffarnagar Bar Association. His name was also entered in the electoral roll of Muzaffarnagar up to 2007, when his name came to be deleted from the voters list after his father informed the concerned authorities that the name of the appellant is to be deleted from the voters list as he is now residing in Roorkee.

14. Considering the aforesaid facts, it was held that the defense taken in the replies by the appellant was baseless and that since he was neither a permanent resident of the State of Uttaranchal nor belonged to Other Backward Classes of State of Uttarakhand, his appointment to the post of Civil Judge [Junior Division] was terminated as per order dated 18.12.2004.

15. Another order came to be issued on 2.3.2005, whereby the Tehsildar Roorkee, who was the competent authority, cancelled the caste certificate issued to the appellant on 29.6.2002 on the ground that after a detailed inquiry it was revealed that the appellant had obtained the caste certificate by showing himself a resident of Roorkee in a mischievous manner, while he was actually a permanent resident of Muzaffarnagar, and thereby he has misused the said caste certificate.

16. The appellant filed a writ petition challenging the legality and the validity of the order dated 02.03.2005. The said writ petition was registered as Writ Petition (Civil) No. 448 of 2005. The aforesaid writ petition, filed by the appellant, was allowed by the Uttrakhand High Court by its order dated 6.5.2005, whereby the High Court quashed the said order on the ground of violation of principles of natural justice, with liberty to the Tehsildar to issue notice to the appellant and to give reasonable opportunity to file his objections against the proposal to cancel the caste certificate.

17. Consequently, a show cause notice was issued to the appellant by the Tehsildar on 6.6.2005, calling upon him to show cause as to why the caste certificate issued to him on 29.6.2002 should not be cancelled, for the reasons stated in the said notice. The appellant submitted his reply to the aforesaid show cause notice. Thereafter, a second show cause notice dated 11.8.2005, in continuation of the notice dated 6.6.2005, was issued to Shri Arshad Jamil. After replies sent by the appellant, he was also given an opportunity to examine the documents on record by issuing a letter dated 11.8.2005 which was sent to his address House No. 7, Opposite Dev Nursing Home, Roorkee.

18. Despite the aforesaid letter, he did not appear and therefore, a notice was pasted at the address intimating him to be present to examine and peruse the relevant documents. As the appellant did not appear to examine the said documents, the Tehsildar, Roorkee proceeded to pass an order dated 1.9.2005. In the said order, the Tehsildar held that after going through the documents relied upon by the objector and other records available, it is revealed that the objector Arshad Jamil was originally a resident of Mohalla Khalapar, Muzaffarnagar, which is established by the fact that his name is mentioned as against House No. 225 of Serial No. 147 of Part No. 42 of 408 Muzaffarnagar Vidhan Sabha Kshetra Electoral Roll, 1995. From the Electoral Rolls of 2003, it was also found that a photo identity card of Arshad Jamil was prepared by the Election Commission of India for Electoral Roll of Muzaffarnagar Vidhan Sabha, wherein his name appeared until it was deleted in 2007 on the basis of information supplied by his father on 27.08.06. His father informed them that his son was now staying at Roorkee.

19. The other documents filed by the appellant were also considered, by which it was deduced that the objector had obtained the caste certificate in question by fraud. In that view of the matter the Tehsildar, Roorkee held that such caste certificate should not have been issued to the appellant and

therefore, passed an order that the caste certificate dated 29.6.2002 be cancelled by issuing his order dated 1.9.2005.

20. Meanwhile, the appellant filed writ petition No. 413 of 2005 challenging the order dated 18.12.2004, terminating his service. He also filed another writ petition being writ petition no. 408 of 2006 challenging the order of cancellation of his caste certificate. The High Court considered the writ petition no. 413 of 2005 filed by the appellant, which was allowed by the High Court by order dated 23.12.2005. By the said order, the High Court directed the reinstatement of the appellant with continuity of service without any break, but ordered that the said reinstatement would be without any salary or allowances for the period for which he had not actually worked.

21. The writ petition No. 408 of 2006 was taken up for final hearing by the High Court and by Judgment and Order dated 13.8.2008 the writ petition was dismissed holding that the appellant cannot get the benefit of being OBC status in the State of Uttrakhand as he is a permanent resident of Muzaffarnagar, UP and also that he obtained a false certificate of being resident of Roorkee, District Haridwar, Uttrakhand.

22. As against the aforesaid, the two orders passed by the High Court, three Special Leave Petitions as aforestated came to be filed in this Court in which notices were issued. The same were listed before us for hearing and we heard the learned counsel appearing for the parties on the said Special Leave Petitions and by this common Judgment and Order we are disposing of all these Special Leave Petitions, after granting leave therein and by giving our reasons.

23. Counsel appearing for the appellant-Arshad Jamil forcefully argued that the respondent-State did not have any jurisdiction to review the order granting caste certificate in favour of the appellant. According to him, after the grant of the aforesaid caste certificate dated 29.6.2002, the matter was once reviewed by the Tehsildar, Roorkee and in the fresh inquiry

also it was found and revealed that the appellant was ordinarily a resident of Uttarakhand and that he belongs to Other Backward Classes and therefore no further review was called for and permissible. According to him, the police also made a verification wherein it was also established that he has been residing in Roorkee for a very long time and, therefore, an ordinary resident of Roorkee. He therefore submitted that the subsequent review made by the Tehsildar regarding the caste verification was without jurisdiction. Counsel also submitted before us that there has been enough cogent evidence on record to justify and prove that the appellant has been in Roorkee at least from the year 1998, which fact is proved from the municipal records itself, and the police verification report also having stated that he has been in Roorkee for about 12 years, the order of cancellation of the caste certificate is illegal and without jurisdiction. He submitted that the expression "ordinarily resident" does not bar simultaneous residence at some other place also, for a person could be at two places at the same time. He also submitted that the order of cancellation of his caste certificate came to be passed on the basis of the dictation of the District Magistrate, which is apparent on the face of the records and, therefore, such an order which is passed at the behest and dictation of a higher authority is illegal and irrational. According to the counsel, there is enough evidence on record like lawyers' identity card issued by Uttarakhand HC Bar Association, entry of his name in the electoral roll of Roorkee in the year 2003, the Hibanama and also the certificate of the landlord showing him as a resident of Roorkee and the municipal records indicating the residence at Roorkee from 1998 to 2003 which, when collectively read, would support the contention that the appellant is ordinarily resident of Roorkee and, therefore, entitled to get a caste certificate of the nature which was issued to him and, therefore, cancellation of the same by the authority was illegal and is liable to be set aside.

24. Counsel appearing for the respondent however, while

rebutting the aforesaid contentions, submitted that the documents on record clearly indicate that the appellant has been a resident of Muzaffarnagar, UP at least upto 2002 and thereafter, in order to make himself eligible to apply for a reserved post, he created documents to indicate that he is an ordinary resident of Roorkee. He has also drawn our attention to the various documents on record, including the document which he had submitted to the Bar Council of India applying for enrolment and the certificate given by the Bar Council, showing his residence to be at Muzaffarnagar. It was also submitted by him that the High Court was justified in upholding the administrative action taken by the respondent State, as judicial review of such administrative action should and could be exercised only in a very limited sphere. He submitted that the aforesaid order of cancellation of the caste certificate was done after an order was passed by the High Court directing for giving a hearing to the appellant and that upon giving such reasonable opportunity to the appellant, his caste certificate was finally cancelled.

25. In the light of the aforesaid submissions of the counsel appearing for the parties, we have perused the records and also perused the decisions relied upon by the counsel appearing for the parties.

26. Undisputedly, and as agreed to by the counsel appearing for the parties during the course of hearing of arguments, if the order passed by the High Court upholding the cancellation of a caste certificate is confirmed by this Court, in that event it would not be necessary to go into the other aspect regarding the issue of legality or otherwise of the order of termination as also the order regarding payment of back wages to the appellant. On the other hand, if we find that the order of the High Court cannot be sustained and that the caste certificate was issued legally and justifiably, in that event, not only the order canceling the caste certificate is to be set aside with a direction to restore the caste certificate to the appellant but at the same

time the order of termination shall also have to be quashed. Consequently, the question with regard to the claim for payment of arrear of wages shall have to be considered.

27. Therefore, in our considered opinion, the issue with regard to the issuance of caste certificate and cancellation thereof, is the crucial question which goes to the root of the dispute between the parties and the same requires our consideration at the very initial stage.

28. Our attention was drawn to the advertisement issued by the respondent-State inviting applications for filling up the post of Civil Judge [Junior Division]. In the said advertisement it was clearly mentioned that the candidates who claim reservation by claiming to belong to Other Backward Classes of Uttarakhand, have to produce a caste certificate in terms of the format attached thereto. It was mentioned therein that the candidate who claims to be a member of the backward classes of Uttarakhand and is ordinarily a resident of Uttarakhand has to submit a caste certificate in format. The appellant also while applying for the said post, obtained a caste certificate which was issued by the Tehsildar on 29.6.2002, which is under challenge.

29. It is no doubt true that the Tehsildar, Roorkee subsequently also reiterated his stand that the appellant is a member of the other backward classes and is also ordinarily a resident of Uttarakhand. Subsequently, however, the same was cancelled by an order dated 02.03.2005 whereby the Tehsildar, Roorkee, who is the competent authority, cancelled the caste certificate issued to the appellant on 29.6.2002, on the ground that after a detailed inquiry it was revealed that the appellant had obtained the caste certificate by showing himself to be a resident of Roorkee in a mischievous manner, while he was actually a permanent resident of Muzaffarnagar and has thereby, misused the said caste certificate. A copy of the said order is on record. The said order indicates that District Magistrate had advised cancelling the certificate. The said

order also indicates that the same was cancelled without giving any opportunity to the appellant. Therefore, a writ petition was filed by the appellant challenging the legality and the validity of the order dated 02.03.2005. The said writ petition was allowed by the Uttarakhand High Court by its order dated 06.05.2005, whereby the High Court quashed the said order on the ground of violation of principles of natural justice, with liberty to the Tehsildar to issue a notice to the appellant and to give reasonable opportunity to file his objections against the proposal to cancel the caste certificate. In view of the aforesaid order passed by the High Court, the State Government became empowered to pass a fresh order in the matter of cancellation of caste certificate, after giving notice to the appellant to show cause as to why it should not be cancelled. There is no dispute with regard to the fact that subsequent thereto the appellant has been given such an opportunity and he had filed replies thereto. The Tehsildar thereafter passed a reasoned order by referring to the various documents filed by the parties and giving reasons for his decisions by relying upon the documents which are on record.

30. The High Court, where the validity of the order passed by the Tehsildar on 02.03.2005 was challenged, considered the contentions raised by the appellant, but dismissed the writ petition holding that the appellant cannot get the benefit of Other Backward Classes status in the State of Uttarakhand as he is a permanent resident of Muzaffarnagar, UP. The High Court has also recorded a finding that the appellant obtained a false certificate of being a resident of Roorkee, District-Haridwar, Uttarakhand.

31. Although, the power and the jurisdiction of this Court in the matter of re-appreciation of evidence is restricted and also keeping in mind the well-settled principles that the scope of judicial review of administrative action is very restricted and limited and, therefore, we should be slow in interfering with the finding of facts arrived at by the High Court, we still looked into

the entire records and the documents relied upon in order to satisfy ourselves that the action taken by the respondent-State in canceling the certificate of the appellant is legal, just and proper.

32. On considering the evidence on record and the documents placed before us we find that the appellant received his education in Muzaffarnagar except for a period when he studied in Mysore. He also obtained his Law Degree from Muzaffarnagar Law College. During the aforesaid period he was a resident of Muzaffarnagar which is established from the records available with us. The appellant thereafter obtained his graduation from the Law College at Muzaffarnagar, and got himself enrolled with the Bar Council of Uttar Pradesh, Allahabad. He submitted his application on 01.12.1999 and he received the enrolment on 09.03.2000 in which also his address was shown as 225, Khalapur, District-Muzaffarnagar, U.P. His name as well as the names of his family members were included in the ration card which has been made in District-Muzaffarnagar. The said ration card however came to be cancelled by the supply office in the year 2001, during card verification scheme for want of a photograph. Despite his claim that he was residing in Roorkee, there is no documentary evidence to prove the said fact except for a document which has been placed on record, being municipal record, but issued in the year 2003 showing him as a tenant of Furkan Ahmed in Mohalla Shekhpuri for the period from 1998 to 2003. But if he was staying in Roorkee from the year 1998, there was no reason why other documentary evidence is not available in support of his contention that he was ordinarily a resident of Roorkee. His name came to be recorded in the electoral roll of Roorkee in the District-Haridwar only in the year 2003. The records placed before us show that the name of the appellant was included in the electoral roll of Muzaffarnagar in the year 1993 on the basis of door to door survey made by the election commissioner. Since he was found residing in Muzaffarnagar, his name was included in the voters list of Muzaffarnagar

constituency. His name finds place in the electoral roll of Muzaffarnagar constituency for the year 1993, 1995, 1998 and 2003. The voter identity card of the appellant was also issued to him from the Muzaffarnagar Assembly constituency showing him to be a resident of House No. 225, Mohalla-Khalapur, District-Muzaffarnagar, U.P. The name of the appellant in the aforesaid voter list continued to be there till his father informed them in the year 2006 that his son is now residing in Roorkee and, therefore, his name is to be deleted from the voters list. The appellant submitted his application for being appointed for the post of Civil Judge [Junior Division] alongwith the cast certificate issued to him on 29.6.2002. There is no contemporaneous document prior to the same showing and justifying his claim that he was ordinarily a resident of Roorkee.

33. Our attention was also drawn to the Section 21 of the Representation of Peoples Act, 1950 laying down the procedure and method for the preparation and revision of electoral rolls in a constituency. Our attention was also drawn to Rule 7 of the Registration of Electors Rules, 1960 which prove and establish that an electoral roll is prepared on the basis of enumeration done by the election staff after making a door to door verification and on the basis of the information disclosed by the family members and the house they visit. On the said disclosures made, the name of the appellant was included in the voters list of Muzaffarnagar upto 2003 and therefore, it cannot be said that he was not only ordinarily resident of Muzaffarnagar but a permanent resident thereof.

34. In view of such authentic and sufficient documentary evidence on record to reject the claim of the appellant that he was an ordinarily resident of Roorkee, the findings recorded by the Tehsildar, Roorkee in his order dated 02.03.2005 and also those recorded by the High Court cannot be sought to be in any manner arbitrary, illegal or irrational.

35. In the case of *Action Committee on Issue of Caste Certificate to SC and ST in the State of Maharashtra and Anr.*

v. *Union of India & Anr.* reported in (1994) 5 SCC 244 a Constitution Bench of this Court considered the issue regarding a person belonging to SC/ST in relation to his original State of which he is a permanent or ordinary resident. While examining the said issue it was held that such a person who belongs to SC/ST in one State of which he is a permanent or ordinary resident cannot deem to belong to SC/ST in relation to another State on his migration to that State for the purpose of employment, education, etc. The aforesaid conclusions were arrived at by the Constitution Bench of this Court after referring to the Government order wherein the expression "ordinary residence" came to be explained as residence which is not for the purpose of service, employment, education, confinement in jail, etc., and in short it means permanent and not a temporary residence. The Constitution Bench also referred to Section 20 of the Representation of Peoples Act, that so far as the Government of India is concerned, it has firmly held the view that a Scheduled Caste/Scheduled Tribe person who migrates from the State of his origin to another State in search of employment or for education purposes or the like, cannot be treated as a person belonging to the Scheduled Caste/ Scheduled Tribe of the State to which he migrates and hence he cannot claim benefit as such in the latter State.

36. The order which is passed by the Tehsildar whereby he had finally cancelled the caste certificate of the appellant and which is the impugned order under challenge in the writ petition, was a detailed order giving cogent reasons for the decision rendered. The said order cannot be termed as an order passed by him at anybody's behest or at the dictation of his superior officer. The aforesaid order was passed independently exercising his own independent mind and upon detailed examination of the records. Therefore, the submission that the same was passed at the dictation of the higher authority or that the same was passed for extraneous consideration is baseless and without any merit.

37. The appellant has failed to prove and establish that he is an ordinary resident of Roorkee in the year 2002 when he made an application for his appointment to the post of Civil Judge [Junior Division] and also when he applied for and obtained the caste certificate. The caste certificate was initially issued to him without making a proper and detailed inquiry, and the Tehsildar proceeded on the basis of certain observation of two persons. A caste certificate is a very important and substantial document and, therefore, while granting the same a proper inquiry is required to be made by the Tehsildar which appears to have been not done in the present case, and the Tehsildar issued the said caste certificate to the appellant in a perfunctory manner and therefore, the same was cancelled by a detailed order giving cogent and valid reasons thereof.

38. Consequently, we find no infirmity in the judgment and order dated 13.08.2008, in writ petition no. 408 of 2006 passed by the High Court, upholding the order of the Tehsildar canceling the caste certificate of the appellant. The appeal filed by the appellant against the order dated 13.8.2008 of the High Court fails.

39. Consequently, the appeal filed by the State of Uttarakhand against the order dated 23.12.2005, passed by the High Court, setting aside the order of termination of the appellant in writ petition no. 413 of 2004 stands allowed in terms of this order.

40. In view of the aforesaid position, the appeal filed by the appellant against the order dated 23.12.2005, passed by the High Court in writ petition no. 413 of 2004, claiming payment of back wages is rendered infructuous, which is also dismissed in terms of this order.

N.J. Appeals disposed of.

MARABASAPPA (D) BY LRS. & ORS.
v.
NINGAPPA (D) BY LRS. & ORS.
(Civil Appeal No. 3495 of 2001)

SEPTEMBER 08, 2011

[G.S. SINGHVI AND H.L. DATTU, JJ.]

Hindu Succession Act, 1956 – s. 14 – Rights of female Hindu under – Held: Any property of a female Hindu is her absolute property – She has full ownership over any property that she has acquired on her own or as stridhana – She may dispose of the same as per her wish, and the same shall not be treated as a part of the joint Hindu family property – There is no presumption that of joint family property, and there must be some strong evidence in favour of the same – On facts, propositor after marriage lived in the paternal house of his wife ('P') – 'P' was gifted a property by her father by a gift deed at the time of marriage, and continued to be in possession and purchased more properties from the income of the land gifted to her – Propositor except having some income from tenanted land had no personal income nor agricultural income which he could utilize for purchase of any property – Suit for partition by son of 'P' alleging that the entire property was a joint family property – Trial court rightly held that lands other than the tenanted portion as occupied by propositor, were the absolute self acquired properties of 'P' which she had purchased/ acquired from the income and funds from the lands gifted by 'P', whereas the order of the High Court that the properties to the suit were joint family properties and the parties to the suit were entitled for 1/3rd share in those properties, set aside.

'S' and 'P' got married in 1924 and at the time of the marriage, the father of 'P' gifted her land A7 under a Gift Deed. 'S' after his marriage, continued to reside in his in-

laws house and during his life time, he had no other source of income except from the tenanted lands. 'P' purchased certain lands A(4)-A(6) under a Sale Deed from the income of the land gifted to her by her father. Thereafter, with the income from the said two lands, 'P' purchased another land A(8)-(12). 'S' died in the year 1951 leaving behind four sons and one daughter-'M' (appellant-defendant), 'N' (respondent-plaintiff), 'B' (deceased); and 'SN' and 'C' (pre-deceased).

In her life time 'P' relinquished her share in land A(4)-A(6) in favour of the appellant. Thereafter, subsequent to an oral partition, she gave one part of the property A(8)-A(12) to the respondent and other to legal heirs of 'B'. In 1984, 'P' executed a will of 'Stridhana' land to her daughter, 'SN'. Thereafter 'P' died. The respondents filed a suit for partition seeking separate possession of 1/3rd share each alleging that the entire property is the joint family property and not the personal property of 'P'. The trial court held that except tenanted portion the said properties were self acquired properties of 'P'. The High Court held that the properties described in the suit are joint family properties and the parties to the suit are entitled for 1/3rd share in those properties. Therefore, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1. Section 14 of the Hindu Succession Act, 1956 clearly mandates that any property of a female Hindu is her absolute property and she, therefore, has full ownership. The Explanation to sub-section (1) further clarifies that a Hindu woman has full ownership over any property that she has acquired on her own or as stridhana. As a consequence, she may dispose of the same as per her wish, and that the same shall not be treated as a part of the joint Hindu family property. There is no presumption that of joint family property, and there

must be some strong evidence in favour of the same. [Paras 21 and 22] [451-E-G]

Appasaheb Chamdgade v. Devendra Chamdgade and Ors. **(2007) 1 SCC 521 – referred to.**

2.1 The High Court did not accept the findings and conclusion reached by the trial court. The High Court wrongly shifted the burden of proving that the said lands were a part of the self acquired property of 'P' and not a part of the joint family property of the appellants-defendents, when there was no affirmative proof of anything contrary. The High Court erred in shifting the burden of proof on the appellants, especially when there was nothing on record either by way of oral or documentary evidence produced by the respondents-plaintiffs before the trial court. [Para 13] [446-F-H]

2.2 Suit Land A(7) was 'stridhana' property of 'P'. This property was gifted to her by her father under a registered Gift Deed in 1924. She was the owner of the said land. She continued to be in possession of the said land till she bequeathed the same in favour of defendant No.5 under a Will dated 30.06.1984. On the death of 'P' and on the basis of the said Will, the legatee-defendant No.5 claims she became owner of the said land which was noted in the Revenue Records. The Will and the Revenue entries made were questioned by the plaintiffs and successfully proved that the said Will was not executed by 'P'. Therefore, defendant No.5 cannot claim title over A(7) under the Will and this property cannot be brought into the hotchpotch of the joint family property and would not be available for partition. Stridhana belonging to a woman is a property of which she is the absolute owner and which she may dispose of at her pleasure, if not in all cases during coverture, in all cases during widowhood. Since the plaintiffs proved that 'P' had not

alienated the property by executing a Will in favour of defendant No. 5 during her lifetime, the property is the absolute property of 'P' and would not be available for partition among the members of joint family since it does not partake the character of joint family property. [Para 18] [448-E-H; 449-A-B]

2.3 As regards the Suit Schedule properties Item No.A(4) to A(6), it is the case of the plaintiffs that the said properties were purchased by 'S', father of the plaintiffs and the defendants under a Sale Deed dated 05.10.1944, but, in the name of his wife 'P' from and out of the income of the tenancy lands A(1) to A(3) for the purpose of the joint family for which he was also the Karta of the family. However, it is the case of the contesting defendants that the said property is the self acquired property of 'P' from and out of her income derived from the property gifted to her by her father in the year 1924; that 'S' was the tenant of the property A(1) to A(3) only from the year 1947 and, therefore, plaintiffs cannot claim that from out of the income of the property A(1) to A(3), lands in item A(4) to A(7) were purchased. It has come in evidence of the contesting defendants that propositor 'S' was the tenant of the lands A(1) to A(3) only from the year 1947. The same was not disputed by the plaintiffs by leading any other cogent evidence to prove that 'S' was the tenant of the lands A(1) to A(3) even prior to 1944, the date of the Sale Deed. In the absence of any evidence, much less cogent and reliable evidence, it is difficult to accept the version of the plaintiffs that the suit schedule A(4) to A(6) should be put into common hotch potch and partitioned by meters and bounds. [Para 19] [449-C-G]

2.4 As regards the lands at Item A(8) to A(12), it is the case of the plaintiffs that on the death of propositor 'S', joint family continued and during its continuance, agricultural lands which is now sub-divided as items A(8)

to A(12) came to be purchased out of the joint family funds, but, in the name of 'P', since she was eldest member of the joint family at the relevant point of time. The oral evidence was led in support of the assertion made in the plaint. The plaintiffs did not produce any other evidence in support of the claim so made. The defence pleaded by the defendants, apart from others, is that 'P' had her independent source of income from A(7) lands. She, with the aid of the said income, acquired not only A(4) to A(6) but also A(8) to A(12) lands and the tenancy lands was held by joint family. It is also contended by them that propositor 'S', after marrying 'P', lived in the paternal house of his wife 'P', which fact is not denied by the plaintiffs, and 'S' had no personal income nor agricultural income which he could utilize for purchase of any property, much less A(8) to A(12) properties. The trial court, after considering the entire evidence on record came to the conclusion that lands A(8) to A(12) is the absolute self acquired properties of 'P'. The findings and the conclusion so arrived is based on the proper appreciation of the evidence on record and the respondents did not bring anything contrary to make a different view. Therefore, lands A(8) to A(12) of the suit Schedule is not the joint family property but the absolute property of 'P', which she purchased/acquired from the income and funds from the lands A(7) and A(4) to A(8). [Para 23] [452-C-H; 453-A-B]

3. The reasoning given by the High Court cannot be accepted. Thus, the reasoning and conclusion reached by the trial court is concurred with. Thus, the judgment and order passed by the High Court is set aside and that of the trial court is restored. [Paras 24 and 25] [453-C-D]

Case Law Reference:

(2007) 1 SCC 521	**Referred to**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3495 of 2001.

From the Judgment and Order dated 30.03.1999 of the High Court of Karnataka in RFA no. 385 of 1993.

Rajesh Mahale and Giri K., for the Appellants.

Gireesh Kumar (for Khwairakpam Nobin Singh), M.A. Chinnasamy and Ankur S. Kulkarni for the Respondents.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. This appeal is directed against the Judgment and Order of the High Court of Karnataka at Bangalore, dated 30th March 1999 in R.F.A. No. 385 of 1993, R.F.A. No. 258 (sic.) of 1994 and R.F.A. No. 775 of 1995 (sic.), wherein the High Court has modified the Decree of the Trial Court and has held that the properties described in 'A' Schedule to the suit are joint family properties and the parties to the suit are entitled for 1/3rd share in those properties. The other observations and directions of the Court is not relevant for the purpose of this appeal.

2. The question that is contested by the parties and has fallen for our consideration is whether the properties in dispute are the personal acquisitions of Parwatevva, or, as held by the High Court, a part of the joint family property.

3. The factual matrix in brief is as follows:-

Siddappa and Parwatevva got married in 1924 and at the time of the marriage, the father of Parwatevva gifted her land in Survey No. R.S. No. 271/1 measuring 8 Acres 16 Guntas under registered Gift Deed dated 30th April 1924 ["A7"]. Siddappa, after his marriage, continued to reside in his in-laws house. During his life time, Siddappa had no other source of income except from the tenanted lands which was only a small extent and was totally dry lands. Parwatevva purchased lands

in R.S. No. 91 measuring 19 Acres 13 Guntas under a registered Sale Deed from the income of the land that was gifted to her by her father on 5th October, 1944 [A(4) – A(6)]. Thereafter, on 2nd June, 1951, with the income from the above two lands, Parwatevva purchased another land being R.S. No. 143 measuring 28 Acres 23 Guntas [A(8)-A(12)]. Siddappa died in the year 1951. The couple had four sons and one daughter – Marabasappa (appellant-defendant), Ningappa (respondent-plaintiff), Bhimappa (deceased – legal heirs are on record), Sangawwa and Channappa (pre-deceased without any heirs).

4. In her life time Parwatevva relinquished her share in R.S. No. 91 in favour of the present appellant (Marabasappa). Thereafter, subsequent to an oral partition, she gave one part of the other property bearing R.S. No. 143/1 and R.S. No. 143/2 to the respondent (Ningappa) and the heirs of Bhimappa respectively. In June 1984, Parwatevva executed a will of 'stridhana' land to her daughter, Sangawwa. Parwatevva died on 08.07.1984. The present dispute is between her children and their heirs.

5. The respondents-plaintiffs filed a suit bearing O.S. No. 40/1990 before the Court of the Civil Judge, Gadag [hereinafter referred to as "the Trial Court"], *inter alia* alleging that the entire property mentioned above is the joint family property and the same was not the personal property of Parwatevva, and hence, a prayer for partition and separate possession of 1/3rd share was made in respect of Schedule 'A' to 'C' properties. Schedule 'A' properties consist of agricultural lands, Schedule 'B' properties consist of houses and open places and Schedule 'C' properties consist of movables of all the properties held by the defendants-appellants except the plaintiffs' properties. The Trial Court negatived this contention of the respondents-plaintiffs on the basis of the oral and documentary evidence and found, *inter alia*, that the said properties were self acquired

properties of Parwatevva, accordingly, has partly decreed the suit in favour of the plaintiffs-respondents.

6. Being aggrieved, the parties to the suit preferred Regular First Appeals. The High Court, by the impugned Judgment and Order, set aside the Judgment of the Trial Court and took the view that apart from the stridhana land, the rest of the property was a part of the joint family property purchased from the income and funds of the joint family property and, therefore, the decree, as sought by the plaintiffs, requires to be granted. Against this finding and the conclusion reached by the High Court, the appellants-defendants are before us.

7. Shri. Rajesh Mahale, learned counsel, appears for the appellants and Shri. Gireesh Kumar, learned counsel, appears for the respondents.

8. The original appellants and respondents have all died during the pendency of the Suit and the Regular First Appeal and their legal representatives have been brought on record with the permission of the Court. Since, it is a family dispute between the brothers and their heirs, it was suggested to the parties through their learned counsel that the course of mediation be adopted to settle the dispute. This Court [G.S. Singhvi and A.K. Ganguly, JJ.] passed the following order on the 9th of December, 2010:

> "During the midst of arguments, learned counsel for the parties agreed that their clients may be given an opportunity to make an attempt to amicably settle their dispute by negotiations.
>
> In view of the statement made by the learned counsel, we direct both the parties to appear before the Mediation Centre, Karnataka High Court, Principal Bench at Bangalore, on 17.01.2011.
>
> The Incharge, Mediation Centre, Karnataka High Court,

Principal Bench, Bangalore, shall send a report to this Court within next four weeks.

List the case in the first week of March 2011."

9. The learned counsel for the parties has reported to us that there is no settlement reached between the parties.

10. Shri. Mahale, learned counsel, submitted that the Trial Court, after appreciating the evidence on record, had reached the conclusion that the properties in question are the self acquired properties of Parwatevva. It is submitted that the High Court, while considering the evidence on record and the conclusion reached by the Trial Court, has erroneously come to the conclusion that the property in dispute is a joint family property and therefore, the findings of the High Court are perverse and further, the High Court has committed serious error in law in holding that the disputed property is a joint family property. Shri. Gireesh Kumar, learned counsel for the respondents, has supported the findings of the High Court.

11. The sum and substance of the allegations in the suit are that out of the tenanted land, 2 Acres, 10 Guntas, late Siddappa acquired all the other properties including the land in R.S No. 271/1 and R.S. No. 91 and R.S. No. 143. Therefore, all the properties are joint family properties, though they stand in the name of Parwatevva. The Trial Court has relied upon the registered Gift Deed [Ex. D.60] and has come to the conclusion that the property marked A7 was the stridhana property of Parwatevva, and by virtue of Section 14(1) of the Hindu Succession Act, 1955 read with the Explanation, was the absolute property of Parwatevva and could not be blended in the joint family property. The Trial Court, while considering the nature of the lands A(4) to A(6), has taken into consideration the certified copy of the sale deed in respect of that land [Ex.D.8], and has come to the conclusion that there is no evidence adduced by the respondents-plaintiffs to deny the fact that the lands A(4) to A(6) were not purchased from the

independent income of the Parwatevva, and hence, negatived the contention of the respondents-plaintiffs that the lands were joint family property, and has also held that these lands were purchased by Parwatevva from the income derived from the stridhana lands, i.e., A7. With regard to the lands A(8) to A(12), the Trial Court, relying on the certified copy of the sale deeds of the said lands [Ex.D. 45], has again found that there was no proof that the said property was acquired out of the income of the joint family property as asserted by the respondents-plaintiffs, and concluded that the same was purchased from the income derived from the aforementioned two properties by Parwatevva.

12. The High Court has found fault with the finding of the Trial Court and has held:

> "21. Coming to the properties said to have been purchased in the name of Parvatewwa under the registered sale deed dated 5-10-1944, twenty years after the Gift deed, the learned Judge find that R.S. No. 91 which lands in A(4) to A(6) was purchased under Ex.D. 8. Now the reasoning given by the learned Judge that if Siddappa is the protected tenant of the said land, there is no reason for him to purchase the said land under Ex.D. 8 cannot be appreciated. In any event, whenever a mother is there and the properties are purchased in the name of the mother, the presumption is that it is for the benefit of the family. It is nobody's case that the lands purchased is for the intention and for the benefit of the mother alone and she also did not differentiate between her sons and daughters. This is a natural and human aspect which has not been considered by the trail court. The finding that Siddappa do no continued (sic.) as tenant or protected tenant of all the lands as mentioned in Ex.P. 20 except 1 acre 20 guntas of land in R.S. 274/3 and A(3) land in R.S. No.:9/3A is not sustainable. Why should valuable tenancy rights given up and then the purchase made in the name

of the mother is not understandable nor it is not explained; probably in confirmation of tenancy rights and make it clear that the properties does not go out of the family. The sale is taken in the name of the mother. Therefore, in my opinion, the purchase made by the mother is only from and out of the income from the family and there is no evidence to show that she had any independent or individual income from the gifted property to purchase these properties. Therefore, irresistible inference shall be drawn that the property purchased in the name of the mother is for the benefit of all the members of the family. Now no doubt the plaintiff came forward with the case that suit lands A(4) to A(6) and A(8) to A(12) were purchased from and out of the family income and the income from the A(1) to A(3) lands. But once it is seen that the 1st defendant was managing the affairs of the family as 'karta', the burden shifts on him to prove that the properties purchased was not for the benefit of the family, but they were exclusively belong to the mother. In those days income from 3 acres 30 guntas cannot be considered as thin nucleus as has been wrongly held by the trial court. Having held that applying the dictum in I.L.R. 1990 Kar Pg-1182, the initial burden lies upon the plaintiff. But once such burden is discharged and shifts on the defendant, the trial court should have considered that whether the defendant has proved that the purchase was made from any other source of income excepting the income from A(1) to A(3). In the absence of any positive evidence spoken to by D.W. 2 or the witnesses examined on behalf of the defendant that the mother was trying to save the property either for herself or not for the benefit of the everybody, the irresistible conclusion is that the mother is always mother and the properties purchased in her name shall be the properties of the family. There is a clear evidence adduced by the plaintiff that the suit lands in A(1) to A(3) were the basis the income of which was utilized for acquisition of the lands in A(4) to A(6) and A(8) to A(12) lands. But the trial court

has relied upon the gift in question and left it not been considered on erroneous approach. The mere fact that the mother has the son and ip-so-facto that the mother is cultivating the land when there admittedly sons who is professional agriculturist and whether it is mother alone or father himself cultivating the lands; everybody contri-butes (sic.) their right and labour to cultivate the land. It is nobody's case that Parwatevva kept her income separately or that income was not occrued (sic.) by the father Siddappa. When it is found by the court below that the plaintiff was only 16 years of age in 1944, and defendant no. 1 was about 22 or 23 years of age, the burden should have been shifted to 1st defendant to explain as to what really happened and what is the necessity for purchase of the property in the name of the mother. This has not been done. Having been found that during the lifetime of Siddappa, Parwatevva could not have being (sic.) the karta of the family. That defendant-1 alone would have become 'karta' of the family, the court below ought to have placed the burden on the defendant and the defendant has not proved or discharged that burden at all. The learned judge would embarked upon the surmises and imagination regarding the income and came to wrong conclusion that the family did not have nucleus to acquire the properties mentioned in 'B' and 'C' Schedule."

13. As is clear from the above conclusion, the High Court has not accepted the findings and conclusion reached by the Trial Court. The High Court has, in our opinion, wrongly shifted the burden of proving that the said lands were a part of the self acquired property of Parwatevva and not a part of the joint family property of the appellants-defendants, when there was no affirmative proof of anything contrary. In our view, the High Court has erred in shifting the burden of proof on the appellants-defendants, especially when there was nothing on record either by way of oral or documentary evidence produced by the respondents-plaintiffs before the trial court.

14. The genealogical relation between the parties is not in dispute. Propositor Siddappa died in the year 1951 and he was survived by his wife Parwatevva, plaintiffs and defendants. He was the tenant of the suit lands A(1) to A(3). It is claimed that Siddappa had purchased lands in R.S. No.91 under a Registered Sale Deed dated 05.10.1944 out of the joint family income and funds but in the name of his wife Parwatevva. The lands in R.S. No. 91 is further divided as A(4) to A(6). It is also claimed that lands in R.S. No.143 was purchased out of joint family funds in the name of Parwatevva. These lands are sub-divided as Serial Numbers A(8) to A(12). Lands in R.S. No.271/1, which was gifted to Parwatevva by her father, was claimed that it got blended and treated with the other joint family property. Marbasappa, defendant No.1, being the eldest in the family had applied to the Land Tribunal for grant of occupancy rights of tenanted lands A(1) to A(3) and the same has been granted in his name and conferment of occupancy rights would enure to the benefit of the joint family. Plaintiffs assert that the Suit Schedule properties are joint family properties and, therefore, the same requires to be partitioned according to their shares by a decree of partition and separate possession. The claim of the plaintiffs is denied by the contesting defendants. Parties have led in copious oral and documentary evidence.

15. At present, we are mainly concerned with 'A' Schedule properties. The parties to the appeal have no grievance so far as decree passed in respect of 'B' and 'C' Schedule properties are concerned.

16. In so far as lands shown as A(1) to A(3) are concerned, it is claimed by the plaintiffs that the propositor Siddappa was a tenant of the lands and continued as such till his death in the year 1951. Thereafter, the HUF continued to be the tenants of the lands and the defendant No.1, being the head of the family, had applied for grant of occupancy rights in respect of those tenanted lands and the Land Tribunal had granted occupancy rights in his favour. On the death of Siddappa, the tenancy lands

A(1) to A(3) were mutated in the name of his sons. It is claimed that the occupancy rights so granted would enure to the benefit of the whole joint family. Therefore, it is a joint family property and requires to be partitioned among the members of the joint family. The defendants have denied that the lands A(1) to A(3) are the joint family tenancy lands.

17. After perusing the records and the order passed by the Land Tribunal, Gadag, it appears to us that defendant No. 1 had applied to the Land Tribunal for grant of occupancy rights in respect of land in Survey No. R.S. No. 9/3A and R. S. No. 274/3 measuring an extent of 2 Acres and 10 Guntas and 1 Acre and 20 Guntas respectively. Land Tribunal had granted occupancy rights in favour of the applicant-defendant No. 1 in respect of the said two lands. Shri Mahale, learned counsel for the appellants, does not contend contrary to the findings and conclusion reached by the Trial Court. He admits that though occupancy rights are granted by the Land Tribunal in the individual name of the appellant-defendant No.1, the said occupancy rights enure to the benefit of all the members of the Joint family.

18. Suit Land A(7) bearing R.S. No.271/1 was 'stridhana' property of Parwatevva. This property was gifted to her by her father under a registered Gift Deed dated 30th April, 1924. She was the owner of the said land. She continued to be in possession of the said land till she bequeathed the same in favour of defendant No.5 under a will dated 30.06.1984. On the death of Parwatevva and on the basis of the said Will, the legatee-defendant No.5 claims she has become owner of the said land. The same has been noted in the Revenue Records. The Will and the Revenue entries made are questioned by the plaintiffs and has successfully proved that the said Will was not executed by Parwatevva. Therefore, defendant No.5 cannot claim title over A(7) under a Will Ex. D-51. Accordingly, this property cannot be brought into the hotchpotch of the joint family property and would not be available for partition. Stridhana

belonging to a woman is a property of which she is the absolute owner and which she may dispose of at her pleasure, if not in all cases during coverture, in all cases during widowhood. Since the plaintiffs have proved that Parwatevva had not alienated the property by executing a Will in favour of defendant No. 5 during her lifetime, the property is the absolute property of Parvatevva and would not be available for partition among the members of joint family since it does not partake the character of joint family property.

19. Now coming to Suit Schedule properties Item No.A(4) to A(6), it is the case of the plaintiffs that the said properties were purchased by Siddappa, father of the plaintiffs and the defendants under a Sale Deed dated 05.10.1944, but, in the name of his wife Parwatevva from and out of the income of the tenancy lands A(1) to A(3) for the purpose of the joint family for which he was also the Karta of the family. However, it is the case of the contesting defendants that the said property is the self acquired property of Parwatevva from and out of her income derived from the property gifted to her by her father in the year 1924. The defence that is also put up by the defendants is that Siddappa was the tenant of the property A(1) to A(3) only from the year 1947 and, therefore, plaintiffs cannot claim that from out of the income of the property A(1) to A(3), lands in item A(4) to A(7) were purchased. It has come in evidence of the contesting defendants that propositor Siddappa was the tenant of the lands A(1) to A(3) only from the year 1947. The same is not disputed by the plaintiffs by leading any other cogent evidence to prove that Siddappa was the tenant of the lands A(1) to A(3) even prior to 1944, the date of the Sale Deed. In the absence of any evidence, much less cogent and reliable evidence, it is difficult to accept the version of the plaintiffs that the suit schedule A(4) to A(6) should be put into common hotch potch and partitioned by meters and bounds.

20. We may also notice the observations made by the Trial Court, which we also agree, in the course of its judgement.

"61. Now let us firstly take up A(4) to A(6) lands. Ex.D.8 is the certified copy of the sale deed in respect of said land, dated 05-10-1944. It is necessary to emphasize that according to the plaintiffs, Shiddappa was protected tenant of the lands mentioned therein as per Ex.P.20, which pertains to 1947. They have obviously, not produced any records, such as R.O.Rs. or mutation entries to show that Shiddappa was the tenant of those 11 lands, mentioned in Ex.P.20 even prior to 1947. It is essential because, we are assessing the productivity of nucleus as on the date of Ex.D.8. Ex.D.8 is admittedly of 1944. Since no document is produced by plaintiffs to show that Shiddappa was the tenant even prior to 1947 of the lands referred to in Ex.P.20, it cannot be said that he had no `independent source of income at the relevant time of 1944 (Ex.D.8). Evidence on record justified that at the relevant time of Ex.D.8, Parvatewwa was already owner and possessor of A(7) land, extent of which is 8 acres 16 guntas. Excepting this land, the family of the parents of plaintiff No.1, defendant No.1 and Bheemappa, is not shown to have had any other source of income. Hence, it follows that the land in Ex.D.8 could not have been acauired at all by Shiddappa, out of his income, since he is not shown to have had any income at all. It is too much to say that the income of the lands at A(1) to A(3) was the source of income for acquisition of the lands A(4) to A(6) (Ex.D.8). This argument pre-supposes that Shiddappa was a tenant of A(1) to A(3) lands even prior to 1944 (Ex.D.8). Absolutely there is no evidence. Hence, it cannot be said that Shiddappa had purchased A(4) to A(6) lands, which is land in Ex.D.8, out of the income of the joint family. Indeed, he was living in the house of his parents-in-law with Parvatewwa and Ex.D.60 of 1924 shows that he had no financial strength. Hence, I am of the definite opinion that the land in Ex.D.8 must have had been acquired by Parvatewwa out of the income she had derived from A(7) land. It cannot be said and it is not acceptable that

Shiddappa had purchased the land mentioned in Ex.D.8 in the name of his wife Parvatewwa. I make it clear that it was purchased by her only out of her income derived from A(7) land.

Plaint shows that plaintiff No.1 and defendant No.1 were of 62 and 70 years respectively on the date of suit. It shows that in 1944, the year of Ex.D.8, plaintiff No.1 was about 16 years of age, and defendant No.1 was about 22 or 23 years of age. I am emphasizing these facts to show that neither of them had independent source of income. It must mean that Parvatewwa was the absolute owner of the suit lands A(4) to A(6) mentioned in Ex.D.8. Hence, it cannot be said as joint family property. Joint family did not have at all, any nucleus to acquire the land in Ex.D.8. Hence, said finding is recorded."

Therefore, the findings contrary to the above view by the High Court are erroneous and cannot be sustained.

21. Section 14 of the Hindu Succession Act, 1956 clearly mandates that any property of a female Hindu is her absolute property and she, therefore, has full ownership. The Explanation to sub-section (1) further clarifies that a Hindu woman has full ownership over any property that she has acquired on her own or as stridhana. As a consequence, she may dispose of the same as per her wish, and that the same shall not be treated as a part of the joint Hindu family property.

22. This Court has time and again held that there is no presumption that of joint family property, and there must be some strong evidence in favour of the same. In the case of *Appasaheb Chamdgade v. Devendra Chamdgade and Ors.*, (2007) 1 SCC 521, after examining the decisions of this Court, it was held:

"17. Therefore, on survey aforesaid decisions, what emerges is that there is no presumption of a joint Hindu

family but on the evidence if it is established that the property was joint Hindu family and the other properties were acquired out of that nucleus, if the initial burden is discharged by the person who claims joint Hindu family, then the burden shifts to the party alleging self-acquisition to establish affirmatively that property was acquired without the aid of the joint family property by cogent and necessary evidence."

23. Insofar as lands at Item A(8) to A(12) are concerned, it is the case of the plaintiffs that on the death of propositor Siddappa, joint family continued and during its continuance, agricultural lands in R.S. No.143, which is now sub-divided as items A(8) to A(12) came to be purchased out of the joint family funds, but, in the name of Parwatevva, since she was eldest member of the joint family at the relevant point of time. The oral evidence was led in support of the assertion made in the plaint. The plaintiffs have not produced any other evidence in support of the claim so made. The defence pleaded by the defendants, apart from others, is that Parwatevva had her independent source of income from A(7) lands. She, with the aid of the said income, acquired not only A(4) to A(6) but also A(8) to A(12) lands and the tenancy lands was held by joint family. It is also contended by them that propositor Siddappa, after marrying Parwatevva, lived in the paternal house of his wife Parwatevva, which fact is not denied by the plaintiffs, and Siddappa had no personal income nor agricultural income which he could utilize for purchase of any property, much less A(8) to A(12) properties. The Trial Court, after considering the entire evidence on record has come to the conclusion that lands A(8) to A(12) is the absolute self acquired properties of Parwatevva . The findings and the conclusion so arrived is based on the proper appreciation of the evidence on record and the respondents have not brought to our notice anything contrary to make a different view. Therefore, while agreeing with the findings and the conclusion reached by the Trial Court, we reject the contention canvassed by learned counsel for the respondents.

Therefore, lands in R.S. No. 143, which is now sub-divided as A(8) to A(12) of the suit Schedule is not the joint family property but the absolute property of Parwatevva, which she has purchased/acquired from the income and funds from the lands A(7) and A(4) to A(8). Accordingly, 'A' Schedule properties requires to be partitioned among the family members in accordance with law.

24. In the light of above discussion, we are unable to accept with the reasoning given by the High Court. We are in agreement with the reasoning and conclusion reached by the Trial Court.

25. In the result, the appeal is allowed and the Judgment and Order passed by the High Court in RFA No. 385 of 1993 dated 30.03.1999 is set aside and Judgment and decree passed by the Trial Court in O.S.No. 40 of 1990 dated 15.07.1993 is restored. Parties are directed to bear their own costs.

N.J. Appeal allowed.

G. REDDEIAH

v.

THE GOVERNMENT OF ANDHRA PRADESH & ANR.

(Criminal Appeal No. 1761 of 2011)

SEPTEMBER 9, 2011

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

Andhra Pradesh Prevention of Dangerous Activities of Boot Leggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986: s.3(1) – Detention order – Detaining Authority found that the detenue was habitually indulging in trespassing forest area, illicit cutting, felling, smuggling and transporting red-sanders trees and committing theft of forest wealth as many as eight times within a period of one year – Conclusion of Detaining authority approved by Government and upheld by the High Court – On appeal, held: The grounds of detention showed that the Detaining Authority, after scrutinising all the details including various orders of arrest and release, bail on various dates and notings held that the detenue was a master-mind in organising the felling of red-sanders trees owned by the Government and also providing vehicles for illegally transporting the red-sanders wood, hiring of labourers from the fringe forest villages and responsible for destruction of valuable governmental property and the provisions of normal law were not sufficient in ordinary course to deal firmly because of his habitual nature – After satisfying all aspects including the fact that the detenue was in jail for sometime and the factum of his release from the jail in 4 criminal cases, Detaining Authority passed an order of detention with a view to prevent him from further indulging into such offences – There was no infirmity either in the reasoning of the Detaining Authority or procedure followed by it – The detenue was afforded adequate opportunity at every stage and there was

no violation of any of the safeguards – In view of enormous activities of the detenue violating various provisions of IPC, the A.P. Act and the Rules, and his habituality in pursuing the same type of offences, the reasoning of the Detaining Authority as approved by the Government and upheld by the High Court is justified – A.P. Forest Act, 1967 – A.P. Sandal Wood & Red Sanders Transit Rules, 1969 – Penal Code, 1860.

Prevention detention – Concept of – Held: The detention is not to punish detenue for something he has done but to prevent him from doing it.

The prosecution case was that the detenue was habitually committing forest offences, particularly, felling, cutting and smuggling of red sanders wood causing loss to national wealth and was involved in such 8 cases within a period of 1 year. The Detaining Authority held that the detenue was a goonda under Section 2(g) of the Andhra Pradesh Prevention of Dangerous Activities of Boot Leggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986. The brother-in-law of the detenue filed a writ of habeas corpus before the High Court, which was dismissed. The instant appeal was filed challenging the order of the High Court.

Dismissing the appeal, the Court

HELD: 1. Section 3 of the of the Andhra Pradesh Prevention of Dangerous Activities of Boot Leggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986 enables the Government to detain certain persons whose activities are prejudicial to the maintenance of public order. If the Government/Detaining Authority is able to satisfy that a person either by himself or in association with other

members habitually commits or attempts or abets such commission of offence punishable under IPC, A.P. Act and the Rules subject to satisfying Section 3 of the 1986 Act, he can be detained in terms of the said Act. The essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it. [Para 6, 7] [465-B; 466-B-D]

Haradhan Saha vs. State of West Bengal & Ors. **(1975) 3 SCC 198: 1975 (1) SCR 778 – relied on.**

2. A reading of the grounds of detention clearly indicated that the detenue had been indulging in various activities in felling and smuggling red-sanders and he was habitually committing the same and was unmindful of wastage of national forest wealth and public order. It also showed that it was not a solitary or stray incident but continuously maintaining his activities commencing from 22.02.2010 till 09.10.2010 in destroying the forest wealth. It clearly showed that he was habitually committing these offences. On going through all the details relating to various offences, incidents and activities, the conclusion of Detaining Authority that by invocation of normal procedure, the activities of the detenue cannot be controlled is acceptable. Detaining Authority was well within its powers in passing the impugned order of detention. [Para 8] [467-H; 468-A-D]

Union of India vs. Paul Manickam and Another **(2003) 8 SCC 342:2003 (4) Suppl. SCR 618 – relied on.**

3. The contention was raised on behalf of the appellant that even though the detenue was arrested on 09.10.2010 and was released on bail on 10.11.2010, the detention order was passed on 12.11.2010, the aspect that the detenue was in custody till 10.11.2010 was neither specifically adverted to and considered in the detention

order nor the sponsoring authority placed any material regarding the same, hence, the ultimate detention order passed 12.11.2010 cannot be sustained. If the Detaining Authority was aware of the relevant fact, namely, that he was under custody from 09.10.2010 and he would be released or likely to be released or as in this case released on 10.11.2010 and if an order is passed after due satisfaction in that regard, undoubtedly, the order would be valid. The said objection was neither raised before the Advisory Board nor in the representation to the Government and was not mentioned in the grounds of challenge and argued before the High Court. This ground was not even raised in the special leave petition. It was not in dispute that such objection was not raised anywhere except during the course of argument. It was also not in dispute that the detenue was given adequate opportunity of hearing before the Advisory Board and all his grievances were addressed to by the Board and submitted its report. The Government, on going through the entire materials including the report of the Advisory Board as well as the representation of the detenue, considering the gravity of the offence alleged against him and his habituality, confirmed the order of detention. [Para 9, 11, 12] [468-D-F; 469-H; 470-A-D; 470-F-G]

M. Ahamedkutty vs. Union of India & Another **(1990) 2 SCC 1: 1990(1) SCR 209 ;** *Anant Sakharam Raut vs. State of Maharashtra and Anr.* **(1986) 4 SCC 771: 1987 (1) SCR 221 – relied on.**

4. The grounds of detention running into 60 pages and the order of detention to 5 pages clearly demonstrated various details about the involvement of the detenue violating the provisions of IPC, A.P. Act and the Rules. The details furnished in the grounds of detention clearly showed the application of mind on the part of the Detaining Authority. It was not the case of the

detenue or the appellant that the required relevant and relied on materials were not furnished which prevented him from making effective representation to the Government. The detailed report of the Inspector of Police and Sponsoring Authority clearly showed that the detenue was a master-mind in organising the felling of red-sanders trees owned by the Government and also providing vehicles for illegally transporting the red-sanders wood, hiring of labourers from the fringe forest villages and responsible for destruction of valuable governmental property. It also showed that it was he who operated gang for destruction of the national wealth causing deforestation leading to ecological imbalance affecting the community as a whole. The grounds of detention also showed that the Detaining Authority, after scrutinising all the details including various orders of arrest and release, bail on various dates and noting that he was habitually indulging in trespass in forest area, illicit cutting, felling, smuggling and transporting red-sanders from the reserved forest owned by the State, arrived at a definite conclusion that the provisions of normal law were not sufficient in ordinary course to deal firmly because of his habitual nature and after satisfying all aspects including the fact that the detenue was in jail from 09.10.2010 to 10.11.2010 and the factum of release from the jail in 4 criminal cases, passed an order of detention with a view to prevent him from further indulging into such offences. In a matter of detention, the law is clear that as far as subjective satisfaction is concerned, it should either be reflected in the detention order or in the affidavit justifying the detention order. Once the Detaining Authority is subjectively satisfied about the various offences labelled against the detenue, habituality in continuing the same, difficult to control him under the normal circumstances, he is free to pass appropriate order under Section 3 of the 1986 Act by fulfilling the conditions stated therein. There was no

infirmity either in the reasoning of the Detaining Authority or procedure followed by it. The detenue was afforded adequate opportunity at every stage and there was no violation of any of the safeguards. In view of the enormous activities of the detenue violating various provisions of IPC, the A.P. Act and the Rules, continuous and habituality in pursuing the same type of offences, damaging the wealth of the nation and taking note of the abundant factual details as available in the grounds of detention and also of the fact that all the procedures and statutory safeguards were fully complied with by the Detaining Authority, the reasoning of the Detaining Authority as approved by the Government and upheld by the High Court is accepted. [Para 13, 14] [470-H; 471-A-H; 472-A-E]

Rekha vs. *State of Tamil Nadu* **(2011) 5 SCC 244 – held inapplicable.**

Case Law Reference:

1975 (1) SCR 778	**relied on**	**Para 7**
2003 (4) Suppl. SCR 618	**relied on**	**Para 10**
1990 (1) SCR 209	**relied on**	**Para 11**
1987 (1) SCR 221	**relied on**	**Para 11**
(2011) 5 SCC 244	**held inapplicable**	**Para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1761 of 2011.

From the Judgment & Order dated 08.4.2011 of the High Court of Judicature Andhra Pradesh at Hyderabad in Writ Petition No. 65 of 2011.

ATM Ranga Ramanujan, Gouri Karuna Das Mohanti, Anu Gupta, Prakhar Sharma, Sanjeev Kumar Sharma, Rani Jethmalani for the Appellant.

R. Sundravardhan, C. Kannan, Ravi Shankar, G.N. Reddy for the Respondents.

The Judgment of the Court was delivered by

P.SATHASIVAM,J. 1. Leave granted.

2. The appellant, who is the brother-in-law of R. Sreenivasulu-the detenue, has filed this appeal against the judgment and final order dated 08.04.2011 passed by the High Court of Judicature, Andhra Pradesh at Hyderabad in a writ of *Habeas Corpus* being Writ Petition No. 65 of 2011 whereby the High Court dismissed his petition holding that the order of detention of R. Sreenivasulu passed by the Collector and District Magistrate, Kadapa, Y.S.R. District, in Ref. No. 670/M/2010 dated 12.11.2010 is not illegal.

3. **Brief Facts:**

a. According to the prosecution, the detenue was found to be involved in felling, transporting, smuggling of red-sanders trees and committing theft of forest wealth in as many as eight times within a period of one year. The cases registered against him disclose his activities. They are:

(i) OR No. 130/2009-10- dated 22.02.2010:

On 22.02.2010, on receiving information at 06:00 a.m., Forest Range Officer and Deputy Range Officer Rayachoty, alongwith other staff proceeded to Masineni Kanuma locality of Palakonda Reserved Forest in Saraswathipalli Beat and noticed 3 persons lifting and storing red-sanders wood and preparing to transport the same. On seeing the Forest officials, they ran away from the scene of offence and could not be apprehended. Later, they were identified and one among them was the detenue. Thereafter, the Forest officials seized 30 red-sanders logs weighing 844 kgs. worth Rs.45,576/-. An offence was registered against them vide P.O.R. No. 6 dated 22.02.2010 under Section 20(1)(c)(ii) of the A.P. Forest Act,

1967 (hereinafter referred to as "the A.P. Act") for trespassing in Reserved Forest, under Section 20(1)(c)(iii) of the A.P. Act for causing damage by willfully cutting trees and dragging the same, under Section 20(1)(c)(vi) and (x) of the A.P. Act for collection and removal of red-sanders timber and under Section 29(2)(b) of the A.P. Act read with Rule 3 of the A.P. Sandal Wood and Red Sanders Transit Rules, 1969 (in short "the Rules") for transportation of red-sanders timber without permit and without any Government Transit Mark and for theft of red-sanders timber from Reserved Forest under Section 378 of the Indian Penal Code, 1860 (in short "IPC") and for criminal conspiracy under Section 120B IPC.

(ii) OR No. 01/2010-11 dated 01.04.2010

On 01.04.2010, on receiving information at 7.30 a.m., the Deputy Range Officer, Forest Beat Officers and Assistant Beat Officer proceeded to the localities in Gudukonda and Pathikona and noticed the movement of the detenue and two others who escaped from the scene of the offence and later the detenue was identified and crime was registered against him vide P.O.R. No. 16 dated 01.04.2010 under various sections of the A.P. Act and the Rules and also under Sections 378 and 120B IPC.

(iii) OR No. 02/2010-11 dated 03.04.2010

On 02.04.2010, the Forest Range Officer, Rayachoty along with other staff stopped a vehicle carrying 20 red- sanders logs. The detenue along with two others escaped from the vehicle but the Forest officials apprehended the driver of the vehicle and a crime was registered vide P.O.R. No. 17 dated 03.04.2010 against them for an offence under various sections of the A.P. Act and the Rules and also under Sections 378 and 120B IPC.

(iv) OR No.13/2010-11 dated 11.05.2010 and PS Crime No. 40/10

On 08.05.2010, on receiving a complaint regarding smuggling of red-sanders logs, while doing routine vehicle check, the Inspector of Police, L.R. Palli along with other staff stopped two vans and caught hold of four persons and seized red-sanders logs from the above two vehicles and on the basis of their information a crime was registered by Galiveedu Police Station in Crime No. 40/2010 for an offence under various sections of the A.P. Act and the Rules and also under Sections 379 IPC against 14 accused persons in which detenue was shown as 12th accused.

(v) OR No. 18/2010-11 dated 23.05.2010

On the intervening night of 22.05.2010, the Forest Officer, Rayachoty along with other staff caught-hold of detenue along with other persons and seized 32 red-sanders logs weighing 794 kgs. and a crime was registered vide P.O.R. No. 20 dated 23.05.2010 against them under various sections of the A.P. Act and the Rules.

(vi) FIR No. 46/10 dated 27.05.2010 and OR No. 20/2010-11 dated 30.05.2010

On 27.05.2010, the Inspector of Police, Rayachoty Rural Circle and Sub-Inspector of Police, Veeraballi P.S. along with their staff noticed one Indica Car followed by a lorry from Ragimannudivanpalli. On seeing them, the occupants tried to run away and the police chased and caught-hold of two persons while one person escaped. The lorry was found loaded with 25 red-sanders logs. On interrogation, they informed that the detenue was escorting them and he ran away from the scene. The police registered a case in FIR No. 46/10 dated 27.05.2010 under Section 379 IPC and Section 29A(1) of the A.P. Act read with Rule 3 of the Rules. The Forest Range Officer, Rayachoty also booked a case vide POR No. 20/2010-11 dated 30.05.2010.

(vii) FIR No. 75/10 dated 03.10.2010 and OR No. 60/2010-11 dated 04.10.2010

On 03.10.2010, the Inspector of Police, Rayachoty Rural Circle and Sub-Inspector of Police, Veeraballi P.S. along with forest officials proceeded to Teacher Narayana Reddy Mango Garden located at Peddamadiga Palli Village, hamlet of Vongimalla and found four persons removing red-sanders logs from the bushes. On seeing them, three persons escaped and the police could apprehend only one person who informed that the detenue was also involved in taking away the logs three times in his vehicle. The police registered a case in Crime No. 75/10 under Section 379 IPC and Section 29 of the A.P. Act read with Rule 3 of the Rules and the Forest Range Officer also booked a case vide POR No. 60/2010-11 dated 04.10.2010.

(viii) Crime No. 92/10

On 09.10.2010, the Sub-Inspector of Galiveedu and Veeraballi, C.I. L.R. Palli along with staff and panchayatdars while proceeding towards the forest found one Tata Sumo and a Ford Ikon car carrying 36 red-sanders logs. When the occupants tried to escape, the police caught hold of them. One among them was the detenue. The police seized the vehicles and registered Crime No. 92 of 2010 under Section 379 IPC and Section 29 of the A.P. Act read with Rule 3 of the Rules.

(b) Thereafter, on 10.11.2010, the detenue was released on bail and he was immediately arrested and order of detention was served on 12.11.2010 by the Collector and District Magistrate, Kadapa, Y.S.R. District under Sections 3(1) and 2 (a) and (b) of the Andhra Pradesh Prevention of Dangerous Activities of Boot Leggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986 (in short "the 1986 Act") stating that the activities of the detenue are dangerous to forest wealth and forest eco-system and are prejudicial to the maintenance of public order.

(c) The General Administration (Law and Order II) Department of the Government of A.P., in G.O. Rt. No. 5657, dated 20.11.2010, approved the order of detention and he was sent to Cherlapalli Jail on 13.11.2010. Again on 22.12.2010, Government of A.P. confirmed the order of detention by directing to continue the detention for a period of 12 months from the date of detention i.e. from 13.11.2010.

(d) In January, 2011, challenging the detention order passed by the Collector and District Magistrate, Kadapa, Y.S.R. District, dated 12.11.2010, the appellant herein - brother-in-law of the detenue, filed W.P. No. 65 of 20011 before the High Court for issuance of writ of *Habeas Corpus*. By impugned order dated 08.04.2011, the High Court dismissed the petition holding that the order of detention is not illegal. Aggrieved by the said order, the appellant has filed this appeal by way of special leave petition before this Court.

4. Heard Mr. A.T.M. Rangaramanujam learned senior counsel for the appellant and Mr. R. Sundaravardan, learned senior counsel for the State.

5. It is the definite stand of the State that its administration is not in a position to curb the illegal activities of the detenue under the normal procedure, who was habitually indulging in illicit trespass, cutting, dressing and transporting the red-sanders wood from the Reserved Forest owned by the State causing irreparable loss to national wealth. The Detaining Authority, on going through all the materials and after holding that the said detenue is a 'goonda' under Section 2(g) of the 1986 Act passed the order of detention.

6. Since the said detention was challenged by his brother-in-law before the High Court and the same has been negatived by the High Court, let us refer certain provisions of the 1986 Act. Section 2(g) defines "goonda" which reads as under:-

2(g) "goonda" means a person, who either by himself of

as a member of or leader of a gang, habitually commits, or attempts to commit or abets the commission of offences punishable under Chapter XVI or Chapter XVII or Chapter XXII of the Indian Penal Code;"

Section 3 of the 1986 Act enables the Government to detain certain persons whose activities are prejudicial to the maintenance of public order. Section 3 reads as under:-

"**3. Power to make orders detaining certain persons**:- The Government may, if satisfied with respect to any bootlegger: dacoit, drug-offender, goonda, immoral traffic offender or land-grabber that with a view to preventing him from acting in any manner prejudicial to the maintenance of public order, it is necessary so to do, make an order directing that such person be detained.

(2) If, having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the Government is satisfied that it is necessary so to do, they may, by order in writing, direct that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub-Section (1), exercise the powers conferred by the said sub-section:

Provided that the period specified in the order made by the Government under this sub-section shall not in the first instance, exceed three months, but the Government may, if satisfied as aforesaid that it is necessary so to do, amend such order to extend such period from time to time by any period not exceeding three months at any one time.

(3) When any order is made under this Section by an officer mentioned in sub-section (2), he shall forthwith report the fact to the Government together with the grounds on which the order has been made and such other

particulars as in his opinion, have a bearing on the matter, and no such order shall remain in force for more than twelve days after the making thereof, unless, in the meantime, it has been approved by the Government."

If the Government/Detaining Authority is able to satisfy that a person either by himself or in association with other members habitually commits or attempts or abets such commission of offence punishable under IPC, A.P. Act and the Rules subject to satisfying Section 3 of the 1986 Act, he can be detained in terms of the said Act.

7. The essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it. Even, as early as in 1975, the Constitution Bench of this Court considered the procedures to be followed in view of Articles 19 and 21 of the Constitution. In *Haradhan Saha* vs. *State of West Bengal & Ors*. (1975) 3 SCC 198, the Constitution Bench of this Court, on going through the order of preventive detention under Maintenance of Internal Security Act, 1971 laid down various principles which are as follows:-

"…..First; merely because a detenue is liable to be tried in a criminal court for the commission of a criminal offence or to be proceeded against for preventing him from committing offences dealt with in Chapter VIII of the Code of Criminal Procedure would not by itself debar the Government from taking action for his detention under the Act.

Second; the fact that the Police arrests a person and later on enlarges him on bail and initiates steps to prosecute him under the Code of Criminal Procedure and even lodges a first information report may be no bar against the District Magistrate issuing an order under the preventive detention.

Third; where the concerned person is actually in jail custody at the time when an order of detention is passed against him and is not likely to be released for a fair length of time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardize the security of the State or the public order.

Fourth; the mere circumstance that a detention order is passed during the pendency of the prosecution will not violate (sic) the order.

Fifth; the order of detention is a precautionary measure. It is based on a reasonable prognosis of the future behaviour of a person based on his past conduct in the light of the surrounding circumstances."

In the light of the above principles, let us test the validity of the detention order issued under the 1986 Act and as affirmed by the High Court.

8. In the earlier part of our order, we have culled out and noted 8 cases in which the detenue-R. Sreenivasulu was involved and was habitually committing forest offences, particularly, felling, cutting and smuggling of red-sanders wood causing loss to national wealth. Inasmuch as we have adverted to the details regarding all the 8 cases commencing from 22.02.2010 ending with 09.10.2010 which is reflected in the grounds of detention, there is no need to refer the same once again. Mr. Rangaramanujam, learned senior counsel for the appellant has submitted that some of the cases have been foisted and, according to him, the relevant details furnished in the grounds of detention such as the date of occurrence, commission of various offences both under the A.P. Act and the Rules and IPC, cannot be construed that his activities are habitual or would not affect the national forest wealth. We are unable to accept the said contention. A reading of the grounds

of detention clearly indicate that the detenue had been indulging in various activities in felling and smuggling red-sanders and he was habitually committing the same and was unmindful of wastage of national forest wealth and public order. It also shows that it was not a solitary or stray incident but continuously maintaining his activities commencing from 22.02.2010 till 09.10.2010 in destroying the forest wealth. It clearly shows that he is habitually committing these offences. On going through all the details relating to various offences, incidents and activities, we are satisfied that the conclusion of Detaining Authority that by invocation of normal procedure, the activities of the detenue cannot be controlled is acceptable. We also hold that Detaining Authority is well within its powers in passing the impugned order of detention. Further, we are also in agreement with the reasoning of the High Court which, by a detailed judgment, upheld the order of detention.

9. Mr. Rangaramanujam submitted that even though the detenue was arrested on 09.10.2010 and was released on bail on 10.11.2010, the detention order was passed on 12.11.2010, the aspect that the detenue was in custody till 10.11.2010 was neither specifically adverted to and considered in the detention order nor the sponsoring authority placed any material regarding the same, hence, the ultimate detention order passed on 12.11.2010 cannot be sustained. Before considering his objection, it is useful to refer the following decision and principles laid down therein.

10. The incident relating to procedure to be adopted in case the detenue is already in custody has been dealt in several cases. In *Union of India vs. Paul Manickam and Another* (2003) 8 SCC 342, this Court, has held as under:-

"14…..Where detention orders are passed in relation to persons who are already in jail under some other laws, the detaining authorities should apply their mind and show their awareness in this regard in the grounds of detention, the chances of release of such persons on bail. The necessity

of keeping such persons in detention under the preventive detention laws has to be clearly indicated. Subsisting custody of the detenue by itself does not invalidate an order of his preventive detention, and the decision in this regard must depend on the facts of the particular case. Preventive detention being necessary to prevent the detenue from acting in any manner prejudicial to the security of the State or to the maintenance of public order or economic stability etc. ordinarily, it is not needed when the detenue is already in custody. The detaining authority must show its awareness to the fact of subsisting custody of the detenue and take that factor into account while making the order. If the detaining authority is reasonably satisfied with cogent materials that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time, he must be detained in order to prevent him from indulging in such prejudicial activities, the detention order can be validly made. Where the detention order in respect of a person already in custody does not indicate that the detenue was likely to be released on bail, the order would be vitiated. The point was gone into detail in *Kamarunnissa* v. *Union of India*. The principles were set out as follows: even in the case of a person in custody, a detention order can be validly passed: (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has a reason to believe on the basis of reliable material placed before him (*a*) that there is a real possibility of his release on bail, and (*b*) that on being released, he would in all probability indulge in prejudicial activities; and (3) if it is felt essential to detain him to prevent him from so doing. If an order is passed after recording satisfaction in that regard, the order would be valid. In the case at hand the order of detention and grounds of detention show an awareness of custody and/or a possibility of release on bail."

11. It is clear that if the Detaining Authority was aware of

the relevant fact, namely, that he was under custody from 09.10.2010 and he would be released or likely to be released or as in this case released on 10.11.2010 and if an order is passed after due satisfaction in that regard, undoubtedly, the order would be valid. Before answering this point, Mr. R. Sundaravardan, learned senior counsel for the State has brought to our notice that the said objection was neither raised before the Advisory Board nor in the representation to the Government and was not mentioned in the grounds of challenge and argued before the High Court. He also pointed out that even before this Court, this ground was not raised in the special leave petition. It is not in dispute that such objection was not raised anywhere except during the course of argument. No doubt, learned senior counsel for the appellant by drawing our attention to Crl.M.P. No. 11504 of 2011 which was filed for permission to file additional documents submitted that the same may be considered and in the absence of such satisfaction by the Detaining Authority as reflected in the detention order, the same is liable to be quashed. Non-consideration of bail order would amount to non-application of mind. [vide *M. Ahamedkutty vs. Union of India & Another.* (1990) 2 SCC 1 and *Anant Sakharam Raut vs. State of Maharashtra and Anr.* (1986) 4 SCC 771].

12. As pointed out above, the said objection was not raised anywhere. It is also not in dispute that the detenue was given adequate opportunity of hearing before the Advisory Board and all his grievances were addressed to by the Board and submitted its report. The Government, on going through the entire materials including the report of the Advisory Board as well as the representation of the detenue, considering the gravity of the offence alleged against him and his habituality, confirmed the order of detention.

13. The grounds of detention running into 60 pages and the order of detention to 5 pages clearly demonstrate various details about the involvement of the detenue violating the

provisions of IPC, A.P. Act and the Rules. The details furnished in the grounds of detention clearly show the application of mind on the part of the Detaining Authority. It is not the case of the detenue or the appellant that the required relevant and relied on materials have not been furnished which prevented him from making effective representation to the Government. The detailed report of the Inspector of Police and Sponsoring Authority clearly show that the detenue was a master mind in organising the felling of red-sanders trees owned by the Government and also providing vehicles for illegally transporting the red-sanders wood, hiring of labourers from the fringe forest villages and responsible for destruction of valuable governmental property. It also shows that it was he who operated gang for destruction of the national wealth causing deforestation leading to ecological imbalance affecting the community as a whole. The grounds of detention also show that the Detaining Authority, after scrutinising all the details including various orders of arrest and release, bail on various dates and noting that he is habitually indulging in trespass in forest area, illicit cutting, felling, smuggling and transporting red-sanders from the reserved forest owned by the State, arrived at a definite conclusion that the provisions of normal law were not sufficient in ordinary course to deal firmly because of his habitual nature and after satisfying all aspects including the fact that the detenue was in jail from 09.10.2010 to 10.11.2010 and the factum of release from the jail in 4 criminal cases, passed an order of detention with a view to prevent him from further indulging into such offences. In a matter of detention, the law is clear that as far as subjective satisfaction is concerned, it should either be reflected in the detention order or in the affidavit justifying the detention order. Once the Detaining Authority is subjectively satisfied about the various offences labelled against the detenue, habituality in continuing the same, difficult to control him under the normal circumstances, he is free to pass appropriate order under Section 3 of the 1986 Act by fulfilling the conditions stated therein. We have already concluded that there is no infirmity either in the reasonings of

the Detaining Authority or procedure followed by it. We are also satisfied that the detenue was afforded adequate opportunity at every stage and there is no violation of any of the safeguards. In these circumstances, we reject the contention raised by learned senior counsel for the appellant.

14. Though an attempt was made to nullify the order of detention by drawing our attention to the latest decision of this Court reported in *Rekha vs. State of Tamil Nadu* (2011) 5 SCC 244, on going through the factual position and orders therein and in view of enormous activities of the detenue violating various provisions of IPC, the A.P. Act and the Rules, continuous and habituality in pursuing the same type of offences, damaging the wealth of the nation and taking note of the abundant factual details as available in the grounds of detention and also of the fact that all the procedures and statutory safeguards have been fully complied with by the Detaining Authority, we are of the view that the said decision is not applicable to the case on hand. On the other hand, we fully agree with the reasoning of the Detaining Authority as approved by the Government and upheld by the High Court.

15. In the light of the above discussion, we find no merit in the appeal, consequently, the same is dismissed.

D.G. Appeal dismissed.

M/S. CAUVERY COFFEE TRADERS, MANGALORE
v.
M/S. HORNOR RESOURCES (INTERN.) CO. LTD.
Arbitration Petition Nos. 7 & 8 of 2009

SEPTEMBER 13, 2011

[DR. B.S. CHAUHAN, J.]

Arbitration and Conciliation Act, 1996:

s.11 – Appointment of arbitrator – Purchase Agreement between applicant-seller and respondent-buyer providing that the quality of iron ore supplied must contain 63% Fe content else the respondent would have right to reject the cargo – Consignment received by respondent contained 62.74% – Respondent informed the applicant that USD 1.5 million would be released for the shipment in place of USD 1.8 million in full and final settlement and in case the applicant was willing to accept the same, it should send instructions through its banker – Applicant received USD 1.5 million and demanded the balance amount on the ground that an erroneous message was forwarded by its bankers to the respondent that the applicant had agreed to receive the less payment towards full and final payment – Respondent did not give response – Application for appointment of arbitrator – Maintainability of – Held: The applicant did not plead that there was any kind of misrepresentation or fraud or coercion on the part of the respondent – Nor it was its case that payment was sent by the respondent without any settlement/agreement with the applicant, and was a unilateral act on their part – The applicant reached the final settlement with its eyes open and instructed its banker to accept the money as proposed by the respondent – Proposal itself was on the basis of terms of the Purchase Agreement which provided for Price Adjustment – In such a fact-situation, the plea that instructions were given by the applicant to the banker erroneously was an afterthought – The

transaction stood concluded between the parties, not on account of any unintentional error, but after extensive and exhaustive bilateral deliberations with a clear intention to bring about a quietus to the dispute – These negotiations were self-explanatory steps of the intent and conduct of the parties to end the dispute and not to carry it further – Since no dispute survived between the parties, application seeking appointment of arbitrator liable to be dismissed.

Part I – Applicability of, to international commercial arbitrations held outside India – Held: The provisions of Part I of the Act would be equally applicable to international commercial arbitrations held outside India, unless any of the said provisions are excluded by agreement between the parties expressly or by implication.

***DOCTRINES/PRINCIPLES**: Doctrine of estoppel – Approbation and reprobation – Held: A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate" – Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order – This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience – The doctrine of election is based on the rule of estoppel - the principle that one cannot approbate and reprobate inheres in it – The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity – By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.*

***WORDS AND PHRASES**: Word 'error' – Meaning of.*

On 24.6.2008, a Purchase Contract was entered into between the applicant and the respondent wherein the applicant agreed to sell to the respondent Calibrated

Lumpy Ore Fines of the approximate quantity of 40,000/- Wet Metric (10% more or less at buyers' option) at the price and on the terms and conditions stipulated in the said agreement. The agreement provided for the chemical specification/composition of the Ore and for guaranteed level of Fe i.e. iron content in the contracted goods which could not be less than 63% and in case the iron content was less than 63%, the buyer would have a right to reject the cargo.

Pursuant to the purchase contract, the applicant on 6.8.2008 shipped the total consignment. The applicant raised a provisional invoice for a sum of US$ 32,13,529.11 and sent a Certificate of Origin and the Bill of Lading dated 6.8.2008 as issued by the carriers in respect of the carriage of the goods from Mangalore Port, India to Rizhao Port, China. The said goods reached at China Port. The delivery of the same was taken by the respondent and on chemical analysis, according to the respondent, the iron contents Fe, were found to be 62.74%. The respondent by email dated 19.9.2008 informed the applicant that a provisional payment would be released for the shipment in question based on revised rates and, in case, the applicant was willing to accept the revised rates stipulated therein, the respondent would request their end buyers' confirmation to release the payment, and for that purpose, applicant was asked to send necessary instructions through their banker. The respondent by email dated 7.10.2008 informed the applicant that US$ 1.5 million could be the amount for the final settlement in respect of the shipment in question, in spite of the fact that the agreed amount was US$ 18,91,204.00. An amount of US$ 1.5 million was received by the applicant. Subsequent thereto, the applicant repeatedly sent reminders to the respondent to make good the balance payment under the said purchase contract, but no payment was made. The applicant sent

a legal notice calling upon the respondent to pay the balance amount under the purchase contract or else in view of the arbitration clause 18 contained in the purchase agreement, friendly negotiations should be carried out to settle the dispute accrued between them. As per the terms of the purchase agreement, arbitration could be held only in a third country. The applicant suggested to have the arbitration proceedings either in Singapore or in Australia. In spite of receiving the said notice and a reminder thereafter, neither the payment of the balance amount was made, nor the respondent came forward for friendly negotiations. The applicant filed the instant arbitration applications. The main ground raised in the applications was that inspite of the fact that the applicant specifically informed their bankers that an amount of USD 1.5 million was to be received in lieu of the provisional payment, an erroneous message was forwarded by the applicant's bankers to the respondent that the applicant had agreed to receive an amount of USD 1.5 million towards full and final payment.

Dismissing the applications, the Court

HELD: 1.1. Notwithstanding the provisions of Section 2(2) of the Arbitration and Conciliation Act, 1996, indicating that Part I of the said Act would apply where the place of arbitration is in India, even in respect of international commercial agreements, which are to be governed by the laws of another country, the parties would be entitled to invoke the provisions of Part I of the said Act and consequently the application made under Section 11 thereof would be maintainable. It clearly lays down that the provisions of Part I of the Arbitration and Conciliation Act, 1996, would be equally applicable to international commercial arbitrations held outside India, unless any of the said provisions are excluded by agreement between the parties expressly or by

implication, which is not so in the instant case. [Para 9] [485-C-F]

Bhatia International v. Bulk Trading S.A **(2002) 4 SCC 105: 2002 (2) SCR 411 – followed.**

Indtel Technical Services Private Limited v. W.S. Atkins Rail Limited **(2008) 10 SCC 308: 2008 (12) SCR 673;** *Citation Infowares Limited v. Equinox Corporation* **(2009) 7 SCC 220: 2009 (6) SCR 737;** *Venture Global Engg. Case v. Satyam Computer Services Ltd.* **(2008) 4 SCC 190: 2008 (1) SCR 501– relied on.**

Shreejee Traco (I) Pvt. Ltd. v. Paperline International Inc. **(2003) 9 SCC 79 – referred to.**

1.2. From the agreement, it is evident that the ore supplied must contain Fe contents not less than 63%. In case the Fe contents are less than the specified percentage, the buyer would have a right to reject the cargo. The Purchase Agreement also contained a clause providing for price adjustment in case the supplied ore did not meet the requirement of specification provided for iron ore. In case of any dispute between the parties, the agreement provided for arbitration in any third country. Stand of the respondent throughout was that under Clause 5 of the Purchase Contract, the buyer had a right to reject the whole consignment in case the iron contents were less than 63%. However, goods had already reached the port of discharge in China, the buyer accepted the delivery thereof and made a proposal for adjustment of price. Negotiations started as is evident from the email messages dated 8.9.2008, 25.9.2008 and 7.10.2008 and it was in pursuance of these negotiations that the applicant had instructed its banker to accept the proposal made by the respondent and it was in pursuance of their instructions, the banker by email dated 8.10.2009 accepted the proposal and agreed to receive a

sum of US$ 1.5 million as full and final settlement for the consignment in issue. The payment made was accepted by the applicant and it was after 3 months thereafter that it served a legal notice for making a reference to the Arbitrator. The applicant did not dispute the negotiations or giving instructions to its banker or in respect of the email by their banker to the respondent or receiving the money in lieu thereof. Error means – a mistake in judgment/assessment in a process or proceedings; some wrong decision taken inadvertently; unintentional mistakes; something incorrectly done through ignorance or inadvertence; mistake occurred from an accidental slip; deviation from standard or course of right or accuracy – unintentionally; to be wrong about; to think or understand wrongly; an omission made not by design, but by mischance. In case, final settlement has been reached amicably between the parties even by making certain adjustments and without any misrepresentation or fraud or coercion, then, acceptance of money as full and final settlement/issuance of receipt or vouchers etc. would conclude the controversy and it is not open to either of the parties to lay any claim/demand against the other party. [Paras 12, 13, 17, 18, 23] [487-F-G; 489-D-H; 490-A, E-F; 493-F-H]

Nathani Steels Ltd. v. Associated Constructions **1995 Supp (3) SCC 324;** *State of Maharashtra v. Nav harat Builders* **1994 Supp (3) SCC 83;** *M/s. P.K. Ramaiah & Company v. Chairman & Managing Director, NTPC* **(1994) Supp. 3 SCC 126;** *National Insurance Company Limited v. M/s. Boghara Polyfab Private Limited* **AIR 2009 SC 170: 2008 (13) SCR 638;** *R.L. Kalathia v. State of Gujarat* **(2011) 2 SCC 400: 2011 (1) SCR 391 – relied on.**

1.3. The applicant had not pleaded that there was any kind of misrepresentation or fraud or coercion on the part of the respondent. Nor it was its case that payment was

sent by the respondent without any settlement/ agreement with the applicant, and was a unilateral act on its part. The applicant reached the final settlement with eyes open and instructed its banker to accept the money as proposed by the respondent. Proposal itself was on the basis of clause 5 of the Purchase Contract which provided for Price Adjustment**. For a period of three months after acceptance of the money under the full and final settlement, applicant did not raise any dispute in respect of the agreement of price adjustment. In such a fact-situation, the plea that instructions were given by the applicant to the banker** erroneously**, being, afterthought is not worth acceptance. The transaction stood concluded between the parties, not on account of any unintentional error, but after extensive and exhaustive bilateral deliberations with a clear intention to bring about a quietus to the dispute. These negotiations, therefore, were self-explanatory steps of the intent and conduct of the parties to end the dispute and not to carry it further. [Para 24] [494-A-E]**

R.N. Gosain v. Yashpal Dhir **AIR 1993 SC 352: 1992 (2) Suppl. SCR 257– relied on.**

2. A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience. Thus, it is evident that the doctrine of election is based on the rule of estoppel- the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law,

a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. In the facts and circumstances of the case, as the respondent resorted to clause 5 of the Purchase Agreement dated 28/6/2008, regarding price adjustment and the offer so made by the respondent has been accepted by the applicant and agreed to receive a particular sum offered by the respondent as a full and final settlement, the dispute comes to an end. The applicant cannot take a complete somersault and agitate the issue that the offer made by the respondent had erroneously been accepted. In view of that as no dispute survives, the applications are dismissed. [Paras 26-28] [494-G-H; 495-A-H]

Nagubai Ammal & Ors. v. B. Shama Rao & Ors. **AIR 1956 SC 593: 1956 SCR 451;** *C.I.T. v. MR. P. Firm Maur* **AIR 1965 SC 1216: 1965 SCR 815;** *Maharashtra State Road Transport Corporation v. Balwant Regular Motor Service, Amravati & Ors.,* **AIR 1969 SC 329: 1969 SCR 808;** *P.R. Deshpande v. Maruti Balaram Haibatti* **AIR 1998 SC 2979: 1998 (3) SCR 1079;** *Babu Ram v. Indrapal Singh* **AIR 1998 SC 3021: 1998 (3) SCR 1145;** *Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors* **AIR 2004 SC 1330: 2004 (1) SCR 62;** *Ramesh Chandra Sankla & Ors. v. Vikram Cement & Ors.* **AIR 2009 SC 713: 2008 (10) SCR 243;** *Pradeep Oil Corporation v. Municipal Corporation of Delhi & Anr.* **2011 5 SCC 270 – relied on.**

Case Law Reference:

2002 (2) SCR 411	**followed**	**Para 9, 11**
2008 (12) SCR 673	**relied on**	**Para 9**
2009 (6) SCR 737	**relied on**	**Para 9**
2008 (1) SCR 501	**relied on**	**Para 9**

(2003) 9 SCC 79	**referred to**	**Para 10**
1995 Supp (3) SCC 324	**relied on**	**Para 11**
1994 Supp (3) SCC 83	**relied on**	**Para 19**
(1994) Supp. 3 SCC 126	**relied on**	**Para 20**
2008 (13) SCR 638	**relied on**	**Para 21**
2011 (1) SCR 391	**relied on**	**Para 22**
1992 (2) Suppl. SCR 257	**relied on**	**Para 25**
1956 SCR 451	**relied on**	**Para 26**
1965 SCR 815	**relied on**	**Para 26**
1969 SCR 808	**relied on**	**Para 26**
1998 (3) SCR 1079	**relied on**	**Para 26**
1998 (3) SCR 1145	**relied on**	**Para 26**
2004 (1) SCR 62	**relied on**	**Para 26**
2008 (10) SCR 243	**relied on**	**Para 26**
2011 5 SCC 270	**relied on**	**Para 26**

CIVIL ORIGINAL JURISDICTION : Arbitration Petition No. 7 & 8 of 2009.

Under Section 11 (5) & 11 (9) of the Arbitration and Conciliation Act, 1996.

V.A. Mohta, P. Vijay Kumar, C.S.N. Mohan Rao for the Petitioner.

S.K. Kulkarni, Ankur S. Kulkarni, M. Gireesh Kumar, Anirudha Anand for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. The arbitration applications under Section 11(5) & (9) of the Arbitration and Conciliation Act, 1996, hereinafter called the "Act 1996" have been filed for appointment of Arbitrator in an international arbitration dispute to adjudicate the disputes/differences which have arisen between the parties.

2. The applicants are a partnership concern incorporated under the Indian Partnership Act, 1932 and have filed two applications as the dispute raised herein relate to two consignments. However, for convenience, facts and issues related to Petition No.7/2009 are being considered.

3. On 24.6.2008, a Purchase Contract bearing No. CCT/ SST/027/ 240608 was entered and executed by and between the applicants and the respondents wherein the applicants agreed to sell and the respondents agreed to purchase Calibrated Lumpy Ore Fines of the approximate quantity of 40,000/- Wet Metric Tones (hereinafter called as 'WMT') (10% more or less at buyers' option) at the price and on the terms and conditions stipulated in the said agreement. The agreement provided for the chemical specification/composition of the Ore and for guaranteed level of Fe i.e. iron content in the contracted goods which could not be less than 63%. In case the iron content was less than 63%, the buyer would have a right to reject the cargo.

4. A large quantity of Ore had been supplied to the respondents which had been accepted and payments had been made. Pursuant to the purchase contract, the applicants on 6.8.2008 shipped a total consignment of 24,500 Dry MT of Calibrated Lumpy Ore from New Mangalore Port, India to the port of discharge viz. Rizhao Port, China by vessel named "MV. FUJIN". The applicants raised a provisional invoice for a sum of US$ 32,13,529.11 and sent a Certificate of Origin and the Bill of Lading dated 6.8.2008 as issued by the carriers in respect of the carriage of the goods from Mangalore Port, India

to Rizhao Port, China. The material so supplied had been sent after proper analysis and it had been certified by the analyst in India that the goods supplied contained more than 63% Fe contents. The said goods reached at China Port. The delivery of the same was taken by the respondents and on chemical analysis, according to them, the iron contents Fe, were found to be 62.74%. The goods reached the Port of Discharge, and were accepted by the respondents-buyers who promised that payment would be made without any delay.

5. The respondents vide email dated 19.9.2008 informed the applicants that a provisional payment would be released for the shipment in question based on revised rates and, in case, the applicants were willing to accept the revised rates stipulated therein, the respondents would request their end buyers' confirmation to release the payment, and for that purpose, applicants were asked to send necessary instructions through their banker. The respondents vide email dated 7.10.2008 informed the applicants that US$ 1.5 million could be the amount for the final settlement in respect of the shipment in question, in spite of the fact that the agreed amount had been US$ 18,91,204.00. By the said email, applicants were asked by the respondents to inform through their banker in case of their acceptance to the said proposal. Under these peculiar facts and circumstances, as the goods had already reached China and applicants were in dire need of money, they informed through their banker that they agreed to receive payment under the Letter of Credit in a sum of total claim of US$ 18,91,204.00. By email dated 7.10.2008 the respondents stated that the applicants should accept US$ 1.5 million in full and final settlement. Accordingly, an amount of US$ 1.5 million had been received by them. Subsequent thereto, the applicants had repeatedly been sending reminders to the respondents to make good the balance payment under the said purchase contract, but no payment had been made. As the respondents failed to make the payment of the balance amount, the applicants sent a legal notice dated 14.11.2008 to call upon the respondents

to pay the balance amount under the purchase contract and further provided that, in view of the arbitration clause 18 contained in the purchase agreement, they should carry on friendly negotiations to settle the dispute accrued between the parties. As per the terms of the purchase agreement, arbitration can be held only in a third country. The applicants suggested to have the arbitration proceedings either in Singapore or in Australia. In spite of receiving the said notice, neither the payment of the balance amount was made, nor the respondents came forward for friendly negotiations. Therefore, a further reminder was sent by the applicants to the respondents calling upon them to indicate the place of arbitration. As neither the payment had been made, nor the respondents have agreed for arbitration proceedings, they have approached this Court by filing these applications.

6. Shri V.A. Mohta, learned senior counsel appearing for the applicants, has submitted that in spite of the fact that the supply of iron ore has been made strictly in terms of the purchase contract and the outstanding payments have not been made even after several reminders, the applicants served a notice on the respondents for appointment of Arbitrator in the third country in terms of Clause 18 of the Purchase Agreement but the respondents did not make any effort either to come for friendly negotiations or to refer the matter for arbitration, therefore, this Court must refer the matter to the Arbitrator in a third country preferably Singapore or Australia.

7. On the contrary, Shri Ashok K. Srivastava, learned senior counsel appearing for the respondents, has vehemently opposed the applications contending that the applications themselves are not maintainable as the purchase agreement can be dealt with Part-II and certainly not under Part-I of the Act 1996. Therefore, the applications under Section 11(5) & (9) of Act 1996 are not maintainable, even otherwise, there has been a complete settlement between the parties and the applicants have accepted the full and final settlement as suggested by the

respondents in view of the fact that Fe contents were not as per the specifications and certain terms had been offered to the applicants for settlement, which had been agreed by them. The question of making the reference to arbitration proceedings does not arise.

8. I have considered the rival submissions made by learned counsel for the parties and perused the record.

9. So far as the issue relating to maintainability of the application itself is concerned, is no more *res integra.* This court in *Bhatia International v. Bulk Trading S.A,* (2002) 4 SCC 105, held as under:

> "…..notwithstanding the provisions of Section 2(2) of the Arbitration and Conciliation Act, 1996, indicating that Part I of the said Act would apply where the place of arbitration is in India, even in respect of international commercial agreements, which are to be governed by the laws of another country, the parties would be entitled to invoke the provisions of Part I of the aforesaid Act and consequently the application made under Section 11 thereof would be maintainable. It clearly lays down that the provisions of Part I of the Arbitration and Conciliation Act, 1996, would be equally applicable to international commercial arbitrations held outside India, unless any of the said provisions are excluded by agreement between the parties expressly or by implication, which is not so in the instant case."

(See also: *Indtel Technical Services Private Limited v. W.S. Atkins Rail Limited,* (2008) 10 SCC 308; and *Citation Infowares Limited v. Equinox Corporation,* (2009) 7 SCC 220).

10. In *Venture Global Engg. Case v. Satyam Computer Services Ltd.* (2008) 4 SCC 190, this Court considered the similar issue and after considering various earlier judgments, came to the conclusion that implied exclusion of provision of Part-I cannot be inferred and therefore the principles regarding

the arbitral reference laid down in *Bhatia International* (supra) are applicable.

11. Hon'ble Mr. R.C. Lahoti, J. (as His Lordship then was) however, has taken a contrary view as in *Shreejee Traco (I) Pvt. Ltd. v. Paperline International Inc.,* (2003) 9 SCC 79; it was held**:**

> ***"8.*** *So far as the language employed by Parliament in drafting sub-section (2) of Section 2 of the Act is concerned, suffice it to say that the language is clear and unambiguous. Saying that this Part would apply where the place of arbitration is in India tantamounts to saying that it will not apply where the place of arbitration is not in India*."

However, considering the fact that *Bhatia International* (supra) is a three-Judge Bench judgment and has consistently been followed, the judgment of the learned Single Judge in *Shreejee Traco (I) Pvt. Ltd.* (supra) does not have binding effect. As a consequence, the application is held to be maintainable.

12. The Relevant part of the Purchase Agreement dated 28.6.2008 reads as under:

> "Clause 5: **Price Adjustmen**t
>
> For Fe content:
>
> In respect of iron ore which does not meet the Fe specifications set forth in Clause 3 the base price referred to in Clause 4 shall be adjusted in accordance with Fe content as determined pursuant to the provisions of Clause 8 as follows:
>
> The base price shall be increased by single prorate (USD2.2) per dry metric tonne for each 1% Fe below 63.5% upto 63.0 fraction prorate.

The Buyer has the right to reject the cargo if Fe content is below 63.0% .

Clause 15: **Title and Risk**

The title with respect to each shipment shall pass from Seller to the Buyers when Seller receives reimbursement of the proceeds from the opening bank through the negotiating bank against the relative shipping documents as set forth in clause 6 after completion of loading on board the vessel at loading port, with effect retrospective to the time of delivery of ore.

Clause 18: **Arbitration**

All disputes in connection with this contract or the execution thereof shall be settled amicably by friendly negotiations between the two parties. If no settlement can be reached, the case in dispute shall then be submitted for arbitration to a third country, which shall be agreed upon by both parties. The arbitration award shall be final and binding on both the parties and may be enforced in any court having jurisdiction over the party against which enforcement is sought. The cost of arbitration shall be borne by the losing party."

Thus, from the Purchase Agreement it is evident that the ore supplied must contain Fe contents not less than 63%. In case the Fe contents are less than the specified percentage, the buyers would have a right to reject the cargo. The Purchase Agreement also contains a clause providing for price adjustment in case the supplied ore does not meet the requirement of specification provided for iron ore. In case of any dispute between the parties, the agreement provides for arbitration in any third country.

13. The documents on record reveal that parties had been negotiating for the goods supplied and also in respect of payment for the same (vide emails dated 25.6.2008 and

8.9.2008). Relevant part of the email dated 25.9.2008 reads as under:

"……Both cargos were rejected by end buyers due to the quality failure.

In such case, we regret to say that the maximum CFR price we can work here is $110 for Zhongqiang II AND $120 FOR Fujin. Pls note current market price for cargo below 63 is only $100 and market is still on the down trend. However in consideration of the long term good cooperation between the two companies, we are offering to bear at least a $10-20 loss on our side and with the huge risks of further slide of market, which actually is foreseeable.

……Our above offer is valid till this Friday (26th September, 2008) only…"

14. The email dated 7.10.2008 sent by the applicants to the respondents reads as under:

"Further to telecom just now, pls note as per **latest mutual agreement between seller and buyer**, the said USD1.50 million **shall be final settlemen**t for subj.shipment, so please request your bank to revise the swift msg as follows:

"beneficiary ***agrees to receive*** *USD1,500,000.00 for full and final payment for this set of documents and under this letter of credit, after release of this amount, the letter of credit shall be considered expired and cancelled."* (Emphasis added)

15. Subsequently, the applicants sent an email to the respondents dated 14.11.2008 which provided *inter-alia,* as under:

"Clause 8 of the Purchase Contract *provided for the*

remedies available in the event of there being a difference in percentage of the Fe content as compared to the specifications mentioned in the Contract. The said Contract also provided that all disputes would be settled amicably and that if no settlement could be reached, the disputes would be submitted to arbitration to a third country to be agreed upon by both the parties.

…….Since the Arbitration clause provides for the dispute being submitted for arbitration to a third country, our clients would suggest conduct of the arbitration either in Singapore under the auspices of the Singapore International Arbitration Centre and/or Australia under the Rules of the Institute of Arbitrators and Mediators, Australia."

16. The applicants again asked the respondents for reference to Arbitrator vide email dated 21.11.2008, but in vein.

17. Stand of the respondents throughout had been that under Clause 5 of the Purchase Contract dated 24.6.2008 in respect of the iron ore, the buyers had a right to reject the whole consignment in case the iron contents were less than 63%, as has been in the instant case. However, considering other factors that goods had already reached the port of discharge in China, the buyers accepted the delivery thereof and therefore, the buyers made a proposal for adjustment of price. Negotiations started as is evident from the email messages dated 8.9.2008, 25.9.2008 and 7.10.2008 as referred to hereinabove, and it was in pursuance of these negotiations that the applicants had instructed their banker to accept the proposal made by the respondents and it was in pursuance of their instructions, the banker vide email dated 8.10.2009 accepted the proposal and agreed to receive a sum of US$500,000.00 as **full and final settlement** for the consignment in issue. The payment made was accepted by the applicants and it was after 3 months thereafter that they served a legal notice dated 14.11.2008 for making a reference to the Arbitrator. The applicants in the

present application do not dispute the negotiations or giving instructions to their banker or in respect of the email by their banker to the respondents or receiving the money in lieu thereof. Therefore, the question does arise as to whether the banker's acceptance of instructions given by the applicants can be treated as full and final settlement of the dispute. The main ground in this regard had been taken in this application in Paragraph (P) as under:

"In spite of the fact that the Applicants had specifically informed their Bankers that an amount of US$ 1.5 million was to be received in lieu of provisional payment, an *erroneous message* was forwarded by the Applicants' Bankers to the Respondents that the beneficiary being the Applicants herein had agreed to receive an amount of US$ 1.5 million towards full and final payment and that the Letters of Credit would be considered expired and cancelled on receipt of the said payment." (Emphasis added)

18. **Error** means – a mistake in judgment/assessment in a process or proceedings; some wrong decision taken inadvertently; unintentional mistakes; something incorrectly done through ignorance or inadvertence; mistake occurred from an accidental slip; deviation from standard or course of right or accuracy – unintentionally; to be wrong about; to think or understand wrongly; an omission made not by design, but by mischance.

19. In *Nathani Steels Ltd. v. Associated Constructions,* 1995 Supp (3) SCC 324, while dealing with a similar issue, this Court held**:**

"……once the parties have arrived at a settlement in respect of any dispute or difference arising under a contract and that dispute or the difference is amicably settled by way of a final settlement by and between the parties, unless that settlement is set aside in proper

proceedings, it cannot lie in the mouth of one of the parties to the settlement to spurn it on the ground that it was a mistake and proceed to invoke the Arbitration clause. If this is permitted the sanctity of contract, the settlement also being a contract, would be wholly lost and it would be open to one party to take the benefit under the settlement and then to question the same on the ground of mistake without having the settlement set aside. In the circumstances, we think that in the instant case since the dispute or difference was finally settled and payments were made as per the settlement, it was not open to the respondent unilaterally to treat the settlement as non est and proceed to invoke the Arbitration clause…."

A similar view has been re-iterated in *State of Maharashtra v. Nav Bharat Builders,* 1994 Supp (3) SCC 83.

20. This Court in *M/s. P.K. Ramaiah & Company v. Chairman & Managing Director, NTPC,* (1994) Supp. 3 SCC 126 considered the ambit of accord and satisfaction by the parties voluntarily entered into and dispute raised thereunder. This Court after considering the entire controversy held that:

"Admittedly the full and final satisfaction was acknowledged by a receipt in writing and the amount was received unconditionally. Thus there is accord and satisfaction by final settlement of the claims. The subsequent allegation of *coercion is an afterthought and a devise to get over the settlement of the dispute, acceptance of the payment and receipt voluntarily given.... Having acknowledged the settlement and* also accepted measurements and having received the amount in full and final settlement of the claim, there is accord and satisfaction. There is no existing arbitrable dispute for reference to the arbitration." (Emphasis added)

21. In *National Insurance Company Limited v. M/s.*

Boghara Polyfab Private Limited, AIR 2009 SC 170, this Court held:

"26. When we refer to a discharge of contract by an agreement signed by both the parties or by execution of a full and final discharge voucher/receipt by one of the parties, we refer to an agreement or discharge voucher which is validly and voluntarily executed. If the party which has executed the discharge agreement or discharge voucher, alleges that the execution of such discharge agreement or voucher was on account of *fraud/coercion/ undue influence* practised by the other party and is able to establish the same, then obviously the discharge of the contract by such agreement/voucher is *rendered void and cannot be acted upon*. Consequently, any dispute raised by such party would be arbitrable." (Emphasis added).

xx xx xx

29. It is thus clear that the arbitration agreement contained in a contract cannot be invoked to seek reference of any dispute to arbitration, in the following circumstances, when the contract is discharged on account of performance, or *accord and satisfaction,* or *mutual agreement,* and the same is reduced to writing (and signed by both the parties or by the party seeking arbitration):

(a) where the obligations under a contract are fully performed and discharge of the contract by performance is acknowledged by a full and final discharge voucher/ receipt, nothing survives in regard to such discharged contract;

(b) where the parties to the contract, by mutual agreement, accept performance of altered, modified and substituted obligations and confirm in writing the discharge of contract by performance of the altered, modified or substituted obligations;

(c) where the parties to a contract, by mutual agreement, absolve each other from performance of their respective obligations (either on account of frustration or otherwise) and consequently cancel the agreement and confirm that there are no outstanding claims or disputes."

(Emphasis added)

22. In *R.L. Kalathia v. State of Gujarat,* (2011) 2 SCC 400, this court considered a similar issue and held:

"(i) Merely because the contractor has issued "no-dues certificate", if there is an acceptable claim, the court cannot reject the same on the ground of issuance of "no-dues certificate".

(ii) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, hence such a clause in the contract would not be an absolute bar to a contractor raising claims which are genuine at a later date even after submission of such "no-claim certificate".

(iii) Even after execution of full and final discharge voucher/ receipt by one of the parties, if the said party is able to establish that he is entitled to further amount for which he is having adequate materials, he is not barred from claiming such amount merely because of acceptance of the final bill by mentioning "without prejudice" or by issuing "no-dues certificate".

23. In view of the above, law on the issue stands crystallised to the effect that, in case, final settlement has been reached amicably between the parties even by making certain adjustments and without any misrepresentation or fraud or coercion, then, acceptance of money as full and final settlement/ issuance of receipt or vouchers etc. would conclude the controversy and it is not open to either of the parties to lay any claim/demand against the other party.

24. The applicants have not pleaded that there has been any kind of misrepresentation or fraud or coercion on the part of the respondents. Nor it is their case that payment was sent by the respondents without any settlement/agreement with the applicants, and was a unilateral act on their part. The applicants reached the final settlement with their eyes open and instructed their banker to accept the money as proposed by the respondents. Proposal itself was on the basis of clause 5 of the Purchase Contract which provided for *Price Adjustment*. For a period of three months after acceptance of the money under the full and final settlement, applicants did not raise any dispute in respect of the agreement of price adjustment. In such a fact-situation, the plea that instructions were given by the applicants to the banker *erroneously*, being, afterthought is not worth acceptance.

The transaction stood concluded between the parties, not on account of any unintentional error, but after extensive and exhaustive bilateral deliberations with a clear intention to bring about a quietus to the dispute. These negotiations, therefore, are self-explanatory steps of the intent and conduct of the parties to end the dispute and not to carry it further.

25. In *R.N. Gosain v. Yashpal Dhir,* AIR 1993 SC 352, this Court has observed as under:–

"Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage."

26. A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such

contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience. (Vide: *Nagubai Ammal & Ors. v. B. Shama Rao & Ors.,* AIR 1956 SC 593; *C.I.T. Vs. MR. P. Firm Maur,* AIR 1965 SC 1216; *Maharashtra State Road Transport Corporation v. Balwant Regular Motor Service, Amravati & Ors.,* AIR 1969 SC 329; *P.R. Deshpande v. Maruti Balaram Haibatti,* AIR 1998 SC 2979; *Babu Ram v. Indrapal Singh,* AIR 1998 SC 3021; *Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors,* AIR 2004 SC 1330; *Ramesh Chandra Sankla & Ors. v. Vikram Cement & Ors.,* AIR 2009 SC 713; and *Pradeep Oil Corporation v. Municipal Corporation of Delhi & Anr.,* (2011) 5 SCC 270).

27. Thus, it is evident that the doctrine of election is based on the rule of estoppel- the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.

28. In the facts and circumstances of the case, as the respondents resorted to clause 5 of the Purchase Agreement dated 28/6/2008, regarding price adjustment and the offer so made by the respondents has been accepted by the applicants and agreed to receive a particular sum offered by the respondents as a full and final settlement, the dispute comes to an end.

The applicants cannot take a complete somersault and agitate the issue that the offer made by the respondents had erroneously been accepted.

In view of the above, as no dispute survives, the applications are dismissed.

D.G. Applications dismissed.

RAJENDRA SINGH VERMA (DEAD) THROUGH LRS
v.
LT. GOVERNOR OF NCT OF DELHI & ANR.
(Civil Appeal No. 7781 of 2011)

SEPTEMBER 12, 2011

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

SERVICE LAW :

Compulsory retirement – Challenge to – Held: Normally, an aggrieved civil servant can challenge the order of compulsory retirement on any of the grounds: (a) that the requisite opinion has not been formed, or (b) that the decision is based on collateral grounds, or (c) that it is an arbitrary decision — If the civil servant is able to establish that the order of compulsory retirement suffers from any of these infirmities, the court has jurisdiction to quash the same – Administrative Law – Judicial review.

Compulsory retirement – Held: Is not considered to be a punishment – Un-communicated adverse remarks can be taken into consideration while deciding the question whether an official should be made to retire compulsorily or not – Therefore the principles of natural justice are not attracted – Thus, the fact that the adverse A.C.R. was communicated but none of the officers had an opportunity to represent before the same was taken into consideration for passing order of compulsory retirement, cannot at all vitiate the order of compulsory retirement.

Compulsory retirement – Officers of Delhi Higher Judicial Service and Delhi Judicial Service – Rules applicable – Held: Rule 16(3) of All India Services (Death-cum-Retirement Benefits) Rules, 1958 would be applicable to the officers of the Delhi Higher Judicial Service – Therefore, the matter

regarding pre-mature retirement of officers of the Delhi Higher Judicial Service who have completed 30 years of qualifying service or attained 50 years of age, has to be reviewed in the light of r. 16(3) of the Rules of 1958 – As regards the Officers of Delhi Judicial Service, Fundamental Rule 56(j) shall regulate the matter of compulsory retirement of such Officers – All India Services (Death-cum-Retirement Benefits) Rules, 1958 – r.16(3) – Delhi Higher Judicial Service Rules, 1970 – Delhi Judicial Service Rules, 1970 – Fundamental Rule 56(j).

Compulsory retirement – Stage of consideration - Officers of Delhi Higher Judicial Service and Delhi Judicial Service – Held: There is no rule prohibiting consideration of the case of an officer for compulsory retirement before he attains the age of 55 years, even if his case has earlier been considered at the age of 50 years – The report of the Screening Committee dated 17.7.2000 not recommending premature retirement "for the time being" was tentative and not final, which will not preclude the authority concerned from passing orders of compulsory retirement later on – Article 235 of the Constitution of India enables the High Court to assess the performance of any judicial officer and exercise the power of compulsory retirement at any time with a view to maintain discipline in the service – Constitution of India, 1950 – Article 235.

Compulsory retirement – Range of consideration of service record – Held: While considering the case of an officer as to whether he should be continued in service or compulsorily retired, his entire service record up to that date on which consideration is made has to be taken into account – The fact that an officer, after an earlier adverse entry, was promoted does not wipe out earlier adverse entry at all.

Annual Confidential Reports – Judicial Review of – Held: Writing the confidential report is primarily and essentially an administrative function – The object of writing confidential reports and making entries therein is to give an opportunity

to the public servant to improve excellence – Opportunity of hearing is not necessary before adverse remarks because adverse remarks by themselves do not constitute a penalty – Natural justice – Opportunity of hearing.

Annual Confidential Reports – Purpose of – Explained – constitution of India, 1950 – Article 51 (j).

CONSTITUTION OF INDIA,1950 :

Article 136 – New plea – Held: Supreme Court would not entertain a new plea at the hearing of the appeal under Article 136 when it is not raised in the High Court or in the petition seeking leave to appeal – However, there are exceptional cases in which the Court may permit a party to raise a new plea – The question sought to be raised in the instant matter is a pure question of law for which factual foundation is already laid – The counsel for the parties have been permitted and heard at great length on the new point – Therefore, having regard to the facts of the case, the Court has permitted the point to be raised.

Articles 233, 234, 235 – Subordinate Judiciary – Control over – Held: Article 235 provides that control over the subordinate courts is vested in High Court of a State is exclusive in nature, comprehensive in extent and effective in operation and is a mechanism to ensure and subserve a basic feature of the Constitution, i.e. independence of judiciary – The scheme envisaged by the Constitution does not permit the State to encroach upon the area reserved by Articles 233, 234 and first part of Article 235 either by legislation or rules or executive instructions – The High Court alone is the sole authority competent to initiate disciplinary proceedings against subordinate Judicial Officers or to impose various punishments including the order of compulsory retirement on verification of the service record – Basic structure theory.

Article 235 r/w Articles 163 and 239AA –

Recommendation of High Court to Governor – Nature of – Held: The Governor, under the scheme of Articles 233,234 and 235 of the Constitution cannot refuse to act in terms of the recommendations made by the High Court on the ground that he is not aided and advised by the Council of Ministers – Governor has to act on the recommendation of the High Court and that is the broad basis of Article 235 – In the matter of compulsory retirement of a Judicial Officer, the Governor cannot act on the aid and advice of Council of Ministers but has to act only on the recommendation of the High Court – Thus, the order of the Lt. Governor compulsorily retiring the Judicial Officers without seeking aid and advice of his Council of Ministers is neither ultra vires nor illegal and is rightly sustained by the High Court.

ADMINISTRATION OF JUSTICE:

Judicial service – Held: Is not a service in the sense of an employment as is commonly understood – Judges are discharging their functions while exercising the sovereign judicial power of the State – Their honesty and integrity is expected to be beyond doubt – The nature of judicial service is such that it cannot afford to suffer continuance in service of persons of doubtful integrity or who have lost their utility – Judiciary.

WORDS AND PHRASES :

Expressions 'control', 'vests', and 'material' – Connotation of.

The appellant (deceased) in C.A. Nos. 7781 of 2011, who joined the Delhi Higher Judicial Service on 9.3.1995 when he was aged about 45 years, and the appellants in C.A. Nos. 7782 of 2011 and 7783 of 2011, who joined the Delhi Judicial Service on 5.5.1972 and 28.1.1978 respectively, were, on the basis of their poor service

record and the Annual Confidential Reports wherein they were graded as " 'C' integrity doubtful", prematurely retired from service by order dated 27.9.2001. Their writ petitions having been dismissed by the High Court, they filed the appeals.

The questions for consideration before the Court were: (i) whether the cases of the appellants for compulsory retirement, could have been considered again before they reached the age of 55 years, when the Screening Committee had already considered their cases for compulsory retirement on their attaining the age of 50 years on 17.7. 2000, and had not recommended their compulsory retirement which recommendation was accepted by the Full Court of the High Court; and (ii) whether the order passed by the Lt. Governor compulsorily retiring the appellants from service without seeking aid and advice of his Council of Ministers as required under Article 239 (AA)(4) of the Constitution was *ultra vires* and illegal.

Dismissing the appeals, the Court

HELD: 1.1 Normally, an aggrieved civil servant can challenge the order of compulsory retirement on any of the grounds: (a) that the requisite opinion has not been formed, or (b) that the decision is based on collateral grounds, or (c) that it is an arbitrary decision. If the civil servant is able to establish that the order of compulsory retirement suffers from any of these infirmities, the court has jurisdiction to quash the same. [para 23] [536-G]

1.2 By virtue of r. 27 of the Delhi Higher Judicial Service Rules, 1970, r. 16 (3) of the All India Services (Death-cum-Retirement Benefits) Rules, 1958 ('the Rules of 1958') would be applicable to the officers of the Delhi Higher Judicial Service. Therefore, the matter regarding

pre-mature retirement of officers of the Delhi Higher Judicial Service who have completed 30 years of qualifying service or attained 50 years of age, has to be reviewed in the light of r. 16 (3) of the Rules of 1958. Similarly, in view of r. 33 of Delhi Judicial Service Rules, 1970, Fundamental Rule 56 (j), which is for the time being in force and applicable to Government servants holding corresponding posts envisaged under the Delhi Judicial Service Rules, 1970, shall regulate the matter of compulsory retirement of officers of Delhi Judicial Service. The screening Committee of the High Court also by its resolution dated 15.12.1992 decided, "Government Rules be applied." FR 56(j) gives absolute right to the appropriate authority to retire any Government servant who has entered the service before attaining the age of 35 years, after he has attained the age of 50 years and in other cases after he has attained the age of 55 years. [para 27-30] [539-H; 540-A-C, F-H; 541-A-B-F-H; 542-A]

2.1 There is no rule prohibiting consideration of the case of an officer for compulsory retirement before he attains the age of 55 years, even if his case has earlier been considered at the age of 50 years. There is nothing in the Delhi Judicial Service Rules or Delhi Higher Judicial Service Rules or the Indian Administrative Service Rules laying down a prohibition that if the case of an officer for compulsory retirement is considered at the age of 50 years, his case cannot be reconsidered till he attains the age of 55 years. [para 34] [544-C-E]

Government of T.N. Vs. P.A. Manickam **1996 (2) SCR 1137 = 1996 (8) SCC 519 - relied on**

State of U.P. Vs. Chandra Mohan Nigam and Others **1978 (1) SCR 521 =(1977) 4 SCC 345; and** *Haryana State Electricity Board vs. K.C. Gambhir* **(1997) 7 SCC 85 – referred to.**

2.2 The Screening Committee of the High Court reviewed the cases of several judicial officers, including the appellants, in its meeting held on 17.7.2000 and gave its report: "We do not find, for the time being, any officer who can be retired prematurely in public interest." This report was accepted in the meeting of the Full Court held on 22.7.2000. The record indicates that the case of each officer was not considered individually. No reasons could be recorded by the Screening Committee as to how earlier entries adversely reflecting on the integrity of the appellants, were dealt with or viewed. Under the circumstances, the observation, "We do not find, for the time being, any officer who can be retired prematurely in public interest" will have to be regarded as tentative and not final in nature. Thus, on the basis of the service record, the three judicial officers could have been retired compulsorily from service but a tentative decision was taken not to retire them at that point of time. But, this tentative decision would not preclude the authority concerned from passing orders of compulsory retirement later on. When the Screening Committee stated that it did not find for the time being any officer who could be retired prematurely in public interest, it meant that the cases of all the officers were deferred to be considered in near future. This is not a case wherein a review had taken place and a positive final decision to continue the appellants in service, was taken by the Screening Committee. [para 34-39,40] [543-E-H; 544-A; 548-C; 550-B-C]

2.3 Thus, after the so-called review of the cases of the three appellants, in July, 2000, their cases were rightly reviewed again and orders retiring them compulsorily from service were rightly passed against them. [para 41] [350-E-F]

2.4 Apart from the poor judicial performance, the appellants were also retired compulsorily from service, on

the ground that their integrity was doubtful. The mandate of Article 235 of the Constitution is that the High Court has to maintain constant vigil on its subordinate judiciary. [para 43- 44] [553-H; 554-A-C]

High Court of Judicature at Bombay through its Registrars Vs. Shirishkumar Rangrao Patil and Another **1997 (3) SCR 1131 = (1997) 6 SCC 339;** *Union of India Vs. M.E. Reddy* **1980 (1) SCR 736 = (1980) 2 SCC 15 – relied on**

2.5 Judicial service is not a service in the sense of an employment as is commonly understood. Judges are discharging their functions while exercising the sovereign judicial power of the State. Their honesty and integrity is expected to be beyond doubt. It should be reflected in their overall reputation. There is no manner of doubt that the nature of judicial service is such that it cannot afford to suffer continuance in service of persons of doubtful integrity or who have lost their utility. Article 235 of the Constitution of India enables the High Court to assess the performance of any judicial officer and exercise the power of compulsory retirement at any time with a view to maintain a discipline in the service, and this constitutional power of High Court cannot be circumscribed by any rule and order. [Para 45] [554-D-G]

High Court of Judicature at Bombay Through its Registrar Vs. Shirishkumar Rangrao Patil and Another **1997 (3) SCR 1131 = 1997 (6) SCC 339;** *Chandra Singh and others Vs. State of Rajasthan & another* **2003 (1) Suppl. SCR 674 = (2003) 6 SCC 545;** *Nawal Singh vs. State of U.P. and another* **2003 (3) Suppl. SCR 1046 = (2003) 8 SCC 117 – relied on.**

2.6 In the instant case, in respect of all the three officers, after the previous consideration in July, 2000, new material in the form of ACR for the year 2000 " 'C' integrity doubtful" had come into existence and had

become a part of their respective service records when the Full Court in its meeting held on 13.9.2001 recorded their ACRs for the year 2000. Thus, the consideration by the Committee constituted for the purpose of evaluating the cases of the officers to ascertain whether they should be compulsorily retired, was subsequent in point of time, namely, on 21.09.2001 and, as such, it will be fully covered by the exception spelt out in *Chandra Mohan Nigam's* Case itself in regard to consideration of cases again before the age of 55 years. [para 47] [555-E-H]

2.7 The consideration of the cases of the three judicial officers on the basis of ACRs dated September 13, 2001 recorded by the Full Court of the Delhi High Court is not a review of the earlier decision of July, 2000. It is a fresh consideration. It is review of the record of service of the officers and not review of the earlier decision and such review is not only permissible but is perfectly legal and valid. [para 47] [555-G-H; 556-A]

Daman Singh and Others Vs. State of Punjab and Others, **1985 (3) SCR 580 = (1985) 2 SCC *670,*** *State of Punjab and Another Vs. H.B. Malhotra,* **2006 (2) Suppl. SCR 391 = (2006) 11 SCC 169*;*** *Mohd. Akram Ansari Vs. Chief Election Officer and Others,* **2007 (12) SCR 901 =(2008) 2 SCC 95; and** *Ex-Constable Ramvir Singh Vs. Union of India and Others*, **2008 (17) SCR 1112 = (2009) 3 SCC 97;** *Tej Pal Singh Vs. State of U.P. & Another,* **1986 (3) SCR 428 = (1986) 3 SCC 604*;* and** *T. Lakshmi Narasimha Chari Vs. High Court of A.P. and Another,* **1996 (2) Suppl. SCR 595 = (1996) 5 SCC 90 – cited.**

3.1 As regards the plea that the Lt. Governor could not have passed orders retiring the appellants compulsorily from service on the recommendation of the High Court and without seeking aid and advice of his Council of Ministers, ordinarily the Supreme Court would not entertain a new plea at the hearing of the appeal

under Article 136 when it is not raised in the High Court or in the petition seeking leave to appeal. However, there are exceptional cases in which this Court may permit a party to raise a new plea. The question sought to be raised in the instant matter is a pure question of law for which factual foundation is already laid. Therefore, having regard to the facts of the case, this Court has permitted the point to be raised. [para 52- 53] [558-D-E; 559-B-F]

3.2 Article 163 of the Constitution makes provision that Council of Ministers has to aid and advice the Governor. Article 239AA enacts special provisions with respect to Delhi. A meaningful and conjoint reading of Article 163 makes it clear that the Governor has to act on aid and advice of the Council of Ministers with the Chief Minister as the head except in so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion. In view of the provisions of sub-Article (4) of Article 239AA, the Lt. Governor has to take aid and advice of the Council of Ministers in the exercise of his functions in relation to matters with respect to which the Legislative Assembly has power to make laws. [para 55- 57] [560-A-E; 561-B-C]

3.3 Article 235 provides that the control over the subordinate courts is vested in the High Court of a State. The "control" vested in the High Court is exclusive in nature, comprehensive in extent and effective in operation and is a mechanism to ensure and subserve a basic feature of the Constitution, i.e., independence of judiciary. Among others things, it includes premature or compulsory retirement of Judges of the District Courts and of Subordinate Courts. [para 57] [561-C-F]

Shamsher vs. State of Punjab **1975 (1) SCR 814 = (1974) 2 SCC 831 – followed.**

3.4 The scheme envisaged by the Constitution does not permit the State to encroach upon the area reserved by Articles 233, 234 and first part of Article 235 either by legislation or rules or executive instructions. [Para 58] [562-C]

3.5 While the High Court retains the power of disciplinary control over the subordinate judiciary including power to initiate disciplinary proceedings, suspend them during enquiries and impose punishment on them, but when it comes to the question of dismissal, removal or reduction in rank or termination of services of judicial officers on any count whatsoever, the High Court becomes the recommending authority and cannot itself pass the orders. The formal order to give effect to such a decision has to be passed by the State Governor on the recommendations of the High Court. In disciplinary proceedings if an action is taken by the High Court against the judicial officer the recommendations made by the High Court bind the Governor and he is left with no discretion except to act according to the recommendations. The Governor, under the scheme of Articles 233, 234 and 235 of the Constitution cannot refuse to act in terms of the recommendations made by the High Court on the ground that he is not aided and advised by the Council of Ministers and this is the true import of total control of the High Court over the Subordinate Judiciary. The recommendation of the High Court is binding on the State Government/Governor and in the matter of compulsory retirement of a Judicial Officer the Governor cannot act on the aid and advice of Council of Ministers but has to act only on the recommendation of the High Court.[para 59, 66 and 81] [562-E-H; 563-A-B; 565-D; 579-B]

Shamsher vs. State of Punjab **1975 (1) SCR 814 = (1974) 2 SCC 831;** *Baldev Raj Guliani Vs. The Punjab and Haryana*

High Court & Others **1977 (1) SCR 425 =** ***(1976) 4 SCC 201;*** *M.M.Gupta and Others Vs. State of Jammu & Kashmir and Others* **1983 (1) SCR 593 = (1982) 3 SCC 412 – relied on**

State of Haryana Vs. Inder Prakash Anand H.C.S. & Others, **1976 Suppl. SCR 603 =** ***(1976) 2 SCC 977;*** *Registrar, High Court of Madras Vs. R. Rajaiah,* **1988 (1) Suppl. SCR 332 =** ***(1988) 3 SCC 211;*** *Registrar (Admn.), High Court of Orissa, Cuttack Vs. Sisir Kanta Satapathy (Dead) by LRs. & Another,* **1999 (2) Suppl. SCR 473 = (1999) 7 SCC 725** *State of U.P. Vs. Batuk Deo Pati Tripathi* **(1978) 2 SCC 102 ;** And *Tej Pal Singh Vs. State of U.P. and Another,* **1986 (3) SCR 428 = (1986) 3 SCC 604 – referred to.**

3.7 Thus, the order of the Lt. Governor compulsorily retiring the appellants without seeking aid and advice of his Council of Ministers is neither *ultra vires* nor illegal and is rightly sustained by the High Court. [Para 81] [579-C-D]

4.1 So far as the plea that the appellants were made to retire compulsorily without affording them an opportunity to make representation against the ACR for the year 2000 is concerned, suffice it to say that an order of compulsory retirement is not a punishment and does not have adverse consequence and, therefore, the principles of natural justice are not attracted. However, when the order of compulsory retirement is passed, the authority concerned has to take into consideration the whole service record of the officer concerned which would include non-communicated adverse remarks also. What is relevant to notice is that this Court has held that an un-communicated adverse A.C.R. on record can be taken into consideration and an order of compulsory retirement cannot be set aside only for the reason that such un-communicated adverse entry was taken into

consideration. Therefore, the fact that the last adverse A.C.R. entry, " 'C' grade doubtful" for the year 2000, was communicated but none of the appellants had an opportunity to represent before the same was taken into consideration for passing order of compulsory retirement, cannot at all vitiate the order of compulsory retirement. The authorities concerned were justified in relying upon the adverse entry made against the appellants in the year 2000, alongwith other materials, indicating that their integrity was doubtful. [para 91-92] [584-F-H; 585-A-B]

State of U.P. vs. Shyam Lal Sharma **AIR 1971 SC 2151;** *State of U.P. and Another Vs. Bihari Lal* **1994 (3) Suppl. SCR 108 = (1994) Supp (3) SCC 593;** *Union of India vs. V.P. Seth and another* **1994 SCC (L&S) 1052;** *Baikuntha Nath Das vs. Chief District Medical Officer, Baripada* **1992 (1) SCR 836 = (1992) 2 SCC 299;** *Posts and Telegraphs Board vs. C.S.N. Murthy* **1992 (2) SCR 338 =(1992) 2 SCC 317;** *Union of India Vs. Col. J.N. Sinha and Another* **1971 (1) SCR 791 =1970 (2) SCC 458;** *Brij Mohan Singh Chopra Vs. State of Punjab*, **1987 (2) SCR 583 = (1987) 2 SCC 188 ; and** *Union of India Vs. M.E. Reddy,* **1980 (1) SCR 736 = (1980) 2 SCC 15 – relied on.**

Baidyanath Mahapatra Vs. State of Orissa and Another **1989 (3) SCR 803 =(1989) 4 SCC 664;** *S. Maheswar Rao Vs. State of Orissa and Another* **1989 Supp (2) SCC 248; and** *V.K. Jain Vs. High Court of Delhi through Registrar General and Others,* **2009 (11) SCR 907 =(2008) 17 SCC 538 – distinguished.**

4.2 Opportunity of hearing is not necessary before adverse remarks, because adverse remarks by themselves do not constitute a penalty. Writing the confidential report is primarily and essentially an administrative function. Normally tribunals/courts are loath to interfere in cases of complaints against adverse

remarks and to substitute their own judgment for that of the reporting or reviewing officers. It is because these officers alone are best suited to judge the qualities of officials working under them and about their competence in the performance of official duties entrusted to them. Despite fear of abuse of power by prejudiced superior officers in certain cases, the service record contained in the confidential reports, by and large, reflects the real personality of the officer. The object of writing confidential reports and making entries therein is to give an opportunity to the public servant to improve excellence. [para 90] [583-E-H; 584-A-B]

4.3 Article 51 A(j) of the Constitution enjoins upon every citizen the primary duty to constantly endeavour to prove excellence, individually and collectively, as a member of the group. Therefore, the officer entrusted with the duty to write C.R. has a public responsibility and trust to write the C.R. objectively, fairly and dispassionately while giving, as accurately as possible the statement of facts on an overall assessment of performance of the subordinate officer. [para 90] [584-C-D]

5.1 As regards applicability of FR 56 (j) read with r.33 of DJS Rules after the introduction of r. 31A of the DJS rules, the newly added rule does not deal with the aspect of compulsory retirement at all. In terms of r. 33 the subject of compulsory retirement did remain residuary even after the introduction of r. 31A in DJS Rules and, therefore, the question of premature retirement will have to be considered only under FR 56(j) and not under the newly added r. 31A. Thus, consideration of the case of the appellant for premature retirement before he attained the age of 58 years cannot be regarded as illegal in any manner at all. [para 109] [597-B-D]

All India Judge's Association Vs. Union of India & Ors., **(1992) 1 SCC 119,** All *India Judges' Association and others*

vs. Union of India and others ***1993*** **(1) Suppl. SCR 749 = (1993) 4 SCC 288;** *Nawal Singh Vs. State of U.P. and another* **2003 (3) Suppl. SCR 1046 = (2003) 8 SCC 117; and** *Ramesh Chandra Acharya Vs. Registrary, High Court of Orissa and Another* **2000 (1) Suppl. SCR 456 = (2000) 6 SCC 332 – relied on**

State of Maharashtra Vs. Ramdas Shrinivas Nayak & Anr., **1983 (1) SCR 8 =(1982) 2 SCC 463,** *Shankar K. Mandal & Ors. Vs. State of Bihar & Ors.,* **2003 (3) SCR 796 = (2003) 9 SCC 519,** *Mount Carmel School Society Vs. DDA*, **2007 (13) SCR 876 =(2008) 2SCC 141, and** *Bhavnagar University Vs. Palitana Sugar Mill (P) Ltd. & Ors*., **2002 (4) Suppl. SCR 517 = (2003) 2SCC 111 - cited.**

6.1 While considering the case of an officer as to whether he should be continued in service or compulsorily retired, his entire service record upto that date on which consideration is made has to be taken into account. What weight should be attached to earlier entries as compared to recent entries is a matter of evaluation, but there is no manner of doubt that consideration has to be of the entire service record. The fact that an officer, after an earlier adverse entry, was promoted does not wipe out earlier adverse entry at all. [Para 115] [600-F-G]

State of Orissa and Others Vs. Ram Chandra Das, **1996 (2) Suppl. SCR 559 = (1996) 5 SCC 331 – relied on.**

6.2 The appellant in CA No. 7782 of 2011 was appointed as a Civil/Sub-Judge in the Subordinate Judicial Services on May 5, 1972. He was promoted to the Higher Judicial Services as Additional District and Sessions Judge on November 1, 1989, but, was reverted to Subordinate Judicial Services by order dated February 15, 1995. For two years i.e. 1994 and 1995, his ACRs " C, integrity doubtful" was upheld. For the year 1996, he was

graded as "C", i.e., below average. Thus, the service record of the appellant indicates that he was an officer "below average" or at the best an average officer and his integrity was doubtful. The High Court was justified in taking into consideration the adverse ACRs reflecting on his integrity for the years 1993, 1994 and 2000 while considering the question whether it was expedient to continue him in service on his attaining the age of 50 years. Similarly, in so far as appellant in CA No. 7783 of 2011 is concerned, he joined Delhi Judicial Service on 28.1. 1978. Admittedly, his work and conduct from 1978 to 1992 was graded as "B", which means his performance was that of an average officer. For the year 1994 -1995 the Full Court recorded his ACR as 'C' (Integrity Doubtful). Again in the year 2000, he was categorized as an officer having doubtful integrity. The appellant in C.A. 7781 of 2011, was appointed in the year 1995 and as on 21.9.2001 his ACRs for six years were available. The report dated 21.9.2001 of the Screening Committee further reveals that it had considered the entire record relevant to his work and conduct and found that throughout his career, he had been assessed and graded either as an "average officer" or "officer below average" and in the year 2000, his integrity was found to be doubtful. The record further shows that the judicial work was withdrawn from him with effect from 8-12-2000 upon the recommendation of the Committee of Judges in its report dated 6-12-2000. Later on, all work including administrative work was withdrawn from him. The service record of the officer is so glaring that on the basis thereof any prudent authority could have come to a reasonable conclusion that it was not in the public interest to continue him in service and that he should be compulsorily retired from service. [para 116-117 and 131-132] [614-A-H; 601-F; 615-A-D]

6.3 Having regard to the service record of all the three officers concerned, the High Court was justified in compulsorily retiring them from service. [para 118] [603-C]

S.D. Singh vs. Jharkhand High Court through R.G. and others **2005 (5) Suppl. SCR 562 = (2005) 13 SCC 737 – relied on**

7.1 As regards the argument of non-supply of material on the basis of which "'C' Doubtful Integrity" was awarded to the appellants, while considering the case of a judicial officer it is not necessary to limit the 'material' only to written complaints or 'tangible' evidence pointing finger at the integrity of the judicial officer. Such an evidence may not be forthcoming in such cases. Contextually the 'material' relates to substance, matter, data, information etc. When even verbal repeated complaints are received against a judicial officer or on enquiries, discreet or otherwise, the general impression created in the minds of those making inquiries or the Full Court is that the judicial officer concerned does not carry good reputation, such discreet inquiry and/or verbal repeated complaints would constitute material on the basis of which ACR indicating that the integrity of the officer is doubtful can be recorded. [para 119 and 123] [603-D-F; 605-E-G]

R.L. Butail Vs. Union of India and Others, **(1970) 2 SCC 876;***High Court of Punjab & Haryana through R.G. Vs. Ishwar Chand Jain and Another*, **1999 (2) SCR 834 = (1999) 4 SCC 579 –relied on**

7.2 The duty conferred on the appropriate authority to consider the question of continuance of a judicial officer beyond a particular age is an absolute one. If that authority bona fide forms an opinion that the integrity of a particular officer is doubtful, the correctness of that opinion cannot be challenged before courts. However,

while undertaking judicial review, the Court in an appropriate case may still quash the decision of the Full Court on administrative side if it is found that there is no basis or material on which the ACR of the judicial officer was recorded, but while undertaking this exercise of judicial review and trying to find out whether there is any material on record or not, it is the duty of the Court to keep in mind the nature of function being discharged by the judicial officer, the delicate nature of the exercise to be performed by the High Court on administrative side while recording the ACR and the mechanism/system adopted in recording such ACR. [para 122-123] [604-H; 605-A-E-H; 606-A-B]

7.3 From the admitted facts in the instant matter, it is evident that there was first a report of the Inspecting Judge to the effect that he had received complaints against the appellants reflecting on their integrity. It has to be legitimately presumed that the Inspecting Judge, before making such remarks of serious nature, acted responsibly. Thereafter, the Full Court considered the entire issue and endorsed the view of the Inspecting Judge while recording the ACR of the appellants. When the suspicion arises regarding integrity of a judicial officer, whether on the basis of complaints or information received from other sources and a committee is formed to look into the same, as was done in the instant case, and the committee undertakes the task by gathering information from various sources as are available to it, on the basis of which a perception about the judicial officer concerned is formed, it would be difficult for the High Court either under Article 226 or for this Court under Article 32 to interfere with such an exercise. Such an opinion and impression formed consciously and rationally after the enquiries would definitely constitute material for recording adverse report in respect of an officer. Such an impression is not readily formed but after

Court's circumspection, deliberation, etc. and, thus, it is a case of preponderance of probability for entertaining a doubt about integrity of an official which is based on substance, matter, information etc. Therefore, it cannot be said that the adverse entries were recorded in the ACR of the appellants without material or basis. [para 124] [606-C-H; 607-A]

8.1 As regards the plea on behalf of the deceased appellant that the recording of ACRs for the years 1997, 1998 and 1999 in one go is arbitrary and constitutes malice in law, normally, entries in confidential records should be made within a specified time soon following the end of the period under review and generally within three months from the end of the year. Delay in carrying out inspections or making entries frustrates the very purpose sought to be achieved. However, at the same time it is not possible to lay down as an absolute proposition of law that irrespective of good, cogent, plausible and acceptable reasons, recording of ACRs of number of years at a time should always be regarded as illegal and bad for all purposes. [para 125-126] [607-B; 608-C-D; 609-A]

Dev Dutt Vs. Union of India, **2008 (8) SCR 174 = 2008 (8) SCC 725, and** *Abhijit Ghosh Dastidar Vs. Union of India,* **2009 (16) SCC 146 – cited**

8.2 In the instant case, from the record it is evident that all the columns of ACR forms for the years 1997, 1998 and 1999 were filled up by the Inspecting Judges respectively well in time for all these years, but they had not recorded any remarks concerning the judicial reputation for honesty and impartiality of the officer and as a corollary the column regarding "Net Result" for these years were left blank by them. Instead, the Inspecting Judges had observed that these remarks be recorded by the Full Court. Because of the course adopted by the

Inspecting Judges, the consideration of recording the ACR was deferred by the Full Court and. ultimately, in its meeting held on 21.4.2001 in respect of the deceased officer, the Full Court referred the case to the Committee constituted to look into the allegations against the judicial Officers. The Committee gave its report dated 6.12.2001 to the effect that the information gathered by the Committee from various sources confirmed the allegation of doubtful integrity against the officer. The matter was thereafter placed before the Full Court and the ACRs of the officer were recorded for the years 1997, 1998 and 1999 on 13.12.2000. Thus, there is sufficient explanation for recording the ACRs of three years at one time. Writing of ACRs for the years 1997, 1998 and 1999 at one time as also communication of the same at one time was justified in the circumstances of the case. [para 126-128] [608-C-D; 609-A-D-F-H; 610-A; 611-A-B]

8.3 Even otherwise, the ACRs for the year 1999 were recorded with promptitude and without any delay in the year 2000, and the officer was assessed as "C Below Average". The ACRs for the year 1999 could have been taken into consideration while assessing the service record of the officer for determining the question whether he was fit to be continued in service on his attaining the age of 50 years. [Para 127] [610-E-G]

9. As regards, the plea of the appellant in C.A. No. 7782 of 2011 that he being a member of the Delhi Higher Judicial Service FR 56 (j) was not applicable to his case, it is significant to notice that under both the Rules there is power to compulsorily retire a judicial officer after he attains the age of 50 years in public interest. Therefore, whether the Lt. Governor had invoked FR 56 (j) or Rule 27 of the DHJS Rules is of little consequence. In fact, for the years 1993 and 1994 the officer had suffered adverse ACR 'C' "Integrity Doubtful." In any view of the matter, it is settled law that when power can be traced to a valid

source, the fact that the power is purported to have been exercised under a wrong provision of law, would not invalidate exercise of power. [para 130] [612-B-G]

10.1 Having regard to the entire service record of the three officers, this Court is of the opinion that the competent authority was justified in passing the order retiring them compulsorily from service. Keeping in view the comprehensive assessment of service record, the Screening Committee rightly recommended that the three officers should be prematurely retired in public interest forthwith. The Full Court after considering the report of the Screening Committee and also after taking into consideration the record of work and conduct, general reputation and service record of the three officers correctly resolved that it be recommended to the Lt. Governor of NCT of Delhi to retire the judicial officers forthwith in public interest. [para 135] [616-E-H; 617-A]

10.2 On a careful consideration of the entire material, it must be held that the evaluation made by the Committee/Full Court, forming their unanimous opinion, is neither so arbitrary nor capricious nor can it be said to be so irrational, so as to shock the conscience of this Court to warrant or justify any interference. There is absolutely no need or justification for this Court to interfere with the impugned proceedings. [para 136] [617-D-E]

Madan Mohan Choudhary Vs. State of Bihar **1999 (1) SCR 596 = 1999 (3) SCC 396** *; High Court of Punjab & Haryana Vs. I.C. Jain* **1999 (2) SCR 834 = 1999 (4) SCC 579***; High Court of Judicature at Allahabad Vs. Sarnam Singh & Another* **1999 (5) Suppl. SCR 344 = 2000 (2) SCC 339***; Bishwanath Prasad Singh Vs. State of Bihar* **2000 (5) Suppl. SCR 718 = 2001 (2) SCC 305***; State of U.P. Vs Yamuna Shanker Mishra* **1997 (2) SCR 371 = 1997 (4) SCC 7** *; Registrar, High Court of Madras Vs. R. Rajiah* **1988 (1)**

Suppl. SCR 332 = 1988 (3) SCC 211*; M.S.* *Bindra Vs. Union of India & Others* **1998 (1) Suppl. SCR 232 = 1998 (7) SCC 310 ;** *Ram Ekbal Sharma Vs. State of Bihar & Another* **1990 (2) SCR 679 = 1990 (3) SCC 504 =** *Anoop Jaiswal Vs. Govt. of India* **1984 (2) SCR 453 = 1984 (2) SCC 369*; and*** *Padam Singh Vs. Union of India & Others,* ***2000 (III) AD (Delhi) 430 (D.B.)*—cited.**

Case Law Reference:

1992 (1) SCR 836	**cited**	**para 6**
1999 (1) SCR 596	**cited**	**para 6**
1999 (2) SCR 834	**cited**	**para 6**
1999 (5) Suppl. SCR 344	**cited**	**para 6**
2000 (5) Suppl. SCR 718	**cited**	**para 6**
1997 (2) SCR 371	**cited**	**para 6**
1988 (1) Suppl. SCR 332	**cited**	**para 6**
1998 (1) Suppl. SCR 232	**cited**	**para 6**
1990 (2) SCR 679	**cited**	**para 6**
1984 (2) SCR 453	**cited**	**para 6**
2000 (III) AD (Delhi) 430 (D.B.)	**cited**	**para 6**
1978 (1) SCR 521	**referred to**	**para 24 and 40**
1996 (2) SCR 1137	**relied on**	**para 25 and 44**
2003 (3) Suppl. SCR 1046	**relied on**	**para 25**
(1997) 7 SCC 85	**referred to**	**para 25 and 40**
1996 (2) SCR 1137	**relied on**	**para 41**

1980 (1) SCR 736	**relied on**	**para 42**
2003 (1) Suppl. SCR 674	**relied on**	**para 45**
2003 (3) Suppl. SCR 1046	**relied on**	**para 45**
1983 (1) SCR 593	**relied on**	**para 49**
1985 (3) SCR 580	**cited**	**para 50**
2006 (2) Suppl. SCR 391	**cited**	**para 50**
2007 (12) SCR 901	**cited**	**para 50**
2008 (17) SCR 1112	**cited**	**para 50**
1975 (1) SCR 814	**followed**	**para 51 and 57**
1976 Suppl. SCR 603	**relied on**	**para 51**
1977 (1) SCR 425	**relied on**	**para 51**
1988 (1) Suppl. SCR 332	**relied on**	**para 51 and 75**
1999 (2) Suppl. SCR 473	**relied on**	**para 51**
1986 (3) SCR 428	**cited**	**para 51 and 80**
1996 (2) Suppl. SCR 595	**cited**	**para 51**
1994 (3) Suppl. SCR 108	**relied on**	**para 91**
1994 SCC (L&S) 1052	**relied on**	**para 92**
1992 (1) SCR 836	**relied on**	**para 92**
1992 (2) SCR 338	**relied on**	**para 92**
1989 (3) SCR 803	**distinguished**	**para 93**
1989 Supp (2) SCC 248	**distinguished**	**para 94**
2009 (11) SCR 907	**disitinguished**	**para 95**
1971 (1) SCR 791	**relied on**	**para 96**

1987 (2) SCR 583	**relied on**	**para 97**
1980 (1) SCR 736	**relied on**	**para 97**
1983 (1) SCR 8	**cited**	**para 101**
2003 (3) SCR 796	**cited**	**para 101**
2007 (13) SCR 876	**cited**	**para 101**
2002 (4) Suppl. SCR 517	**cited**	**para 101**
1991 (2) Suppl. SCR 206	**relied on**	**para 102**
1993 (1) Suppl. SCR 749	**relied on**	**para 102**
2000 (1) Suppl. SCR 456	**relied on**	**para 108**
1997 (3) SCR 1131	**relied on**	**para 115**
1996 (2) Suppl. SCR 559	**relied on**	**para 115**
2005 (5) Suppl. SCR 562	**relied on**	**para 118**
(1970) 2 SCC 876	**relied on**	**para 120**
1999 (2) SCR 834	**relied on**	**para 121**
2008 (8) SCR 174	**cited**	**para 125**
2009 (16) SCC 146	**cited**	**para 125**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7781 of 2011.

From the Judgment & Order dated 02.05.2008 of the High Court of Delhi at New Delhi in Civil Writ Petition No. 2157 of 2002.

WITH

C.A. Nos. 7782 of 7783 of 2011.

R.P. Gupta, Sanjay Parikh, Anish R. Shah, Mamta Saxena, Anitha Shenoy, M.S. Rohilla (Petitioner—In—Person), Pradeep Kuamr Dubey, A.K. Tiwari, Tara Chandra Sharma, P.D. Gupta for the Appellants.

A. Mariarputham, Annam D.N. Rao, Megha Gaur, Yusuf Khan for the Respondents.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. Leave granted in each of the special leave petition.

2. These appeals, by the grant of special leave, are directed against common judgment dated May 2, 2008 rendered by the Division Bench of the High Court of Delhi in C.W.P. No. 2157 of 2002, C.W.P. No.1965 of 2002 and C.W.P. No.2362 of 2002. The appellants were the Members of Delhi Higher Judicial Service ('D.H.J.S.', for short). Mr. M.S.Rohilla and Mr. P.D.Gupta were compulsorily retired from service under Rule 56 (j) of the Fundamental Rules, read with Rule 33 of the Delhi Judicial Service Rules 1970, whereas deceased Mr. R.S.Verma was compulsorily retired from service under Rule 16(3) of All India Service (Death-cum-Retirement Benefit) Rules 1958 read with Rule 27 of the Delhi Higher Judicial Service Rules 1970, on different dates. They had challenged orders of their compulsory retirement from service by filing Writ Petitions under Article 226. Though the result of each appeal would depend on its own facts, having regard to the commonality of submissions on legal aspects, this Court had tagged these cases together and heard them one after the other. This Court proposes to dispose of the three appeals, by this common Judgment for the sake of avoiding repetitiveness of legal principles. However, the Court proposes to consider each case on its own merits.

With these observations, the Court proposes to deal with appeal arising out of Special Leave to Appeal (Civil) No.27028 of 2008, filed by Mr. Rajendra Singh Verma against decision in C.W.P. No.2157 of 2002. Mr. Verma was born on April 13, 1950. After enrolling himself as an advocate, he had started legal practice in the year 1980. In the year 1994 applications were invited from practicing advocates for direct recruitment to

the D.H.J.S. Mr. Verma had also applied pursuant to the said advertisement and after interview he was selected and was offered appointment to D.H.J.S. He joined the service on 9.3.1995 and was aged about 45 years on the date of joining service. He worked as Additional District Judge at Karkardooma Courts, Shahdara, Delhi. For the year 1995-1996 he was given a 'B' remark in the A.C.R., which means his performance was average. From April 1, 1999 to December 7, 2000, he functioned as Sessions Judge, Tis Hazari, Delhi.

3. By the year 2000 he had rendered service of five years. It may be mentioned that a Screening Committee consisting of two Hon'ble Judges of Delhi High Court was constituted for screening the cases of those officers of the D.H.J.S. and Delhi Judicial Service, who had either completed thirty years of service or had attained the age of 50/55 years and for considering the question whether those Judicial Officers should be continued in service or should be prematurely retired in public interest. The Screening Committee considered the cases of several officers including that of Mr. Verma under Rule 56 (j) of the Fundamental Rules. The learned members of Screening Committee perused service record including the ACR dossiers of the Judicial Officers but did not find, for the time being, any Officer who could be retired prematurely in public interest as on July 17, 2000. A copy of the abstracts from the Minutes of the Meeting of the Full Court of Delhi High Court held on July 22, 2000 indicates that the Full Court had accepted the report of the Screening Committee.

However, by an order dated December 7, 2000 which was served upon Mr. Verma on December 8, 2000, judicial work entrusted to him was withdrawn with immediate effect. He was made in-charge of all the record rooms in Tis Hazari Courts, Delhi. ACRs of four years i.e. from the year 1997 to the year 2000 were not communicated to him on due dates. From the record it is evident that ACRs of Mr. Verma for the years 1997, 1998 and 1999 were written in one go and he was awarded

'C' remark, which means below average. The ACRs for above mentioned three years were communicated to him on January 8, 2001 whereupon he had made representation against the same on February 16, 2001.

4. In the A.C.R. for the year 2000, he was given 'C-' remark, which means his integrity was doubtful. While communicating the ACR for the year 2000, he was given a time of six weeks to make representation against the same. Such communication was received by him on September 25, 2001. On September 21, 2001 the Screening Committee of the High Court decided to retire Mr. Verma compulsorily from service. The Full Court of the Delhi High Court accepted the recommendation made by the Screening Committee in its meeting held on September 22, 2001. After acceptance of recommendation of the Screening Committee by the Full Court, entire work entrusted to him was withdrawn by a letter dated September 24, 2001. He made representation dated September 25, 2001 against the proposed order retiring him compulsorily from service. He was thereafter served with order dated September 27, 2001 retiring him compulsorily from service with effect from September 28, 2001. The record shows that the representation dated 16.2.2001 made by Mr. Verma against ACRs for the years 1997, 1998 and 1999 was rejected on October 5, 2001. Against the A.C.R. for the year 2000, Mr. Verma had made a representation dated October 13, 2001, which was received by the High Court on September 25, 2001. This was rejected by the High Court vide order dated November 25, 2001.

5. Thereupon Mr. Verma had filed C.W.P. No. 2157 of 2002 before the Delhi High Court challenging the order of compulsory retirement dated September 27, 2001. The reliefs claimed in the petition filed by him are enumerated in detail in paragraph 7 of the impugned judgment and, therefore, it is not necessary to reproduce the same in this judgment. The prayers made by Mr. Verma in his Writ Petition were essentially based

on the following grounds, namely, (1) ACRs for the years 1997, 1998 and 1999 were not recorded as and when they fell due and, therefore, he had reason to believe that nothing adverse was found against his judicial work and/or conduct whereas recording of ACRs for the three years at the same time on January 3, 2001, was illegal. (2) There was no inspection by the Hon'ble Inspecting Judge for the years 1997, 1998, 1999 and 2000 as a result of which the decision to retire him prematurely from service on the basis that his performance was below average and his integrity was doubtful, was bad in law. (3) In July, 2000 when the Screening Committee had reviewed the cases of various Officers of D.H.J.S. for premature retirement in public interest, no recommendation was made to retire anyone including him, compulsorily from service and thus review of his case on September 21, 2001 by the Screening Committee, on the same material, was impermissible. (4) Adverse entry for the year 2000 was served upon him on September 25, 2001 vide a letter dated September 21, 2001 from the Registrar (Vigilance), High Court whereas the recommendation made by the Screening Committee on September 21, 2001 to retire him compulsorily from service was accepted by the Full Court in its meeting held on September 22, 2001, on the basis of which the Lt. Governor of Delhi passed the order of compulsory retirement on September 27, 2001 which was communicated to him on September 28, 2001 and as he was deprived of right to make meaningful representation against ACR of the year 2000, the order retiring him compulsorily from service was liable to be set aside. (5) His representation against the entries for the years 1997, 1998 and 1999 was rejected vide letter dated October 5, 2001, which was received by him on October 8, 2001 whereas his representation dated October 13, 2001 against the entry for the year 2000 was dismissed by order dated April 5, 2002, before which order of compulsory retirement from service was passed against him on September 28, 2001 and thus non-consideration of representation before passing order of compulsory retirement had vitiated order of his compulsory

retirement. (6) Before taking decision to retire him prematurely from service opportunity of being heard was not given to him. (7) The circumstances of the case indicated that the Order of compulsorily retirement passed against him was punitive, arbitrary, mala fide and in violation of the principles of natural justice.

6. In support of these submissions, Mr. Verma had relied upon decisions in (a) *Baikunth Nath Das Vs. Chief District Medical Officer, Baripada* (1992) 2 SCC 299; (b) *Madan Mohan Choudhary Vs. State of Bihar* (1999) 3 SCC 396; (c) *High Court of Punjab & Haryana Vs. I.C. Jain* (1999) 4 SCC 579; (d) *High Court of Judicature at Allahabad Vs. Sarnam Singh & Another* (2000) 2 SCC 339; (e) *Bishwanath Prasad Singh Vs. State of Bihar* (2001) 2 SCC 305; (f) *State of U.P. Vs Yamuna Shanker Mishra* (1997) 4 SCC 7; (g) *Registrar, High Court of Madras Vs. R. Rajiah* (1988) 3 SCC 211; (h) *M.S. Bindra Vs. Union of India & Others* (1998) 7 SCC 310; (i) *Ram Ekbal Sharma Vs. State of Bihar & Another* (1990) 3 SCC 504; (j) *Anoop Jaiswal Vs. Govt. of India* (1984) 2 SCC 369; and (k) *Padam Singh Vs. Union of India & Others,* 2000 (III) AD (Delhi) 430 (D.B.).

7. On Service of notice, the respondent No.1, namely, the Lt. Governor, Administrator (Government of N.C.T. of Delhi) and the respondent No.2, i.e., the High Court of Delhi had filed their separate counter affidavits opposing the Writ Petition. The High Court, in its reply, amongst other things had explained that the date of birth of Mr. Verma was April 13, 1950 and, therefore, review of his case on September 21, 2001 when he had completed fifty one years of age was perfectly legal. According to the High Court, his case was reviewed by the Screening Committee on September 21, 2001 and the Committee had recommended that he should be compulsorily retired from service keeping in view his overall service record, ACRs and performance. The High Court mentioned in its reply that the recommendation made by the Screening Committee was

accepted by the Full Court on September 22, 2001. What was asserted by the High Court was that the decision of the Full Court was just and reasonable having regard to the ACRs of Mr. Verma.

8. The Division Bench hearing the petition filed by Mr. Verma had summoned the entire service record relating to his case. After hearing the learned counsel for the parties and considering the materials on the record, the High Court observed that a mere glance at the ACRs of Mr. Verma and other records was enough to conclude that the decision to retire him compulsorily from service was well founded. The High Court discussed principles laid down by this Court in the case of *Baikunth Nath Das* (supra) with regard to compulsory retirement under Rule 56(j) of the Fundamental Rules, and also took into consideration the principles of law as to when interference by a writ Court with the decision of compulsory retirement would be justified. Having noticed the law, the High Court held that principles of natural justice were not attracted in case of compulsory retirement. The High Court observed that in this case the ACRs for three years were recorded at the same time which according to High Court was not proper, but held that there is no absolute proposition of law that recording of ACRs at once would be *perse* illegal. The High Court expressed the view that if good reasons were noted for which the ACRs could not be recorded by stipulated dates and the matter of recording of ACRs had to be deferred, the recording of ACRs of few years at one point of time would not render the same illegal. The High Court noticed the reasons as to why ACRs for the years 1997, 1998 and 1999 were recorded in one go, and thereafter held that there was sufficient explanation for recording the ACRs of three years at one time. The argument that there was no material justifying recording such ACRs was considered to be misconceived in view of settled legal position. According to the High Court the entire service record of Mr. Verma from 1995 to 2000 revealed that even for one year he had not earned "Above Average" remark and his performance and

conduct as a judicial officer in fact had kept on deteriorating and shown a downward trend. After taking into consideration the law on the point, the High Court concluded that action under Fundamental Rule 56(j) need not await the disposal of the representation made against the ACRs and, therefore, the order of compulsory retirement passed against him after taking into consideration the ACR for the year 2000 was not bad in law.

9. In view of the above conclusions the High Court dismissed the petition which has given rise to the above numbered appeal.

10. It may be mentioned that during the pendency of the SLP the original petitioner that is Mr. Rajendra Singh Verma expired in October, 2009. Therefore, the appeal is being prosecuted by his legal representatives.

11. The facts giving rise to the appeal arising out of SLP (C) No. 314 of 2009, are as under:

The appellant Mr. Purshottam Das Gupta was born on 24.12.1949. He joined Delhi Judicial Service on 28.01.1978. He was granted selection grade on 03.06.1993 retrospectively with effect from 31.05.1991. He joined as Additional Senior Civil Judge Delhi on 06.01.1996. According to him his work and conduct from 1978 to 1992 was graded as "B", which means his performance was average. In the year 1995 the Inspecting Judge reported that "I have not inspected his Court, but I have heard complaints about integrity", and left column nos. 6 and 7 to be filled up by Full Court. On 18.05.1996 the Full Court recorded ACR for the years 1994-95 as "C-Integrity Doubtful" and on the basis of the same denied promotion to him to Delhi Higher Judicial Service. Mr. Gupta filed a representation against adverse ACR for the year 1994-95 on 10.07.1996. The High Court rejected the same by an order dated 05.09.1997. On 26.09.1997 the Full Court recorded his ACR for the year 1996 as "B". He filed W.P.(C) No. 4334 of

1997 against his non-promotion to Delhi Higher Judicial Services and also prayed to expunge adverse remark for the year 1994-95. Pending the said petition, the Full Court on 22.05.1998 recorded his ACR for the year 1997 as "B". W.P.(C) No. 4334 of 1997 filed by Mr. Gupta was allowed by a Single Judge of the High Court vide Judgment dated 28.05.1999 and the adverse remark for the year 1994-95 was quashed. Thereupon, he was granted deemed promotion with seniority. The High Court on its administrative side filed LPA No. 329 of 1999 against Judgment dated 28.05.1999. On 24.12.1999 he attained the age of 50 years. In July 2000 the Screening Committee had reviewed the cases of various officers of DHJS including that of Mr. Gupta for premature retirement in public interest. The Screening Committee gave report dated July 17, 2000. In the report it was mentioned that the Members of the Screening Committee had gone through the service record including the ACR dossiers of the officers of Delhi Higher Judicial Service and Delhi Judicial Service who were within the zone of consideration for being considered for premature retirement in public interest at the age of 50/55 years, but they did not find, for the time being, any Officer who could be retired prematurely in public interest. The Full Court considered the report of Screening Committee in its meeting held on 22.07.2000 and accepted the report. However, on 29.07.2000 the Full Court recorded ACR of the appellant for the year 1999 as "C". On ACR being communicated, to him, he filed representation dated 08.09.2000.

12. The LPA No. 329 of 1997 filed by the High Court against Judgment dated 28.05.1999 rendered by a Single Judge in W.P.(C) No. 4334 of 1997 which was filed by the appellant, was accepted by the Division Bench vide Judgment dated 09.02.2001. The record does not indicate that the Judgment rendered by the Division Bench in LPA No. 329 of 1997 was subjected to challenge by Mr. Gupta before higher forum. It may be mentioned that Mr. Justice M.S.A. Siddiqui was nominated as Inspecting Judge of the court of Mr. Gupta for the

year 2000. The case of Mr. Gupta is that he had sent one copy each of his five Judgments delivered by him during the year 2001, on 18.05.2001 as was requisitioned by the learned Inspecting Judge. The learned Inspecting Judge retired on 29.05.2001 without giving his report in respect of Mr. Gupta for the year 2000. The representation made against adverse ACR for the year 1999 was rejected by the High Court vide order dated 01.06.2001. The record does not show that the said decision was challenged by Mr. Gupta before higher authority or in court of law. Thus the ACR for the year 1999 had attained finality. According to Mr. Gupta, Mr. Justice K.S.Gupta who was not his inspecting Judge for any year visited his Court on 07.09.2001 and directed him to send copies of three Judgments delivered by him during 2000, which requisition was complied with by him. The record would indicate that Mr. Justice K.S.Gupta submitted his inspection report for the year 2000 on 11.09.2001 for consideration of the Full Court. On 21.09.2001, the Full Court recorded ACR of Mr. Gupta for the year 2000 as "C (Integrity Doubtful)". On 21.09.2001 the Screening Committee of the High Court submitted its report recommending his premature retirement from service. The Full Court in its Meeting dated 22.09.2001 recommended premature retirement of Mr. Gupta to the Lt. Governor of Delhi (The Administrator). On 21.09.2001 he was communicated ACR for the year 2000 and he was granted six weeks time to file representation against the same. Meanwhile the Administrator (Lt. Governor of Delhi) passed an order dated 27.09.2001, prematurely retiring him from service, under Fundamental Rule 56 (j) of the Fundamental Rules read with Rule 33 of Delhi Judicial Service Rules, 1970. The appellant made a representation against adverse entry in the ACR for the year 2000, on 29.10.2001 i.e. after the appellant was retired compulsorily from service. The appellant also addressed a representation dated 16.11.2001 to the Administrator against the order retiring him compulsorily from the service. It was forwarded by the Administrator, to the High Court for necessary action. The High Court by order dated 12.02.2002 rejected the

representation made by the appellant on 16.11.2001 which was addressed to Lt. Governor. The representation of the appellant against adverse ACR for the year 2000 was also rejected by the High Court vide order dated 16.03.2010. Feeling aggrieved by the order retiring him compulsorily from service the appellant filed W.P.(C) No. 2362 of 2002 in the High Court and also prayed to expunge adverse remarks in his ACR for the years 1999 and 2000.

13. On service of notice the High Court filed reply affidavit controverting the averments made in the petition. It was explained in the reply that the Screening Committee of the two learned Judges had considered the overall service record of the appellant and found that his performance and conduct were recorded as average for the years 1979-80, 1980-81, 1999, 1997 and 1998. The High Court mentioned in the reply that in the report for the year 1995, the Inspecting Judge had recorded that he had heard complaints about the integrity of the appellant. According to the High Court, again in the inspection report for the year 1999-2000 the Inspecting Judge, in respect of judicial reputation of the appellant and in respect of his impartiality and integrity, had recorded that the appellant did not enjoy good reputation. As per the reply, the case of the appellant was considered for promotion on18.05.1996 but he was not found fit at that time and even in the subsequent selections as a result of which he was not promoted. What was highlighted in the reply was that for the year 1994-95 the appellant was granted "C-Integrity Doubtful" whereas for the year 1999 he was granted "C (Below Average)" and for the year 2000 he was granted "C-Integrity Doubtful", and keeping in view the over all assessment of service record, the Screening Committee had recommended that the appellant be prematurely retired from service in public interest forthwith. It was explained in the reply that the report of the Screening Committee with respect to number of Judicial Officers was placed before the Full Court of the High Court and the Full Court after considering the report of the Screening Committee and the work and conduct as

reflected in service record and general reputation of the appellant as well as of other officers, had resolved that it be recommended to the Administrator, Government of NCT of Delhi to retire the appellant and others forthwith in public interest. The High Court mentioned in the reply that the Lt. Governor had accepted the recommendations of the High Court and vide order dated 27.09.2001, the appellant was compulsorily retired in public interest. It was further stated in the reply that the appellant had preferred a representation before the Lt. Governor who after going through his service record including assessments made by the Inspecting Judge along with the recommendations of the Screening Committee and the resolution of the Full Court of the High Court had concluded that the appellant was not fit to be continued in service and his representation was rejected by order dated 13.09.2001 which was communicated to him vide order dated 27.09.2002.

14. The High Court after hearing the learned Counsel for the parties concluded that so far as ACR for the year 1999-2000 was concerned, there was hardly any reason to interfere with the same. The High Court noted that the ACR for the year 1994-95 recording "C-Integrity Doubtful" was upheld by the High Court, on judicial side, on the ground that there was sufficient material to record the said ACR. According to the High Court the Judgment of the Division Bench of the Delhi High Court in L.P.A. was upheld by the Supreme Court which operated as *res-judicata* so far as the appellant was concerned. The High Court, on the basis of said fact, came to the conclusion that the action of the High Court on its administrative side, to compulsorily retire the appellant from service would be sustainable as easing out a person with integrity doubtful. The High Court noticed that so far as the ACR for the year 1999 was concerned the appellant was given "C" grading i.e. below average and representation made by him was rejected by the Full Court in its Meeting held on 19.05.2001. High Court after looking into the over all career profile of the appellant held that

it was totally untenable to allege that there was any bias or mala fide against him.

15. In view of the above mentioned conclusions the High Court rejected the petition.

16. Thereupon, the petitioner filed Review Petition before the High Court. However, the same was withdrawn with a view to filing SLP against Judgment delivered by High Court in W.P.(C) No. 2362 of 2002. After withdrawing the review application, the appellant filed Special Leave Petition no. 314 of 2009 which on leave being granted is treated as an appeal.

17. The facts of the appeal arising out of Special Leave to Appeal No.27200 of 2008 are as under :-

The appellant, i.e., Mr. M.S. Rohilla was appointed as Civil/ Sub. Judge, in the Subordinate Judicial Services under the Government of Delhi on May 05, 1972. On June 17, 1975 he was confirmed as an officer in the Delhi Judicial Services. He was granted benefit of Selection Grade on June 3, 1980 and was promoted to the Higher Judicial Services as Additional District & Sessions Judge on November 1, 1989. One anonymous complaint was received against him and, after looking into the same, he was reverted to Subordinate Judicial Services, as Civil/Sub. Judge by order dated February 15, 1995. Feeling aggrieved, he had preferred W.P. No. 4589 of 1995, challenging his reversion. Meanwhile, he was served with a communication from the High Court of Delhi dated October 23, 1997 wherein his A.C.R. for the year 1996 was graded as 'C'. Thereupon he made a representation dated December 3, 1997 against the said grading. The representation made by him was rejected on December 2, 1998. The record does not show that any steps were taken by him to challenge order dated December 2, 1998 by which his representation against ACR for the year 1996 was rejected.

18. Thereafter he received a communication from the High

Court in the year 1999 whereby he was informed that in his A.C.R. for the year 1997, he was awarded 'B' remark. Again by a communication dated February 9, 2000 forwarded by the High Court he was informed that in his ACR for the year 1998 he was graded 'B'. He made a representation against his ACR for the year 1998 in the year 2000. In July, 2000 the Screening Committee consisting of Hon'ble Judges of the High Court of Delhi reviewed the case of the appellant with that of several other judicial officers. As observed earlier, the deliberations made by the Screening Committee indicate that it did not find, for the time being, any officer who could be retired prematurely in public interest as on July 17, 2000. A copy of the abstracts from the Minutes of the meeting of the Full Court of High Court of Delhi held on July 22, 2000 produced on the record of the case, indicates that Full Court had accepted the report of the Screening Committee. In July, 2000 he received a communication from the High Court mentioning that his ACR for the year 1999 was graded as 'B'. On 21.9.2001 he received a communication from the High Court with reference to the ACR for the year 2000 whereby he was informed that he was given Grade 'C'. It was further mentioned therein that his integrity was found doubtful. By the said communication, he was given six weeks time to make a representation against the said grading. According to Mr. Rohilla, when he was awaiting the response to his previous representations made with reference to the ACRs for the years 1998 and 1999 and when he was yet to respond to the ACR for the year 2000, he received communication dated September 27, 2001 from the High Court prematurely retiring him from service under rule 56(j) of the fundamental Rules read with Rule 33 of the Delhi Subordinate Judicial Services. According to him he made a representation requesting the respondents to supply the material upon which decision was taken to prematurely retire him from service. As he was called upon to make a representation against the ACR for the year 2000 within six weeks from the date of communication dated 21.9.2001, he filed representation dated November 3, 2001 against the same but of no avail. Ultimately,

in the month of March 2002 he filed W.P. No. 1965 of 2002 challenging order of his compulsory retirement from service. Pending the said Writ Petition, the Full Bench of the High Court hearing W.P. No. 4589 of 1995 which was directed against the order of his reversion dated February 15, 1995, allowed the same by judgment dated May 29, 2006. The result was that he stood reinstated to his post of Additional District Judge under Higher Judicial Services.

19. As is evident from the memorandum of the writ petition, the order retiring him compulsorily from service was challenged on several grounds. On notice being served the respondents namely the Lieutenant Governor as well Delhi High Court had filed their separate counter affidavits controverting the claims advanced by Mr. Rohilla in his writ petition. It was emphasized in the counter affidavit filed on behalf of the High Court that the petition filed by Mr. Rohilla proceeded on a mistaken assumption and incorrect presumption that he was retired compulsorily from service only upon consideration of adverse remark 'C-' recorded indicating that his integrity was doubtful for the year 2000. It was mentioned in the reply that the Full Court as also the Screening Committee consisting of the two learned Judges of the Delhi High Court, had considered his entire service record which revealed that his performance as a judicial officer was either average or below average and his integrity was found doubtful and despite the passage of time, nothing was done by him to improve his performance/image. The reply affidavit proceeded to mention that in so far as the case of Mr. Rohilla was concerned, in its report dated September 21, 2001 the Screening Committee had inter alia recorded as under :

> "The officer has earned throughout his career 'B' (Average) or C (Below Average) or 'C' (Below Average-Integrity doubtful) reports except for three years i.e. 1979-80, 1981-82 and 1988 when he could earn only B+ (Good) and for the years 1997, 1998 and 1999 when he could earn 'B'

reports. In the inspection note dated 29th March 1973, the concerned Hon'ble Inspecting Judge observed that he needed to be watched so far as his efficiency as a Judicial Officer was concerned. The District & Sessions Judge, Delhi, in his report dated 31.5.1973 for the year 1972-73, mentioned that "a complaint was pending against him in the High Court about the return of ornaments in a theft case to a party which was not entitled". Further, as directed by a Single Bench of this Court by its order dated 24.7.1973 passed in Criminal Revision No. 428/72 in re: *Ramavtar Vs. State*, the findings of the District & Sessions Judge, Delhi, regarding the conduct of Mr. M.S. Rohilla, then working as Judicial Magistrate, First Class, were placed on his personal file. It had been noted in the aforesaid findings of the District & Sessions Judge, that Mr. M.S. Rohilla should not have shown so much indecent haste in passing the order for handing over the ornaments to Jawahar Lal Gupta. Though, the District & Sessions Judge, Delhi, did not find any malafide on the part of Mr. M.S. Rohilla, still according to him, he acted in a most injudicious manner due to his inexperience and suppression of the material facts by the S.H.O. while sending the report in the above noted case. The Full Court recorded 'C' (Below Average) remarks for the year 1972-73).

In the Inspection Report dated 29.4.1978 for the year 1977-78, the District & Sessions Judge, Delhi, observed regarding the reputation for honesty and impartiality of the officer that there were complaints of which the High Court was seized then. In the Inspection Report dated 7.12.1985, for the year 1983-84, his efficiency as Judicial Officer was termed as a mediocre. As regards his reputation for honesty and impartiality, the District & Sessions Judge observed that he must improve his reputation which suffered a set back when he was Additional Rent Controller. In Inspection Report for the same year, the

District & Sessions Judge, Delhi, reported that he did not enjoy good reputation for honesty among lawyers and general public and that he was in the habit of drinking and gambling almost daily. In the Inspection Report dated 7.12.1985 for the year 1984-85, the concerned Hon'ble Inspecting Judge had observed that his reputation was under cloud although no specific instance of corruption had come to his notice, but watch was called for.

Following adverse remarks were recorded on the work and conduct of Sh. M.S. Rohilla for the years mentioned against each :-

Years	**Adverse Remarks**
1972-73	'C' (Below Average)
1993	'C' (Below Average) (Integrity doubtful)
1994	'C' (Below Average) (Integrity doubtful)
1994	'C' (Below Average) (Integrity doubtful)
1995	'C' (Below Average)
1996	'C' (Below Average)
2000	(Integrity doubtful)

Keeping in view the over all record of the officer, we recommend that Mr. M.S. Rohilla be prematurely retired in public interest forthwith."

20. According to the High Court it was on this basis that the case of Mr. Rohilla was recommended for premature retirement in public interest which recommendation was accepted by the Full Court.

21. It may be stated that the entire service record of Mr. Rohilla was called for by the Division Bench. After taking holistic view of the matter and the facts projected in the counter affidavit of the High Court, the Division Bench of the High Court expressed irresistible opinion that Mr. Rohilla was rightly retired

compulsorily from service under FR 56 (j) of Fundamental Rules. According to the High Court, it was totally misconceived and untenable on the part of Mr. Rohilla to argue that the so-called material relied upon was only one sided view or it was not known what was the material placed before the High Court before decision to retire him compulsorily from service was taken. The High Court found that there was no force in the contention that his case could have been considered for the purpose of compulsory retirement only in the year 2001 when he was about to attain the age of 55 years in the year 2002. The High Court further concluded that it was also a wrong premise adopted by Mr. Rohilla that the High Court had based its decision solely on the basis of his ACR for the year 2000 wherein it was recorded that his integrity was doubtful. What was concluded by the High Court was that the exercise undertaken clearly revealed that his entire service record was taken into consideration. In view of the above-mentioned conclusions as well as other findings, the High Court has rejected the writ petition filed by Mr. Rohilla giving rise to the appeal by him.

22. It is relevant to notice that though each appeal will have to be decided on its own facts, certain common points were raised in three appeals by the learned counsel for the appellants for consideration of this Court. Therefore this Court proposes to deal with those common points raised by the learned counsel for the appellants for consideration.

23. Normally, an aggrieved civil servant can challenge an order of compulsory retirement on any of the following grounds, namely, (a) that the requisite opinion has not been formed, or (b) that the decision is based on collateral grounds, or (c) that it is an arbitrary decision. If the civil servant is able to establish that the order of compulsory retirement suffers from any of the above infirmities, the court has jurisdiction to quash the same. In the light of the above stated position of law, the present appeals will have to be considered.

24. The first point which was argued was that once a review was conducted by the Screening Committee of the High Court on 17.7.2000 on the appellants' reaching the age of 50 years, which was accepted by the Full Court, no second review on the same material was permissible and the service record of the appellants for compulsory retirement, could have been reviewed only upon their reaching the age of 55 years and not before reaching the said age. What was maintained was that the Screening Committee as well as the Full Court had considered the entire service record of the appellants and found that there was no material to recommend compulsory retirement of any of them as a result of which the previous record of each appellant before July, 2000 could not have been again considered for compulsory retirement. According to the learned counsel for the appellants, the effect of decision of the Full Court of the High Court dated July, 22, 2000 reflected in its resolution, passed on the recommendation of the report of the Screening Committee dated July 17, 2000, which was submitted after considering the entire service records and ACR Dossiers of each of the appellant, not to retire any of them prematurely, was that there was a bar to consider again the case of the appellants for premature retirement and, therefore, the order of compulsory retirement was liable to be set aside. In support of this plea, reliance was placed on the decision of this Court in *State of U.P. Vs. Chandra Mohan Nigam & Others* (1977) 4 SCC 345.

25. In reply to the above mentioned argument, it was pointed out by the learned Counsel for the High Court that the decision of the Committee dated July 17, 2000 was purely tentative in nature and was not a final decision. According to the learned counsel for the High Court, the use of the expression "for the time being" in the Minutes of the Committee would show that it was not a final decision meaning thereby the matters were to be considered in detail on a later date and final decision was to be taken later on. What was maintained was that the decision of the Committee dated July 17, 2000 was

not a decision dealing each officer separately but general in nature and, therefore the phrase "for the time being" should be construed to mean that it was not a final decision and the cases of the appellants were deferred for being considered in future. Elaborating this contention, it was submitted that the Division Bench of the High Court has considered the question as to whether it was consideration on merits or a case of deferment and rightly held that the exercise done in July 2000 was not final and the cases of the appellants were deferred. According to the learned counsel, the High Court, in the impugned judgment, was perfectly justified in holding that there was no consideration on merits of the cases of the appellants before 21.9.2001, and, therefore, the orders passed in cases of the appellants retiring them compulsorily from service were not bad in law. Without prejudice to above mentioned contention, it was argued that even if it was assumed for the sake of argument that there was consideration of the cases of the appellants in July, 2000, even then there was no legal bar in again considering their cases in next year particularly when it had come to the notice of the High Court that their integrity was doubtful. The learned counsel for the High Court emphasized that in *State of U.P. Vs. Chandra Mohan Nigam and others* (Supra) there was consideration of cases of the respondents therein for compulsory retirement at the age of 50 years and next consideration could have been only at the age of 55 years but in the said case an exception to this rule is carved out, namely, if material in regard to doubtful integrity of the officer comes to light, the authority need not wait till the officer attains the age of 55 years and action can be taken immediately. Placing reliance on the decision of this Court in *Government of T.N. Vs. P.A. Manickam* (1996) 8 SCC 519, it was argued that the consideration of an employee for compulsory retirement at the age of 50 years is only the starting point and not the end point, and, therefore, after 50 years at any time case of an officer can be considered for compulsory retirement. The learned counsel brought to the notice of this Court, the observations made in *Nawal Singh Vs. State of U.P. and another* (2003) 8 SCC 117 to the effect that

"the nature of judicial service is such that it cannot afford to suffer continuance in service of persons of doubtful integrity or who have lost their utility" and argued that it was always open to the High Court to consider the case of the appellants at any point of time though earlier a decision was taken not to retire any of the appellants compulsorily from service in the public interest. According to the learned counsel for the High Court the consideration of the cases of the appellants in September, 2001 was in fact not a review of the earlier decision taken by the Screening Committee in July 2000 but it was a fresh consideration and on review of record of service of the appellants the High Court was justified in retiring the appellants compulsorily from service. Placing reliance on the decision in *Haryana State Electricity Board Vs. K.C. Gambhir* (1997) 7 SCC 85, it was pointed out that therein the case of the officer was considered at the age of 50 years and he was permitted to continue in service and again his case was considered at the age of 55 years and he was permitted to continue in service but he was compulsorily retired at the age of 57 years and such a decision was upheld by this Court by rejecting the plea that his case could have been considered only again at the age of 60 years.

26. This Court has considered the rival contentions raised by the learned counsel for the parties on the question whether the cases of the appellants for compulsory retirement, could have been considered again before they had reached the age of 55 years, when the Screening Committee had already considered their cases for compulsory retirement on their attaining the age of 50 years on July 17, 2000, and had not recommended their compulsory retirement which recommendation was accepted by the Full Court of the High Court.

27. In this connection it is relevant to notice certain facts emerging from the record of the case. Rule 27 of the Delhi Higher Judicial Service Rules, 1970 provides that in respect

of matters regarding the conditions of service for which no provision or insufficient provision has been made in those rules, the rules, directions or orders for the time being in force, and applicable to the officers of comparable status in the Indian Administrative Service and serving in connection with the affairs of the Union of India, shall regulate the conditions of such service. Thus Rule 16(3) of the All India Services (Death-cum-Retirement Benefits) Rules, 1958 ('the Rules of 1958' for short) would be applicable to the officers of the Delhi Higher Judicial Service. Clause (3) of Rule 16 of the Rules of 1958 was substituted in 1972 specifying the age of premature retirement to be 50. Rule 16(3), after its substitution, reads as under: -

> "16 (3) The Central Government may, in consultation with the State Government concerned and after giving a member of the Service at least three months, previous notice in writing, or three months pay and allowance in lieu of such notice, require that member to retire in public interest from service on the date on which such member completes thirty years of qualifying service or attains fifty years of age or on any date thereafter to be specified in the notice."

Therefore, the matter regarding pre-mature retirement of officers of the Delhi Higher Judicial Service who have completed 30 years of qualifying service or attained 50 years of age, has to be reviewed in the light of Rule 16(3) of the Rules of 1958 quoted above.

28. Similarly, in case of officer of Delhi Judicial Service, Rule 33 of Delhi Judicial Service Rules, 1970 provides that in respect of all such matters regarding the conditions of service for which no provision or insufficient provision has been made in the Rules, the Rules or orders for the time being in force, and applicable to Government servants holding corresponding posts in connection with the affairs of the Union of India, shall regulate the conditions of such service.

29. In Delhi Judicial Service Rules, 1970, no provision for compulsory retirement has been made. Therefore, Fundamental Rule 56(j), which is, for the time being in force and applicable to Government servants holding corresponding posts envisaged under the Delhi Judicial Service Rules, 1970, shall regulate the matter of compulsory retirement of officers of Delhi Judicial Service. Fundamental Rule 56(j), which is applicable to officers of Delhi Judicial Service, reads as under:-

> "(j) Notwithstanding anything contained in this rule, the appropriate authority shall, if it is of the opinion that it is in the public interest so to do, have the absolute right to retire any Government servant by giving him notice of not less than three months in writing or three months pay and allowances in lieu of such notice:
>
> (i) if he is in Group 'A' or Group 'B' service or post in a substantive, quasi permanent or temporary capacity and had entered Government service before attaining the age of 35 years, after he has attained the age of 50 years;
>
> (ii) in any other case after he has attained the age of fifty-five years.
>
> Provided that nothing in this clause shall apply to a Government servant referred to in clause (e), who entered Government service on or before the 23rd July, 1966."

It would be seen that FR 56(j) gives absolute rights to the appropriate authority to retire any government servant who entered the service before attaining the age of 35 years, after he has attained the age of 50 years.

30. The cases of the officers of Delhi Higher Judicial Service and Delhi Judicial Service were laid before the Screening Committee constituted by the Administrative Committee vide its resolution dated December 15, 1992 and

also for laying down the guidelines before reviewing the cases of direct recruits. The Screening Committee decided as under :-

> "Government Rules be applied."

31. It may be stated that after reviewing the cases of the officers of Delhi Higher Judicial Service and Delhi Judicial Service upto 31.12.1994, the Full Court in its meeting held on February 7, 1996 had taken the following decision :-

> "It was decided that for screening of the cases of the officers of the Delhi Higher Judicial Service and Delhi Judicial Services, now falling within the zone of consideration for retirement in public interest, a Screening Committee consisting of Hon'ble Mr. Justice Jaspal Singh and Hon'ble Mr. Justice J.K. Mehra be constituted and the report of the Committee be laid before the Full Court for consideration."

Consequent upon the retirement of Hon'ble Mr. Justice J.K. Mehra, it was decided to reconstitute the composition of the Screening Committee by Full Court in its meeting held on January 17, 1998. The aforesaid reconstituted Screening Committee reviewed the cases of several judicial officers in its meeting held on July 17, 2000 and gave its report which reads as under: -

> "We have gone through the service record including the ACR dossiers of the officers of Delhi Higher Judicial Service and Delhi Judicial Service who are within the zone of consideration for being considered for premature retirement in public interest at the age of 50/55 years.
>
> We do not find, for the time being, any officer who can be retired prematurely in public interest."

32. As ordered by the then Hon'ble the Chief Justice of the Delhi High Court, the report of the Screening Committee

was to be laid before the Full Court for consideration and orders.

33. In the meeting of the Full Court held on July 22, 2000 the report of the Screening Committee was considered. The true copy of extracts from the Minutes of the Meeting of the Full Court held on Saturday, the July 22, 2000 at 11.00 A.M. in the Judge Court reads as under :-

> "Agenda : 6. To review the case of the officers of DHJS and DJS who are within the zone of consideration for being considered for premature retirement in public interest – Report dated 17.7.2000 of the Screening Committee consisting of Hon'ble Mr. Justice Arun Kumar and Hon'ble Mr. Justice S.K. Mahajan constituted pursuant to Full Court decision dated 17.01.1998.
>
> Minutes : "The report of the Committee was accepted."

34. On a fair reading of the report of the Screening Committee quoted above read with the resolution adopted by the Full Court in its meeting dated July 22, 2000, it becomes evident that the cases of the appellants alone for premature retirement were not considered but cases of all the officers of Delhi Higher Judicial Service as well as that of officers belonging to Delhi Judicial Service who were within the zone of consideration for being considered for premature retirement in public interest at the age of 50/55 years were also considered. The record of the case would indicate that cases of number of officers belonging to Delhi Higher Judicial Service and Delhi Judicial Service were considered on one day, and that too, in the Meeting of the Screening Committee held on July 17, 2000. The record indicates that case of each officer was not considered individually. No reasons could be recorded by the Screening Committee as to how earlier entries adversely reflecting on the integrity of the appellants, were dealt with or viewed. Under the circumstances, the observation that "We do not find, for the time being, any officer who can be

retired prematurely in public interest" will have to be regarded as tentative and not final in nature. When the Screening Committee stated that it did not find for the time being any officer who could be retired prematurely in public interest, it meant that the cases of all the officers were deferred to be considered in near future. It would be seen that FR 56(j) gives absolute right to the appropriate authority to retire any Government servant who has entered the service before attaining the age of 35 years, after he has attained the age of 50 years and in other cases after he has attained the age of 55 years. There is no rule prohibiting consideration of case of an officer for compulsory retirement before he attains the age of 55 years, even if his case is earlier considered at the age of 50 years. There is nothing in the Delhi Judicial Service Rules or Delhi Higher Judicial Service Rules or the Indian Administrative Service Rules laying down a prohibition that if the case of an officer for compulsory retirement is considered at the age of 50 years, his case cannot be reconsidered till he attains the age of 55 years. As held by this Court in *Government of T.N.* (Supra), 50 years is only the starting point and not the end point which means that after 50 years at any time case of an officer can be considered for compulsory retirement.

35. In *State of U.P. Vs. Chandra Mohan Nigam and Others* (1977) 4 SCC 345, the facts were that the respondent, i.e., Mr. Chandra Mohan Nigam was recruited in the Indian Administrative Service in Uttar Pradesh Cadre. He joined service on March 23, 1947. He was appointed as Judicial Member of the Board of Revenue in 1969 and had attained the age of 50 years on December 29, 1967. By an order dated August 22, 1970 the President of India, in consultation with the Government of Uttar Pradesh, in pursuance of the power conferred by sub-rule (3) of Rule 16 of the All India Services (Death-cum-Retirement Benefits) Rules 1958 had passed the order of compulsory retirement of the respondent in the public interest on the expiry of three months from the date of service of the order. That was challenged by Mr. Chandra Mohan Nigam

by a writ petition before the Allahabad High Court. The learned Single Judge had allowed the same on the grounds of contravention of the justiciable and binding rules and because the order was based on consideration of irrelevant matters and was also vitiated by bias.

Feeling aggrieved both the Union of India and the State of U.P. had appealed to the Division Bench of the High Court. The Division Bench of the High Court by an order dated April 13, 1973, dismissed both the appeals by a common judgment. The Division Bench had not agreed with all the reasons given by the learned Single Judge and had quashed the order of compulsory retirement holding that the decision of the Central Government to retire Mr. Nigam was passed on collateral facts and was, therefore, invalid.

36. In appeals by certificates, this Court had noticed the service career of the respondent. It was noticed that the respondent during his service career, had the following adverse entries in his character role – (1) A warning was administered to him on December 6, 1953, for taking undue interest in the ejectment of tenants from a house owned by him at Lucknow, (2) another warning was issued to him on August 31, 1962, for having acquired a car from Varanasi Corporation while working as the Administrator of the said Corporation, (3) he was once warned for not observing proper rules and procedure for utilizing the fund earmarked for lower-income group housing scheme towards the construction of a market (1956-1957) and (4) he was placed under suspension in 1964 in connection with some strictures passed on him by the Election Tribunal in a case relating to the Gorakhpur Parliamentary Constituency elections.

37. With regard to the last entry, he had filed appeal before High Court and the strictures were expunged upon which the order of suspension was set aside and he was reinstated in service. However, the aforesaid entry continued to be part of his character roll at least till December 20, 1969. In pursuance

of sub-Rule (3) of Rule 16 and in consonance with the certain instructions, the State Government of U.P. in October 1969 had constituted a Review Committee to review the records of the members of the Service who were to attain or had attained the age of 50 years. The list of officers considered by this Committee had included the respondent Mr. Nigam. The Committee had not recommended any of the Officers including Mr. Nigam for premature retirement and, on the other hand, had recommended that they should be continued in service. The State Government had accepted the report of the Review Committee and communicated its decision to the Central Government. On December 20, 1969, the Secretary, Ministry of Home affairs of the Central Government had addressed a letter wherein a reference was made to the adverse remarks in the character roll of Mr. Nigam including suspension of Mr. Nigam which was set aside on strictures being expunged by the High Court, and a view was expressed that his was a fit case in which proposal for his premature retirement under Rule 16(3) of the All India Services (Death-cum-Retirement Benefits) Rules, 1958 should have been considered. After noticing the fact that the State Government had not recommended the compulsory retirement the letter proceeded to mention that the Central Government was not knowing if there were any particular reasons for taking a different view or whether it was a case of over-sight. By the said letter the Central Government had expressed opinion to have the considered views of the State Government before any decision was taken by the Central Government. On January 29, 1970, the Chief Secretary to the State Government had replied that the Review Committee had considered the character roll and the merits of the case of Mr. Nigam and found that he was suitable for continuing in service, and that the decision of the Committee was accepted by the State Government. In the reply, it was mentioned that the State Government's decision in the matter was taken after thorough consideration and that the State Government did not consider it necessary to go into this question again. No adverse decision contrary to the recommendation of the State Government was

taken and communicated by the Central Government to the State Government in pursuance of the recommendation of the first Review Committee in October, 1969. However, the State Government, on its own motion, constituted a second Review Committee in May 1970. Again before this Committee also the case of all the officers who had attained the age of 50 years including those whose cases had been reviewed earlier in October 1969 was also placed for consideration. Thus Mr. Nigam's case was considered again by the Second Review Committee. This time the Committee recommended that the two officers one of whom was Mr. Nigam should be prematurely retired. The State Government having accepted this recommendation forwarded the same to the Central Government. The Central Government asked the State Government to send the proceeding of the Review Committee and on receipt of the proceedings, the Central Government agreed with the views of the State Government and passed the order of compulsory retirement of Mr. Nigam.

38. It is in the light of these facts that this Court made following observations in paragraph 29 of the reported decision which read as under :

> "**29.** The correct position that emerges from Rule 16(3) read with the procedural instructions is that the Central Government, after consultation with the State Government, may prematurely retire a civil servant with three months' previous notice prior to his attaining 50 years or 55 years, as the case may be. The only exception is of those cases which had to be examined for the first time after amendment of the rule substituting 50 years for 55 years where even officers, who had crossed the age of 50 years, even before reaching 55, could be for the first time reviewed. Once a review has taken place and no decision to retire on that review has been ordered by the Central Government, the officer gets a lease in the case of 50 years upto the next barrier at 55 and, if he is again cleared at

> that point, he is free and untrammelled upto 58 which is his usual span of the service career. This is the normal rule subject always to exceptional circumstances such as disclosure of fresh objectionable grounds with regard to integrity or some other reasonably weighty reason."

39. So far as present case is concerned, no final decision was taken by the Screening Committee in case of any officer of Delhi Higher Judicial Service and Delhi Judicial Service, but a tentative decision was taken that at that stage no officer was found fit who could have been retired compulsorily from service. This is not a case wherein a review had taken place and a positive final decision to continue the appellants in service, was taken by the Screening Committee. In the case of *Chandra Mohan Nigam* (Supra), the case of Mr. Nigam was considered positively for retirement but a specific recommendation was made to continue him in service, by the Review Committee which was accepted by the State Government and except expressing an opinion that having regard to certain adverse remarks in his character roll, this was a fit case in which proposal for his premature retirement should have been considered, the Central Government, after receipt of reply from the State Government, had not taken any adverse decision contrary to the recommendation of the State Government, which was in turn based on the recommendation of the First Review Committee. Further, in *Chandra Mohan Nigam's* case itself this Court has in para 27 of the reported decision hastened to add that when integrity of an officer is in question, that will be an exceptional circumstance for which order may be passed in respect of such an officer under Rule 16(3), at any time, if other conditions of that rule are fulfilled apart from the choice of disciplinary action which will also be open to the Government. Thus an exception to the rule, that if there is consideration at the age of 50, next consideration can be only at the age of 55 is made in *Chandra Mohan Nigam's* case itself by holding that if material in regard to doubtful integrity of the officer comes to light, the authority need not wait till the officer attains the age

of 55 years and action can be taken immediately. The integrity of all the three Judicial Officers was found to be doubtful and, therefore, their compulsory retirement from service cannot be held to be illegal.

40. At this stage, a reference may be made to the decision of this Court in *Haryana State Electricity Board vs. K.C. Gambhir* (1997) 7 SCC 85. Though the decision may not be strictly applicable to the facts of the present cases, but certain observations made therein are relevant to understand the issue posed for consideration of this Court in the present appeals.

The respondent therein was an employee of Haryana State Electricity Board. He was promoted as Executive Engineer on February 19, 1977. When he attained the age of 50 years, his case for compulsory retirement was reviewed on November 30, 1986. His integrity was reported doubtful in the year 1985-86, yet it was decided not to retire him compulsorily because his representation against adverse remarks was pending. On attaining 55 years of age, his case for compulsory retirement was again reviewed on November 30, 1991. AT that time also, departmental proceedings were pending against him for a serious act of misconduct and, therefore, it was decided not to retire him. The enquiry was over on August 4, 1993 and thereafter, he was compulsorily retired on February 3, 1994 by giving him three months' notice. The retirement came nine months before his date of superannuation. Thus, on two earlier occasions, it was decided not to retire him compulsorily, but on third occasion, order of compulsory retirement was passed. The order of compulsory retirement was set aside by the High Court of Punjab and Haryana in the writ petition filed by the respondent. This Court, while allowing the appeal filed by the Haryana State Electricity Board, observed that though the appellant could have taken the action of compulsorily retiring the respondent from service earlier, it acted very fairly and allowed him to remain in service till his representation against the adverse remarks was considered on the first occasion and

subsequently, till the departmental enquiry was completed. The clear meaning of the above-mentioned observation is that even during the pendency of his representation against adverse remarks and during the pendency of departmental enquiry, Haryana State Electricity Board could have taken action of compulsorily retiring the respondent from service earlier. Thus on the basis of service record, the three Judicial Officers could have been retired compulsorily from service but a tentative decision was taken not to retire them from service at that point of time. But this tentative decision would not preclude the authority concerned from passing orders of compulsory retirement later on.

41. In *Government of T.N. vs. P.A. Manickam* AIR 1996 SC 2250, what is ruled by this Court is that the rule permits the appropriate authority to retire any Government servant after he has attained the age of 50 years or after he has completed 25 years of qualifying service and the rule prescribes a starting point, which is the attaining of the age of 50 years or the completion of 25 years of service, but it does not prescribe a *terminus ad quam* and it is, therefore, open to the appropriate authority under the rule to consider the case of a Government servant for premature retirement at any time after the aforementioned starting points. Thus, after the so-called review of the cases of the two appellants and the deceased officer in July, 2000, their cases were rightly reviewed again and orders retiring them compulsorily from service were rightly passed against them.

42. In *Union of India Vs. M.E. Reddy* (1980) 2 SCC 15, the respondent Mr. Reddy started his career in the Police Service as Deputy Superintendent of Police in the year 1948. In the year 1958 he was appointed to the Indian Police Service. On July 31, 1958, he was promoted as Superintendent of Police in State of Andhra Pradesh and held charge of a number of Districts from time to time. He was awarded the President Police Medal on August 14, 1967 but the award of the said

medal was withheld as he was placed under suspension by the Government on August 11, 1967 pending departmental enquiry into a number of allegations made against him.

In 1969, he filed a writ petition in the Andhra Pradesh High Court praying that the order of suspension passed against him be quashed as it was passed on false allegations and at the instance of Mr. K. Brahmanand Reddy who was then Chief Minister of the State. The writ petition was admitted by the High Court and an interim order staying all further proceedings in departmental enquiry was passed. When the writ came up for hearing, the State Government represented to the High Court that, it had decided to withdraw order of suspension and reinstate Mr. Reddy. The State Government withdrew the order of suspension and directed that the period of suspension be treated as on duty. Thereafter, on application being filed by Mr. Reddy, the writ petition was dismissed as withdrawn. Because of these developments the departmental proceedings against him were dropped and he was given Selection Grade, which was withheld because of the suspension order. By an order dated April 28, 1971, he was promoted to the rank of Deputy Inspector General of Police. During the course of the departmental enquiry an entry to the effect that "he had concocted a case of attempt to rape against one Mr. Venugopal Reddy to please the then Inspector General of Police Mr. Nambiar and there was a strong suspicion about his integrity" was made in his A.C.R. He made a representation to expunge the entry. The Government decided that as statements were factual, it would be sufficient if entry was made to the effect that the suspension was subsequently lifted and the period was treated as on duty and that further action was not necessary as there were no good grounds to hold him guity of any of the charges leveled against him.

However, on August 7, 1975, a Review Committee consisting of the Chief Secretary, Home Secretary and Inspector General of Police considered various cases of police

officers including that of Mr. Reddy and made recommendations. On September 11, 1975, the Government of India, after considering report of the Review Committee, ordered compulsory retirement of Mr. Reddy in public interest.

Thereupon Mr. Reddy filed writ petition in the Andhra Pradesh High Court. The Single Judge allowed the petition and quashed order of compulsory retirement. That decision was upheld by the Division Bench of the High Court, in appeal filed by State of Andhra Pradesh and Union of India. Therefore, the two appeals by certificate were filed before this Court.

It was argued before this Court on behalf of Mr. Reddy that the order impugned was passed on materials which were not existent inasmuch as there were no adverse remarks against Mr. Reddy who had a spotless career throughout and if such remarks had been made in his confidential reports, they would have been communicated to him under the rules. This contention was negatived in following terms: -

> "Here we might mention that the appellants were fair and candid enough to place the entire confidential personal file of Reddy before us starting from the date he joined the Police Service and after perusing the same we are unable to agree with Mr. Krishnamurty Iyer that the officer had a spotless career. The assessment made by his superior officers from the very beginning of his service until the impugned order was passed show that at the best Reddy was merely an average officer and that the reports show that he was found to be sometimes tactless, impolite, impersonated, suffered from other infirmities, though not all of them were of a very serious nature so as to amount to an adverse entry which may be communicated to him. We might also mention that before passing an order under Rule 16(3) it is not an entry here or an entry there which has to be taken into consideration by the Government but the overall picture of the officer during the long years of his service that he puts in has to be considered from the point

of view of achieving higher standard of efficiency and dedication so as to be retained even after the officer has put in the requisite number of years of service. Even in the last entry which was sought to be expunged through a representation made by Reddy and other entries made before that it appears that the integrity of Reddy was not above board."

While allowing the appeals of the Union of India and State of Andhra Pradesh, this Court has emphasized the importance of adverse entry. After referring to observations made by this Court in para 27 of the decision in the case of *Sate of U.P. vs. Chandra Mohan Nigam* (1977) 4 SCC 345, wherein the Court had hastened to add that when integrity of an officer is in question that will be an exceptional circumstance for which order may be passed in respect of such a person under Rule 16(3) at any time, if other conditions of the rule are fulfilled, apart from the choice of disciplinary action which will also be open to Government, this Court M.E. Reddy's case, has held as under: -

"Thus, even according to the decision rendered by this Court in the aforesaid case the fact that an officer is of doubtful integrity stands on a separate footing and if he is compulsorily retired that neither involves any stigma nor any error in the order."

Further, in the process of interpreting the decision in *Chandra Mohan Nigam's* case, this Court in para 25 of the reported decision inter-alia observed that "we have already indicated above that this Court made it absolutely clear that when a person was retired under Rule 16(3) on the ground that his integrity was in question, the observations made by this Court would have no application."

43. Apart from the poor judicial performance, the appellants were also retired compulsorily from service, on the ground that their integrity was doubtful.

44. The mandate of Article 235 of the Constitution is that the High Court has to maintain constant vigil on its subordinate judiciary as laid down by this Court in *High Court of Judicature at Bombay through its Registrars Vs. Shirishkumar Rangrao Patil and Another* (1997) 6 SCC 339. In the said case, this Court has explained that the lymph nodes (cancerous cells) of corruption constantly keep creeping into the vital veins of the judiciary and need to stem it out by judicial surgery lies on the judiciary itself by its self- imposed or corrective measures or disciplinary action under the doctrine of control enshrined in Articles 235, 124(6) of the Constitution, and therefore, it would be necessary that there should be constant vigil by the High Court concerned on its subordinate judiciary and self introspection.

45. Judicial service is not a service in the sense of an employment as is commonly understood. Judges are discharging their functions while exercising the sovereign judicial power of the State. Their honesty and integrity is expected to be beyond doubt. It should be reflected in their overall reputation. There is no manner of doubt that the nature of judicial service is such that it cannot afford to suffer continuance in service of persons of doubtful integrity or who have lost their utility. As explained by this Court in *Chandra Singh and others Vs. State of Rajasthan & another* (2003) 6 SCC 545, the power of compulsory retirement can be exercised at any time and that the power under Article 235 in this regard is not in any manner circumscribed by any rule or order. What is explained in the said decision by this Court is that Article 235 of the Constitution of India enables the High Court to assess the performance of any judicial officer at any time with a view to discipline the black sheep or weed out the deadwood, and this constitutional power of the High Court cannot be circumscribed by any rule or order. Moreover while upholding the orders of compulsory retirement of judicial officers who were working in the State of U.P., following weighty observations have been made by this Court in para 13 of decision in case

of *Nawal Singh vs. State of U.P. and another* (2003) 8 SCC 117: -

> "13. It is to be reiterated that for keeping the stream of justice unpolluted, repeated scrutiny of service records of judicial officers after a specified age/completion of specified years of service provided under the Rules is a must by each and every High Court as the lower judiciary is the foundation of the judicial system. We hope that the High Courts would take appropriate steps regularly for weeding out the dead wood or the persons polluting the justice delivery system."

46. Under the circumstances this Court is of the firm opinion that the principle laid down in Chandra Mohan Nigam's case will not be applicable to the facts of the appellants who were Members of the Delhi Higher Judicial Service.

47. Even if it is assumed for the sake of argument that the principle laid down in Chandra Mohan Nigam's case would apply with all the vigour to the facts of the appellants also, this Court finds that in respect of all the three officers, after the previous consideration in July, 2000, new material in the form of ACR for the year 2000 "'C' integrity doubtful" had come into existence and had become a part of their respective service records when the Full Court in its meeting held on 13.9.2001 recorded their ACRs for the year 2000. Thus the consideration by the Committee constituted for the purpose of evaluating the cases of the officers to ascertain whether they should be compulsorily retired, was subsequent in point of time, namely, on 21.09.2001 and as such it will be fully covered by the exception spelt out in *Chandra Mohan Nigam's* Case itself in regard to consideration of cases again before the age of 55 years. The consideration of the cases of the three judicial officers on the basis of ACRs dated September 13, 2001 recorded by the Full Court of the Delhi High Court is not a review of the earlier decision of July, 2000. It is a fresh consideration. It is review of the record of service of the officers and not review

of the earlier decision and such review is not only permissible but is perfectly legal and valid.

48. The net result of the above discussion is that this Court does not find any substance in the first contention raised on behalf of the appellants and the same is hereby rejected.

49. The next contention which was raised by the learned counsel for the appellants was that the order passed by the Lt. Governor compulsorily retiring the appellants from service, without seeking aid and advice of his Council of Ministers, as required by Article 239(AA)(4) of the Constitution is ultra vires as well as illegal and therefore, the same should not be sustained. Elaborating the said point, it was argued that the order retiring the appellants compulsorily from service was passed by the Lt. Governor on receiving the recommendation of the High Court of Delhi, pursuant to the resolution of the Full Court passed on September 22, 2001 acting under and in exercise of control over subordinate judiciary under Article 235 of the Constitution, but the powers of the Lt. Governor of N.C.T. of Delhi under Article 239(AA)(4) which are analogous to powers of a Governor under Article 163(1) of the Constitution can be exercised only on aid and advice of his Council of Ministers, and therefore, the order passed by the Lt. Governor retiring the appellants compulsorily from service are bad in law. In support of these submissions the learned counsel for the appellants placed reliance on: (a) *Samsher Singh Vs. State of Punjab and Another,* (1974) 2 SCC 831 = AIR 1974 SC 2192 and (b) *M.M.Gupta and Others Vs. State of Jammu & Kashmir and Others,* (1982) 3 SCC 412.

50. The learned counsel for the respondent High Court pleaded that the contention that Lt. Governor while passing the Order of compulsory retirement ought to have been advised by his Council of Ministers was not advanced before the High Court and therefore was not considered by the High Court and this plea should not be permitted to be raised for the first time in the appeals arising by grant of special leave. It was pointed

out that in the appeal arising out of SLP No. 314 of 2009 in the list of dates filed by Mr. P.D. Gupta it was pleaded that this plea was urged before the High Court but the same was not considered before the High Court and if that be so the remedy of the appellant is to go back to the High Court and file the review petition. What was emphasized was that Mr. Gupta had in fact filed a review petition but later on withdrawn the same without seeking any liberty to agitate this point in the Special Leave Petition or in any other proceedings and therefore, he is not entitled to urge this plea. It was emphatically pointed out by the learned counsel for the High Court that in other appeals, it is not stated by the appellants that such a plea was urged before the High Court and they having not urged such a plea in the memorandum of Special Leave Petitions, the plea raised at the delayed and belated stage should not be considered by this Court. In support of this argument, the learned counsel for the respondent relied upon decisions in (a) *Daman Singh and Others Vs. State of Punjab and Others,* (1985) 2 SCC 670, (b) *State of Punjab and Another Vs. H.B. Malhotra,* (2006) 11 SCC 169, (c) *Mohd. Akram Ansari Vs. Chief Election Officer and Others,* (2008) 2 SCC 95 and (d) *Ex-Constable Ramvir Singh Vs. Union of India and Others,* (2009) 3 SCC 97.

51. Without prejudice to the above stated contention, it was argued by the learned counsel for the respondent that under Article 235, it is High Court which has to exercise supervision and control over the subordinate judiciary and not the State Government and therefore, recommendations of the High Court in regard to compulsory retirement were/are binding on the State Government/the Governor. The learned counsel pleaded that the Lt. Governor has to act on the recommendation of the High Court and there is no illegality, if the Governor on the recommendations of the High Court had passed order retiring the appellants compulsorily from service. To buttress this submission, the learned counsel for the respondent placed reliance on (a) *Samsher Singh Vs. State of Punjab and Another,* (1974) 2 SCC 831 = AIR 1974 SC 2192, (b) *State of Haryana Vs. Inder Prakash Anand H.C.S. & Others,* (1976) 2 SCC 977, (c) *Baldev Raj Guliani Vs. The Punjab and Haryana High Court & Others,* (1976) 4 SCC 201, (d) *Registrar, High Court of Madras Vs. R. Rajaiah,* (1988) 3 SCC 211, (e) *Registrar (Admn.), High Court of Orissa, Cuttack Vs. Sisir Kanta Satapathy (Dead) by LRs. & Another,* (1999) 7 SCC 725, (f) *Tej Pal Singh Vs. State of U.P. & Another,* (1986) 3 SCC 604 and (g) *T. Lakshmi Narasimha Chari Vs. High Court of A.P. and Another,* (1996) 5 SCC 90.

This Court has heard the learned counsel for the parties at great length on the question whether the order passed by the Lt. Governor compulsorily retiring the appellants from service without seeking aid and advice of his Council of Ministers as required under Article 239 (AA)(4) of the Constitution is ultravires and illegal.

52. It is true that the appellant Mr. Gupta has stated in the Memorandum of Special Leave Petition that the point that Lt. Governor could not have passed order retiring him compulsorily from service on the recommendation of the High Court and without seeking aid and advice of his Council of Ministers, was urged before the High Court, but the said point was not considered by the High Court. It is rightly argued by the learned counsel for the respondent that even in such an eventuality, the only course/remedy available to the said appellant was to approach the High Court seeking review of the Judgment. The record shows that the appellant Mr. Gupta had filed review application before the High Court, but the same was unconditionally withdrawn. At the time of withdrawal of review application, the appellant had not sought any liberty to agitate this point in Special Leave Petition before this Court. So far as two other appellants are concerned they have not stated that such a point was argued on their behalf before the High Court and was not dealt with by the High Court. Under the circumstances a question arises whether the learned counsel

for the appellants should be permitted to raise such a plea before this Court at the stage of final disposal of the matters.

53. Ordinarily the Supreme Court would not entertain a new prayer at the hearing of the appeal under Article 136 when it is not raised in the High Court or in the petition seeking leave to appeal. Point not raised before the High Court but taken in Special Leave Petition will not ordinarily be allowed to be agitated before this Court. The consistent practice of this Court is that the Court does not permit a party to raise a new point which has not been argued before the High Court. However, there are exceptional cases in which this Court may permit a party to raise a new plea before this Court for the first time, for example, where the plea raised does not require investigation of new facts or where the question raised is a pure question of law or where the point is likely to be raised in future affecting such cases or where the respondent has dealt with the point raised for the first time, in the reply filed before this Court and the learned counsel for the parties are heard at length and in great detail. This Court having gone through the decisions relied upon by the learned counsel for the respondent, finds that no absolute proposition of law is laid down in any of the decisions that in no circumstances a new plea can ever be permitted to be raised before this Court if the same was not raised before the High Court. The question sought to be raised is a pure question of law for which factual foundation is already laid. The learned counsel for the parties have been heard at great length on the new point sought to be raised first time before this Court. The authorities cited at the Bar have been read and re-read to emphasize respective view points. Therefore, having regard to the facts of the case, this Court has permitted the learned counsel for the appellants to raise the point and heard the learned counsel for the parties in detail.

54. In order to answer the question posed for the consideration of the Court, it will be useful to notice the contents of Articles 163(1) and 239(AA) (4) of the Constitution.

55. Article 163 makes provision that Council of Ministers has to aid and advice Governor. It inter alia provides that there shall be a Council of Ministers with the Chief Minister as the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion. The said Article further provides that if any question arises whether any matter is or is not a matter in respect of which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion. Sub Article (3) of Article 163 stipulates that the question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any Court.

56. Article 239AA inserted by the Constitution (Sixty-ninth Amendment) Act, 1991 enacts special provisions with respect to Delhi. Clause (1) of said Article states that as from the date of commencement of the Constitution (Sixty-ninth Amendment) Act, 1991 which is February 1, 1992 the Union Territory of Delhi shall be called the National Capital Territory of the Delhi and the administrator thereof appointed under Article 239 shall be designated as the Lieutenant Governor. Sub-clause (2) deals with the constitution of Legislative Assembly for the National Capital Territory and total number of seats of the assembly etc. Sub-clause (3) of the Article confers power on the Legislative Assembly to make laws for the whole or any part of the National Capital Territory. Sub-clause (4) with which the court is concerned, inter alia provides that there shall be a Council of Ministers consisting of not more than ten per cent of the total number of members in the Legislative Assembly, with the Chief Minister at the head to aid and advise the Lieutenant Governor in the exercise of his functions in relation to matters with respect to which the Legislative Assembly has power to make laws, except in so far as he is, by or under any law, required to act

in his discretion.

57. A meaningful and conjoint reading of Article 163 of the Constitution makes it clear that the Governor has to act on aid and advice of the Council of Ministers with the Chief Ministers as the head except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion. In view of the provisions of sub Article (4) of Article 239AA of the Constitution, the Lt. Governor has to take aid and advice of the Council of Ministers in the exercise of his functions in relation to matters with respect to which the Legislative Assembly has power to make laws. Article 235 provides that the control over the subordinate courts is vested in High Court of a State. The expression "control" has been elucidated in several reported decisions of this Court, the leading case being *Shamsher vs. State of Punjab* (1974) 2 SCC 831. The "control" vested in the High Court is a mechanism to ensure independence of the subordinate judiciary. Under Article 235 of the Constitution, the control over the subordinate judiciary, vested in the High Court, is exclusive in nature, comprehensive in extent and effective in operation and it is to subserve a basic feature of the Constitution, i.e., independence of judiciary. Among others things, it includes – (a) (i) disciplinary jurisdiction and a complete control subject only to the power of Governor in the matter of appointment, dismissal, removal and reduction in rank of District Judges and initial posting and promotion to the cadre of District Judges, (ii) in Article 235 the word 'Control' is accompanied by the word 'vest' which shows that the High Court alone is made the sole custodian of the control over the judiciary, and (iii) Suspension from service of a member of judiciary with a view to hold disciplinary enquiry; (b) transfers, promotion and confirmation of such promotions, of persons holding posts in judicial service, inferior to that of District Judge; (c) transfer of District Judges; (d) recall of District Judges posted on ex-cadre posts or on deputation on administrative posts; (e) award of selection grade to the members of the judicial service, including District Judges

and grant of further promotion after their initial appointment to the cadre; (f) confirmation of the District Judges who have been on probation or are officiating after their initial appointment or promotion by the Governor to the cadre of District Judges under Article 233; and (g) premature or compulsory retirement of Judges of the District Courts and of Subordinate Courts.

58. The scheme envisaged by the Constitution does not permit the State to encroach upon the area reserved by Articles 233, 234 and first part of Article 235 either by legislation or rules or executive instructions.

59. Article 235 has no concern with the conferring of jurisdiction and powers on the Court but it only relates to administrative and disciplinary jurisdiction over the subordinate Courts. Therefore, the conferment of power of the prescribed authority by the State Legislature on the Judicial Officers cannot be construed to mean that the power of the High Court under Article 235 is inoperative or inchoate as High Court alone is the sole authority competent to initiate disciplinary proceedings against Subordinate Judicial Officers or to impose various punishments including passing of order of compulsory retirement on verification of the service record. The State is least competent to aid and advise Governor on such subjects. While the High Court retains the power of disciplinary control over the subordinate judiciary including power to initiate disciplinary proceedings, suspend them during enquiries and impose punishment on them, but when it comes to the question of dismissal, removal or reduction in rank or termination of services of judicial officers on any count whatsoever, the High Court becomes the recommending authority and cannot itself pass the orders. The formal order to give effect to such a decision has to be passed by the State Governor on the recommendations of the High Court. In disciplinary proceedings if an action is taken by the High Court against the judicial officer the recommendations made by the High Court bind the Governor and he is left with no discretion except to

act according to the recommendations. The Governor, under the scheme of Articles 233, 234 and 235 of the Constitution cannot refuse to act in terms of the recommendations made by the High Court on the ground that he is not aided and advised by the Council of Ministers and this is the true import of total control of the High Court over the Subordinate Judiciary.

60. In the light of the above mentioned principles the decisions sited at the bar will have to be considered.

61. In *Shamsher Singh* (Supra), there were two appellants, namely, Shamsher Singh and Ishwar Chand Agarwal. The two appellants were members of the Punjab Civil Services (Judicial Branch) and were appointed on probation. The services of appellant Shamsher Singh were terminated by an order dated April 27, 1967, by the Governor of Punjab under Rule 9 of the Punjab Civil Services (Punishment and Appeal) Rules, 1952, with immediate effect. By an order dated December 15, 1969, the services of the appellant Ishwar Chand Agarwal were terminated under Rule 7(3) in Part 'D' of the Punjab Civil Services (Judicial Branch) Rules, 1951, by the Governor of Punjab, on the recommendation of the High Court of Punjab and Haryana. Both of them had filed writ petitions in the Punjab and Haryana High Court against the termination of their services. The writ petitions were dismissed and, thereafter, they had filed appeals to the Supreme Court.

62. The first contention raised by appellant Ishwar Chand Agarwal that he completed his initial period of probation of two years on November 11, 1968 and by reason of the fact that he continued in service after the maximum period of probation, he became confirmed by necessary implication, was negatived by this Court on the ground that notice dated October 4, 1968 was given at the end of the probation and the period of probation got extended till the inquiry proceedings commenced by the notice under Rule 9 came to an end.

63. The second contention on behalf of Ishwar Chand

Agarwal that termination of his service was by way of punishment on the basis of charges of gross misconduct by ex-parte enquiry conducted by the Vigilance Department found favour with this Court.

64. This Court accepted the plea that the termination of his services was based on the findings of misconduct contained in about eight complaints, which were never communicated to him and High Court had abdicated the control vested in it under Article 235 by not having an enquiry through judicial officers subordinate to the control of the High Court, but asking the Government to enquire through the Vigilance Department.

65. The abdication of the control over the subordinate judiciary by the High Court under Article 235 in favour of the Government and the stand of the State that the High Court wanted the Government to be satisfied about the suitability of Mr. Agarwal was found to be something obnoxious and had annoyed and shocked this Court. Therefore, this Court, without mincing the words, authoritatively, clearly and for future guidance of one and all, expressed itself in the following strong words in para 78 of the reported decision.

> "78. The High Court for reasons which are not stated requested the Government to depute the Director of Vigilance to hold an enquiry. It is indeed strange that the High Court which had control over the subordinate judiciary asked the Government to hold an enquiry through the Vigilance Department. The members of the subordinate judiciary are not only under the control of the High Court but are also under the care and custody of the High Court. The High Court failed to discharge the duty of preserving its control. The request by the High Court to have the enquiry through the Director of Vigilance was an act of self abnegation. The contention of the State that the High Court wanted the Government to be satisfied makes matters worse. The Governor will act on the recommendation of the

High Court. That is the broad basis of Article 235. The High Court should have conducted the enquiry preferably through District Judges. The members of the subordinate judiciary look up to the High Court not only for discipline but also for dignity. The High Court acted in total disregard of Article 235 by asking the Government to enquire through the Director of Vigilance."

Having laid down, abovementioned proposition of law, this Court deprecated the abdication of control by the High Court by observing that the High Court denied itself the dignified control over the Subordinate Judiciary and after holding that the order of termination of the services of Ishwar Chand Agarwal was clearly by way of punishment, set aside the same.

66. In view of what is categorically, clearly and authoritatively held in paragraph 78 of the reported decision there is no manner of doubt that it is ruled by Seven Judge Bench of this Court in case of *Shamsher Singh* (supra), that the Governor has to act on the recommendation of the High Court and that is the broad basis of Article 235.

The appellant Shamsher Singh was appointed on May 1, 1964 as Subordinate Judge. He was on probation. On March 22, 1967, the Chief Secretary issued a notice to him substantially repeating the same charges which had been communicated to him by the Registrar on December 15, 1966, and asked the appellant to show cause as to why his services should not be terminated as he was found unsuitable for the job. The appellant gave an answer. On April 29, 1967, the services of the appellant were terminated.

Shamsher Singh, in the context of the Rules of Business, contended that the removal of a Subordinate Judge from service was a personal power of the Governor and was incapable of being delegated or dealt with under the Rules of Business.

This Court held that the Governor can allocate the business of the Government to the Ministers and such allocation is no delegation and it is an exercise of executive power by the Governor through the Council or officers under the Rules of Business. Therefore, the contention of the appellant that the order was passed by the Chief Minister without the formal approval of the Governor was found to be untenable and it was held that the order was of the Governor.

Thereafter, this Court noted the contents of the show-cause notice, reply given to the said notice by the appellant, protection granted by Rule 9, etc. and held that it was clear that the order of termination of services of Shamsher Singh was one of punishment and set it aside.

In the light of the contention raised on behalf of Shamsher Singh in the context of the Rules of Business, this Court, in para 88 of the said decision, held that the President and the Governor act on the aid and advice of Council of Ministers in executive action and the appointment as well as removal of the members of the Subordinate Judicial Service is an executive action of the Governor to be exercised on the aid and advice of the Council of Ministers in accordance with the provisions of the Constitution.

67. Thus what is observed by the Supreme Court, in para 88 of the reported decision, will have to be read in the light of the submission made on behalf of the appellant Shamsher Singh and subject to clear, unambiguous and manifest proposition of law laid down in para 78 of the reported decision. Therefore, it is wrong to contend that in *Shamsher Singh's* case (supra), it is ruled by this Court that the Governor is bound to act as per the aid and advice tendered by the Council of Ministers and not on the recommendations of the High Court in the matter of termination of services of the judicial officers on any count whatsoever.

68. In another decision relied upon by the learned counsel

for the appellants, i.e., in *M.M. Gupta and Others* (Supra), this Court held that in the appointment of Judicial Officers or removal of Judicial Officer by the Government, there has to be effective consultation between the Government and the High Court. This decision basically interprets Section 109 of the Constitution of Jammu and Kashmir. In the State of Jammu and Kashmir certain vacancies for the post of District and Sessions Judge occurred for being filled up out of the eligible Judicial Officers. The High Court at a meeting of all the Judges considered the merits and suitability of all the eligible candidates and by a resolution recommended to the Government the name of some officers in supersession of others. The Government then called for a copy of the High Court's resolution and Annual Confidential Reports of the candidates. In response, the high Court sent its detailed comments justifying its recommendation as also reasons for the supersession of seniors along with the resolution and confidential reports as desired by the Government. Thereafter, a Cabinet sub-committee considered the matter. But the government neither communicated the recommendation of the Committee to the High Court, nor sought the High Court's views thereon and thereafter without any further intimation or discussions made the appointments in accordance with seniority. Those officers whose names were recommended by the High Court filed a writ petition under Article 226 challenging validity of the appointments. The Court granted a stay of operation of the appointment order pending disposal of the matter regarding admissibility of the petition. But ultimately in view of the agreement between the parties, the High Court declined to hear the petition on the ground of judicial propriety and vacated the order of stay and granted a certificate of fitness to the petitioners to file an appeal in the Supreme Court, holding that the point involved in the writ petition relating to the interpretation of Section 109 of the Constitution of Jammu and Kashmir, raised a substantial question of law of general public importance and the case was a fit one in which a certificate of fitness should be granted. Against this order the State filed a

special leave to appeal in this Court. The petitioners also filed a writ petition under Article 32 substantially for the same reliefs claimed in their earlier writ petition under Article 226. Allowing the aggrieved officers appeal with costs against the State Government, this Court held that the power to make appointment of District Judges vested in the Governor is conditioned by the mandatory duty on the part of the Governor to consult the High Court, and the High Court has to decide whether a person is fit for promotion and make recommendations accordingly. This Court further held that the consultation has to be made with the High Court alone and not with any other authority, because the High Court by virtue of its control over the officers must be considered to be the best judge of the ability and suitability of any officer as it has in its possession all the relevant materials regarding the performance of the officers. Therefore, this Court in the said case ruled that it should generally be left to the High Court to decide as to which of the officers will best serve the requirements in furtherance of the cause of justice. In this decision in no uncertain terms this Court after considering previous judgments on the point held that the High Court should judge the suitability for promotion in a detached manner taking into consideration all material facts and relevant factors and normally, as a matter of rule, the recommendations made by the High Court should be accepted by the State Government and the Governor should act on the same. If the decision is construed in a pragmatic manner there is no manner of doubt that this decision also takes a view that Governor has to act on the recommendations made by the High Court. Ultimately, this Court found that the appointments of respondent Nos. 3, 4, 5, 6 therein made by the State Government were in violation of the Constitutional provisions and were therefore, set aside.

69. In *State of Haryana Vs. Inder Prakash Anand H.C.S. and Others* (Supra), the respondent joined the Punjab Civil Service, (Executive Branch) in November, 1954. He was selected for the Judicial Branch of the Punjab Civil Service on

May 1, 1965. On November 15, 1968 he was promoted as officiating Additional District and Sessions Judge. He was due to attain the age of 55 years on February 24, 1971. The State referred his case to the High Court for its recommendation whether he should be retired at the age of 55 years or he should be retained in service till the age of 58 years, i.e., the age of superannuation. The High Court recommended that the respondent should be reverted to his substantive post of Senior Subordinate Judge/Chief Judicial Magistrate and that he might be allowed to continue in service till the age of 58 years. The State again sought recommendation about his retirement. The High Court recommended against compulsory retirement. The State Government did not agree and retired the respondent compulsorily. The High Court in a Writ Petition filed by the respondent quashed the order. In appeal this Court examined the scope of Article 235 of the Constitution and held that control which is vested in the High Court is complete control subject only to the power of the Governor in the matter of appointment including dismissal, removal, reduction in rank and the initial posting and of the initial promotion to District Judges. According to this Court when a case is not of removal or dismissal or reduction in rank, any order in respect of exercise of control over the judicial officers is by the High Court and cannot be by any other authority. What is explained by this Court is that there cannot be dual control and if the State Government is to have the power of deciding whether a judicial officer should be retained in service after attaining the age of 55 years up to the age of 58 years, that will seriously affect the independence of the Judiciary and take away the control vested in the High Court. What is ruled by this Court in the said decision is that it is unsound to contend that the Governor and not the High Court has the power to retire a judicial officer compulsorily under Section 14 of the Punjab General Clauses Act.

70. In paragraph 18 of the reported judgment this Court has held that the control vested in the high Court is that if the High Court is of the opinion that a particular judicial officer is

not fit to be retained in service, the High Court will communicate that to the Governor because the Governor is the authority to dismiss, remove, reduce in rank or terminate the appointment, but in such cases it is the contemplation in the Constitution that the Governor as the head of the State will act in harmony with the recommendation of the High Court. According to this Court, if the recommendation of the High Court is not held to be binding on the State, the consequences will be unfortunate. What is highlighted by this Court in the said decision is that it is in public interest that the State will accept the recommendation of the High Court. As a principle, it is stated in the said decision that the vesting of complete control over the subordinate Judiciary in the High Court leads to this that the decision of the High Court in matters within its jurisdiction will bind the State.

71. In *Baldev Raj Guliani* (1976) 4 SCC 201, this Court had occasion to consider and interpret the provisions of Articles 235, 311 and 234 read with Article 309 of the Constitution. In the said case adverse reports having been received against the appellant while he was acting as Subordinate Judge, disciplinary proceedings were initiated against him by the High Court. After preliminary enquiry, he was suspended and on the findings of the departmental enquiry and on consideration of his explanation in reply to show-cause notice under Article 311(2), the High Court recommended to the Government that the officer should be removed from service. The State Government although on its own showing was inclined to agree with the views of the High Court and with the recommendations made by it, however referred the case to the Haryana Public Service Commission for advice purporting to act under Article 320(3) of the Constitution. The Commission advised that no case had been made out against the appellant and that he should be exonerated. The Governor accepted the advice of the Commission and passed the order for reinstatement. The High Court, however, did not issue any posting order as it regarded the order of reinstatement by the Governor illegal. It

even requested the Government to review its order.

72. Thereupon the appellant filed a writ petition praying for a writ of mandamus directing the high Court to issue an appropriate order of posting and also for a mandamus directing the Government to disburse full salary to him and other consequential reliefs. While the writ petition was pending the Governor compulsorily retired him. Subsequently a Full Bench of the High Court delivered its judgment holding the order of reinstatement violative of Article 235, for the Governor was bound to accept the recommendation of the High Court as regards the subordinate judiciary. Therefore, the appellant preferred an appeal before this Court. Three questions were considered by this Court in the said case – (1) whether the Government is bound under the Constitution to accept the recommendation of the High Court and to pass an order of removal of the judicial officer, (2) whether consultation with the Public Service Commission in the matter of a disciplinary proceeding relating to the judicial officer under the control of the High Court is unconstitutional. Was the order of reinstatement passed by the Government constitutionally valid, and (3) if not what will be position of the officer on the date of the officer's compulsory retirement? Was an order of removal possible after that date?

73. After considering the scheme envisaged by different provisions of the Constitution this Court held that the appointing authority of a Subordinate Judge under Article 235 as well as under the Appointment Rules, is the Governor because under Article 235 itself the Subordinate Judge will be governed by the Appointment Rules made under Article 234 read with Article 309. This Court then considered the submission of the appellant that the Governor being the appointing authority, both under Article 235 and the Appointment Rules read with the Punishment Rules, is the final authority to pass the order of removal of the officer and is not under any constitutional obligation to be bound by the recommendation of the High

Court and also the assertion made on behalf of the High Court that Article 235 leaves no option to the Governor to refuse to accept its recommendation in a disciplinary matter in respect of a judicial officer. This Court found that the High Court in making its recommendation to the Governor for passing the order of removal, had rightly conceded the authority of the Governor to pass the same. Thereafter the Court considered the question : Is the recommendation of the High Court binding on the Governor, and answered that since the Governor is the ultimate authority to pass the order for removal it will not be correct always to insist that he has no authority even under certain extraordinary circumstances to decline to accept, forthwith, the particular recommendation, but ordinarily and as a matter of graceful routine, recommendations of the High Court are and should be always accepted by the Governor, because that is ordinarily so and should be in practice the rule as a matter of healthy convention.

74. In paragraph 28, of the reported decision this Court has held that the quality of exclusive control of the High Court does not appear to be whittled down by the constitutional device of all orders issued in the name of the Governor as the head of the State administration and, therefore, when the High Court exercising disciplinary control over the subordinate judiciary finds, after a proper enquiry, that a certain officer is guilty of gross misconduct and is unworthy to be retained in judicial service and, therefore, recommends to the Governor his removal or dismissal, it is difficult to conceive how and under what circumstances such a recommendation should be rejected by the Governor acting with the aid and advice of the Council of Ministers or, as is usually the case, of one of the ministers. It is explained by this Court in the said decision that in this context more than once the Supreme Court has observed that the recommendation of the High Court in respect of judicial officers should always be accepted by the Governor, and this is the inner significance of the constitutional provisions relating to the subordinate judiciary. This Court further noted that

whenever in an extraordinary case, rare in itself, the Governor feels, for certain reasons that he is unable to accept the High Court's recommendations, these reasons will be communicated to the High Court to enable it to reconsider the matter, but it is, however, inconceivable that without reference to the High Court, the Governor would pass an order which had not been earlier recommended by the High Court. This Court further explained that such a course will be contrary to the contemplation in the Constitution and should not take place. In para 36 of the reported decision , this Court has explained the power and/or role of Governor in such matters and laid down the law authoritatively as under : -

> "36. The Governor could not have passed any order on the advice of the Public Service Commission in this case. The advice should be of no other authority than the High Court in the matter of judicial officers. This is the plain implication of Article 235. Article 320(3)(c) is clearly out of place so far as the High Court is concerned dealing with judicial officers. To give any other interpretation to article 320(3)(c) will be to defeat the supreme object underlying Article 235 of the Constitution specially intended for the protection of the judicial officers and necessarily the independence of the subordinate judiciary. It is absolutely clear that the Governor cannot consult the Public Service Commission in the case of judicial officers and accept its advice and act according to it. There is no room for any outside body between the Governor and the High Court."

It may be noted that in the case of *Baldev Raj Guliani* (supra), this Court had considered the case of Shamsher Singh and thereafter has laid down above mentioned proposition of law. In the decision delivered in case of Baldev Raj Guliani, this Court has not ruled that the Governor has to act in aid and on advice of the Council of Ministers. What is ruled is that the recommendation made by the High Court is binding on the Governor.

75. Again in the case of *Registrar, High Court of Madras Vs. R. Rajaiah,* (1988) 3 SCC 211, the High Court had decided to compulsorily retire the respondents but had not communicated the recommendations to the Governor for passing formal orders of compulsory retirement. Instead the High Court had passed the orders of compulsory retirement under FR 56 (d). As there was no formal order by the Government under FR 56 (d), this Court held that the impugned orders of the High Court were ineffective. Ultimately, this Court did not interfere with the view expressed by the Division Bench of the High Court on merits of the matter and held that the High Court was perfectly justified in quashing orders of compulsory retirement. However, this Court considered the scope of Article 235 of the Constitution and held that the test of control is not the passing of an order against a member of the subordinate judicial service, but the power to take such decision and action. The Court explained that so far as the members of the subordinate judicial service are concerned, it is the Governor, who being the appointing authority, has to pass an order of compulsory retirement or any order of punishment against such a member, but passing or signing of such orders by the Governor will not necessarily take away the control of the High Court vested in it under Article 235 of the Constitution. This Court further explained that an action against any Government servant consists of two parts. Under the first part, a decision will have to be made whether an action will be taken against the Government servant and in the second part, the decision would be carried out by a formal order. Having explained this, this Court proceeded to hold that the power of control envisaged under Article 235 of the Constitution relates to the power of making a decision by the High Court against a member of the subordinate judicial service and such a decision is arrived at by holding an enquiry by the High Court against the member concerned, and after the High Court comes to the conclusion that some action either in the nature of compulsory retirement or by the imposition of a punishment, as the case may be, has to be taken against the member concerned, the High Court will

make a recommendation in that regard to the Governor and the Governor will act in accordance with such recommendation of the High Court by passing an order in accordance with the decision of the High Court. What is ruled by this Court is that the Governor cannot take any action against any member of a subordinate judicial service without and contrary to the recommendation of the High Court. After review of the law on the subject matter till then, this Court has made following pertinent observations, in para 18 of the reported decision: -

> "18. The control of the High Court, as understood, will also be applicable in the case of compulsory retirement in that the High Court will, upon an enquiry, come to a conclusion whether a member of a subordinate judicial service should be retired prematurely or not. If the High Court comes to the conclusion that such a member should be prematurely retired, it will make a recommendation in that regard to the Governor inasmuch as the Governor is the appointing authority. The Governor will make formal order of compulsory retirement in accordance with the recommendation of the High Court."

Again, in para 20 of the reported decision, this Court, while holding that so long as there is no formal order by the Governor, the compulsory retirement, as directed by the High Court would not take place, has, inter-alia observed that "It may be that the power of the Governor under Rule 56(d) of the Fundamental Rules is very formal in nature, for the Governor merely acts on the recommendation of the High Court by signing an order in that regard". The proposition of law laid down in this case also supports the contention of the respondents that in the matter of disciplinary action against a member of the Subordinate Judicial Service, the Governor has no option, but to pass final order on the basis of the recommendation of the High Court.

76. It may be mentioned that in this case, i.e., *Registrar, High Court of Madras* (supra), this Court has referred to the decision of *Shamsher Singh* (supra), and has thereafter ruled

that Governor has to act in accordance with the recommendation of the High Court by passing an order in accordance with the decision of the High Court and the Governor cannot take any action against any member of the judicial service without and contrary to the recommendation of the High Court.

77. This Court further finds that in *Registrar (Admn.) High Court of Orissa, Cuttack* (Supra), decision of Orissa High Court on administrative side was required to be forwarded to the Governor for passing an order of the compulsory retirement but this was not done, and an order of compulsory retirement was passed by the High Court itself. This decision was challenged before the high Court on judicial side. The writ petition was decided in favour of judicial officers holding that the order dated February 5, 1987 compulsorily retiring them was bad in law. In appeal, this Court considered the scope of Articles 233 to 235 of the Constitution as well as Articles 55 and 368 in the light of basic feature of the Constitution namely independence of the judiciary. After noticing several previous decisions on the point, this Court considered the powers of the High Court and held that the Governor is bound by the recommendation of the High Court but the constitutional propriety requires that the recommendation would be sent by the High Court to the Governor and formal order would be passed by the Governor. Explaining the scope of Articles 234, 235 and 311 of the Constitution, a five-Judge Constitution Bench of this Court has held that while the High Court retains the power of disciplinary control over the subordinate judiciary, including the power to initiate disciplinary proceedings, suspend them pending enquiries and impose punishment on them but when it comes to the question of dismissal, removal, reduction in rank or termination of the services of the judicial officer, on any count whatsoever, the High Court becomes only the recommending authority and cannot itself pass such an order. What is ruled by the Constitution Bench is that the formal order to give effect

to such a decision has to be passed only by the State Governor on the recommendation of the High Court.

78. In the said case, this Court found that by not making an order of compulsory retirement on the recommendation of the High Court, a peculiar situation was created in the sense that the judicial officers were neither in service nor were they technically out of service nor had they performed any work and, therefore, in order to balance the equities between the parties and in order to give litigation a quietous, this Court had requested the Governor of the State to pass a formal order of compulsory retirement of judicial officers.

79. On review of law, what is ruled by the Constitution Bench of this Court is that undoubtedly, the High Courts alone are entitled to initiate, to hold enquiry and to take a decision in respect of dismissal, removal, reduction in rank or termination from service, but the formal order to give effect to such a decision has to be passed only by the State Governor on the recommendation of the High Court, and it is well settled again by a catena of decisions of this Court that the recommendation of the High Court is binding on the State Government/Governor.

80. In *Tej Pal Singh Vs. State of U.P. and Another,* (1986) 3 SCC 604, the State Government moved the High Court in the year 1967 with proposal of premature retirement of the appellant, an Additional District and Sessions Judge. On July 8, 1968 the Administrative Judge agreed with the proposal of premature retirement after giving three months' notice. The Governor passed the order of retirement on August 24, 1968. Three days thereafter, on August 27, 1968 the Administrative Committee of the High Court gave its approval to the recommendation of the Administrative Judge earlier communicated to the State Government. Thereafter on August 30, 1968 the Additional Registrar transmitted the order of retirement to the appellant. It was actually served on the appellant on September 3, 1968. The question for consideration in this case before this Court was whether the

order of compulsory retirement passed against the appellant satisfied the requirements of the Constitution. While allowing the appeal, this Court held that the impugned order of premature retirement passed by the Governor without having before him the recommendation of the Administrative Committee or of the Full Court was void and ineffective. What is ruled is that it is for the High Court, on the basis of assessment of performance and all other aspects germane to the matter to come to the conclusion whether any particular judicial officer under its control is to be prematurely retired and once the High Court comes to the conclusion that there should be such retirement, the Court recommends to the Governor to do so, and the conclusion is to be of the High Court since the control vests therein. After noticing the Rules obtaining in the Allahabad High Court, this Court held that the Administrative Committee could act for and on behalf of the Court but the Administrative Judge could not have done so and therefore his agreeing with the Government proposal was of no consequence and did not amount to the satisfaction of the requirement of Article 235. After noting that it was only after the Governor passed the order on the basis of such recommendation, that the matter was placed before the Administrative Committee before the order of retirement was actually served on the appellant, this Court held that the deviation was not a mere irregularity which could be cured under Rule 21 of the Rules of Court, 1952 by the ex post facto approval given by the Administrative Committee to the action of the Governor after the order of premature retirement had been passed and the error committed was an incurable defect amounting to an illegality. This Court took notice of the decision of the Court in *State of U.P. Vs. Batuk Deo Pati Tripathi,* (1978) 2 SCC 102, and ruled therein that the Governor can pass an order of compulsory retirement only on the recommendation made by the High Court or the Administrative Committee. Further, in paragraph 18 of the reported decision, this Court observed that in view of the control over the members of lower judiciary vested in the High Court by virtue of Article 235 of the

Constitution, the Governor is bound, in each case, to act in accordance with the recommendation of the High Court. This decision also takes the firm view that the recommendation made by the High Court is binding on the Governor.

81. Thus, it is fairly well settled by catena of decisions of this Court that in the matter of compulsory retirement of a Judicial Officer the Governor cannot act on the aid and the advice of Council of Ministers but has to act only on the recommendation of the High Court. Though the Lt. Governor is a party to these appeals, he has not raised any plea that the recommendation made by the Delhi High Court was not binding on him and he could have acted in the matter only on the aid and advice of his Council of Ministers. Thus the order of the Lt. Governor compulsorily retiring the appellants without seeking aid and advice of his Council of Ministers is neither ultra vires nor illegal and is rightly sustained by the High Court. The Governor could not have passed any order on the aid and advice of Council of Ministers in this case. The advice should be of no other authority except that of the High Court in the matter of judicial officers. This is the plain implication of Article 235. Reliance on Article 239AA(4) is entirely out of place so far as the High Court is concerned, dealing with the judicial officers. To give any other interpretation to Article 239AA(4) will be to defeat the supreme object underlying Article 235 of the Constitution, specially intended for protection of the judicial officers and necessarily independence of the subordinate judiciary. It is absolutely clear that the Governor cannot take the aid and advice of his Council of Ministers in the case of judicial officers and accept its advice and act according to it. There is no room for any outside body between the Governor and the High Court. Therefore, this Court does not find any substance in this contention also and the same is rejected.

82. The next point which was argued on behalf of the appellants was that the appellants were made to retire compulsorily from service without affording them an opportunity

to make representation against the ACR of the year 2000 wherein they were graded as "'C' doubtful integrity", which was the basis for their compulsorily retirement, and, therefore, the orders retiring them compulsorily from service are liable to the set aside. It was vehemently contended that in such circumstances when ACR of 2000 wherein the appellants were graded as "'C' doubtful integrity" which was the sole basis of passing the order of compulsory retirement, the respondents were under legal obligation to look into the representation of the appellants against those adverse remarks but before the appellants could made the representation against the said ACR, orders retiring them compulsorily from service were passed, and, therefore, the orders impugned should be regarded as arbitrary, unfair and unreasonable.

83. In the appeal arising from SLP No. 27028 of 2008 deceased Mr. R.S. Verma had stated that adverse remark for the year 2000 was communicated to him vide letter dated September 21, 2001 by the Registrar, Vigilance, Delhi High Court which was received by him on September 25, 2001, whereas on the same date i.e. on September 21, 2001 the Screening Committee had taken decision to retire him prematurely from service which was accepted by the Full Court in its meeting held on September 22, 2001 and though in the letter communicating ACR it was mentioned that he was entitled to made representation within six weeks, the order of compulsory retirement against him was passed on September 27, 2001 which was communicated to him on September 28, 2001 and as he was deprived of making any representation against the ACR for the year 2000, the order retiring him from service compulsorily was bad in law.

84. In the Appeal arising from Special Leave Petition No.27200 of 2008 it was contended by M.S. Rohilla that in the ACR for the year 2000, recorded by the Full Court on May 24, 2001, he was graded 'C-Integrity doubtful' and he was communicated the said ACR and was asked to submit his

representation within six weeks, but within three days thereafter i.e. on September 27, 2001 decision was taken to retire him compulsorily from service and, therefore, the order retiring him compulsorily from service was illegal.

85. In Appeal arising out of Special Leave Petition No. 314 of 2009 it was contended on behalf of P.D. Gupta that the Full Court had recorded remarks 'C-Integrity Doubtful' for the year 2000, in his case, which was communicated to him vide letter dated September 22, 2001 and he was asked to file his representation against the remarks within six weeks, but without waiting for the representation to be filed by him, the High court upon the adverse remarks of 2000 had recommended his premature retirement to the Lt. Governor under F.R. 56(j) read with Rule 33 of the DJS Rules, and therefore the order retiring him from service should have been set aside by the High Court.

86. As against this it was emphasized on behalf of the respondents that this Court not only has taken the view that a single adverse entry reflecting on the integrity of the officer is sufficient because there has to be constant vigil by the High Court over subordinate judiciary but this Court has further taken the view that it is not necessary that such an entry should have been communicated or that the officer concerned should have an opportunity to represent against the said adverse entry or that before it could be taken into consideration and acted upon, the representation should have been considered or rejected.

87. The High Court in the impugned judgment, while considering this plea raised on behalf of the appellants, has inter alia held that action under FR 56(j) need not await the final disposal of such representation. It may be mentioned that in support of their respective contentions, the learned counsel have cited several decisions for the guidance of the Court but this Court proposes to refer to only those judgments which are relevant for deciding the issue.

88. Compulsory retirement from service is not considered

to be a punishment. Under the relevant rules, an order of dismissal is a punishment laid on a Government servant when it is found that he has been guilty of misconduct or the like. It is penal in character because it involves loss of pension which under the Rules have accrued in respect of the service already put in. An order of removal also stands on the same footing as an order of dismissal and involves the same consequences, the only difference between them being that while a servant who is dismissed is not eligible for re-appointment, one who is removed is. A compulsory retirement is neither dismissal nor removal and differs from both of them, in that it is not a form of punishment prescribed by the rules and involves no penal consequences, in as much as the person retired is entitled to pension and other retiral benefits, proportionate to the period of service standing to his credit.

89. As explained by a Bench of three Hon'ble Judges of this Court in *State of U.P. vs. Shyam Lal Sharma* AIR 1971 SC 2151, in ascertaining, whether the order of compulsory retirement is one of punishment, it has to be ascertained, whether in the order of compulsory retirement there was any element of charge or stigma or imputation or any implication of misbehaviour or incapacity against the officer concerned. Secondly, the order of compulsory retirement will be indicative of punishment or penalty if the order will involve loss of benefits already earned. Thirdly, as order of compulsory retirement on the completion of 25 years of service or an order of compulsory retirement made in the public interest to dispense with further service will not amount to an order for dismissal or removal as there is no element of punishment. Fourthly, an order of compulsory retirement will not be held to be an order in the nature of punishment or penalty on the ground that there is possibility of loss of future prospects, namely, that the officer will not get his pay till he attains the age of superannuation, or will not get an enhanced pension for not being allowed to remain a few years in service and being compulsorily retired. So far as the present cases are concerned, this Court finds that

there are no words in the orders of compulsory retirement, which throw any stigma against the two appellants and the deceased officer. Therefore, it is not necessary for this Court to make inquiry into the Government files to discover whether any remark amounting to stigma could be found in the files. The reason is that it is the order of compulsory retirement, which alone is for examination. If the order itself does not contain any imputation or charge against the two appellants and the deceased officer, the fact that considerations of misconduct or misbehaviour weighed with the High Court in coming to its conclusion to retire them compulsorily does not amount to any imputation or charge against them. It is not established from the order of compulsory retirement itself that the charge or imputation against the appellants was made a condition for exercise of the power. Therefore, the orders of retirement cannot be considered to be one for dismissal or removal in the nature of penalty or punishment.

90. Now, the policy underlying Article 311(2) of the Constitution is that when it is proposed to take action against the servant by way of punishment and that will entail forfeiture of benefits already earned by him, he should be heard and given an opportunity to show cause against the order. The confidential reports provide the basic and vital inputs for assessing the performance of an officer and his advancement in his career as also to serve the data for judging his comparative merits when the questions arise for his confirmation, promotion, grant of selection grade, crossing E.B., retention in service beyond the age of 50 years etc. Maintenance of such records is ordinarily regulated by administrative rules or instructions. Writing the confidential report is primarily and essentially an administrative function. Normally tribunals/Courts are loath to interfere in cases of complaints against adverse remarks and to substitute their own judgment for that of the reporting or reviewing officers. It is because these officers alone are best suited to judge the qualities of officials working under them and about their

competence in the performance of official duties entrusted to them. Despite fear of abuse of power by prejudiced superior officers in certain cases, the service record contained in the confidential reports, by and large, reflects the real personality of the officer. The object of writing confidential reports and making entries therein is to give an opportunity to the public servant to improve excellence. Article 51 A(j) of the Constitution enjoins upon every citizen the primary duty to constantly endeavour to prove excellence, individually and collectively, as a member of the group. Therefore, the officer entrusted with the duty to write C.R. has a public responsibility and trust to write the C.R. objectively, fairly and dispassionately while giving, as accurately as possible the statement of facts on an overall assessment of performance of the subordinate officer. Opportunity of hearing is not necessary before adverse remarks because adverse remarks by themselves do not constitute a penalty. However, when the order of compulsory retirement is passed, the authority concerned has to take into consideration the whole service record of the officer concerned which would include non-communicated adverse remarks also. Thus it is settled by several reported decisions of this Court that un-communicated adverse remarks can be taken into consideration while deciding the question whether an official should be made to retire compulsorily or not.

91. In *State of U.P. and Another Vs. Bihari Lal* (1994) Supp (3) SCC 593, this Court has taken the view that even an adverse entry which has been set aside in appeal on technical grounds could also be taken into consideration. The plea that since the last entry, i.e., 'C-Integrity Doubtful' for the year 2000 was communicated almost around the same time when the order of compulsory retirement was communicated and as the appellants had no opportunity to represent against the same, it ought not to have been taken into consideration and that the consideration of the said last adverse entry vitiates the order of compulsory retirement has no merits. This Court has consistently taken the view that an order of compulsory

retirement is not a punishment and does not have adverse consequence and, therefore, the principles of natural justice are not attracted. What is relevant to notice is that this Court has held that an un-communicated adverse A.C.R. on record can be taken into consideration and an order of compulsory retirement cannot be set aside only for the reason that such un-communicated adverse entry was taken into consideration. If that be so, the fact that the adverse A.C.R. was communicated but none of the appellants had an opportunity to represent against the same, before the same was taken into consideration for passing order of compulsory retirement, cannot at all vitiate the order of compulsory retirement.

92. In *State of U.P. and another vs. Biharilal* (supra), this Court has ruled that before exercise of the power to retire an employee compulsorily from service, the authority has to take into consideration the overall record, even including some of the adverse remarks, though for technical reasons, might have been expunged on appeal or revision. What is emphasised in the said decision is that in the absence of any mala fide exercise of power or arbitrary exercise of power, a possible different conclusion would not be a ground for interference by the Court/Tribunal in exercise of its power of judicial review. According to this Court, what is needed to be looked into is whether a bona fide decision is taken in the public interest to augment efficiency in the public service. Again, a three Judge Bench of this Court in *Union of India vs. V.P. Seth and another* 1994 SCC (L&S) 1052, has held that uncommunicated adverse remarks can be taken into consideration while passing the order of compulsory retirement. The bench in the said case made reference to *Baikuntha Nath Das vs. Chief District Medical Officer, Baripada* (1992) 2 SCC 299, as well as *Posts and Telegraphs Board vs. C.S.N. Murthy* (1992) 2 SCC 317, and after reiterating, with approval, the principles stated therein, has laid down firm proposition of law that an order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it, uncommunicated adverse

remarks were also taken into consideration. Applying the ratio laid down in the above-mentioned two cases to the facts of the present cases, this Court finds that the authorities concerned were justified in relying upon the adverse entry made against the two appellants and the deceased officer in the year 2000 indicating that their integrity was doubtful alongwith other materials. Here in these cases, the ACRs for the year 2000 were communicated to the three officers but before they could exercise the option given to them to make representation against the same, the orders of compulsory retirement were passed. When an uncommunicated adverse entry can be taken into consideration, while passing order of compulsory retirement, there is no reason to hold that adverse entry communicated, against which opportunity of making representation is denied, cannot be taken into consideration at the time of passing order of compulsory retirement. Merely because the two appellants and the deceased officer had no opportunity to make representation against the said entry or that the representation made against the same was pending, would not render consideration of the said entry illegal, in any manner, whatsoever.

93. In *Baidyanath Mahapatra Vs. State of Orissa and Another* (1989) 4 SCC 664, the Review Committee constituted by the Government of Orissa in October 1983 to determine the appellant's suitability for retention in service after his completing the age of 50 years, recommended the appellant to be compulsorily retired under Rule 71(1)(a) of the Orissa Service Code. The Committee took into account for formulating its opinion, the entries awarded to him for the years 1981-82 and 1982-83 which had been communicated to the appellant on July 5, 1983 and August 9, 1983 respectively. The appellant made representations against entries on November 1, 1983 but without disposing them of, the Government made an order on November 10, 1983 compulsorily retiring the appellant from service, which was upheld by the State Administrative Tribunal. Allowing the appeal this Court held that the appellant had right

to make representation against the adverse entries within six months, and, therefore, the adverse entries awarded to him in the years 1981-82 and 1982-83 could not have been taken into account either by the Review Committee or by the State Government in forming the requisite opinion as contemplated by Rule 71(1)(a) of the Orissa Service Code, before the expiry of the period of six months. According to the Court, the proper course for the Review Committee should have been not to consider those entries or in the alternative, the Review Committee should have waited for the decision of the Government on the appellant's representation. This Court in the said decision emphasized the purpose of communicating adverse entries and held that delay in communication of adverse entries should be avoided. This Court finds that the said case did not deal with entry which had adverse reflection on the integrity of the official concerned.

94. In *S. Maheswar Rao Vs. State of Orissa and Another* 1989 Supp (2) SCC 248 the appellant was a Superintending Engineer. His case was considered under the first proviso to Rule 71(a) of the Orissa Service Code and on the basis of adverse remarks awarded to him for the last three years, i.e., for the years 1980-81, 1981-82 and 1982-83, the Review Committee had made recommendation for his premature retirement. At that time his representation against the adverse remarks relating to the first year was pending. Against the remarks for the other years, he made representations subsequently and the State Government had without disposing of these representations compulsorily retired him. The Bhubaneswar Administrative Tribunal disapproved the taking into consideration of the remarks for the first year but sustained the impugned order of compulsory retirement on the basis of remarks for the subsequent years. While allowing the appeal this Court observed that adverse entries for the years 1981-82 and 1982-83 could not have been taken into consideration for the premature retirement of the appellant, and the Review Committee should have deferred the consideration of his case

till his representation against the aforesaid adverse entries was disposed of or in the alternative the State Government itself should have considered and disposed of the representation before issuing the order for premature retirement. However, in this case also, this Court finds that this was not a case of consideration of adverse entry relating to the integrity of the officer concerned.

95. Though the learned counsel for the appellants have relied upon decision in *V.K. Jain Vs. High Court of Delhi through Registrar General and Others,* (2008) 17 SCC 538, this Court finds that basically the said decision deals with expunction of adverse remarks made by the High Court against a judicial officer while setting aside his judicial order granting bail to an accused. It emphasizes, the judicial restraints to be exercised by the High Courts in judicial functions. It does not deal with compulsory retirement of a judicial officer or how to write his ACR. Therefore, detailed reference to the same is avoided.

96. However, this Court finds that in *Union of India Vs. Col. J.N. Sinha and Another,* 1970 (2) SCC 458, the respondent was compulsorily retired by the Government of India under Fundamental Rule 56(j). The said order was challenged by the respondent amongst other things on the ground that the lack of opportunity to show cause amounted to denial of natural justice. The said plea was accepted by the High Court and High Court had issued a writ of *certiorari* quashing the said order. In appeal this Court held that a Government Servant serving under the Union of India holds his office at the pleasure of the President, but this 'pleasure' doctrine is subject to the rules or law made under Article 309 as well as to the conditions prescribed under Article 311. This Court firmly held that rules of natural justice are not embodied rules nor can they be elevated to the position of fundamental rights, and the Court cannot ignore the mandate of the Legislature or a statutory authority. After holding that the compulsory retirement involves

no civil consequences and that a Government servant does not lose any of the rights acquired by him before retirement, it was held that Fundamental Rule 56 (j) holds the balance between the rights of the individual Government servant and the interests of the public. According to this Court, while a minimum service is guaranteed to the Government servant, the government is given power to energize its machinery and make it more efficient by compulsorily retiring those who in its opinion should not be there in public interest. Thus the plea of breach of principles of natural justice was not accepted by this Court in the said case.

97. In *Baikuntha Nath Das and Another Vs. Chief District Medical Officer, Baripada and Another,* (1992) 2 SCC 299, the three Judge Bench of this Court had occasion to consider the question of effect of uncommunicated adverse remarks taken into consideration while passing order of compulsory retirement against the appellants of that case and scope of judicial review of the order retiring an employee compulsorily from service. The appellants in the appeals were compulsorily retired by the Government of Orissa in exercise of the power conferred upon it by the first Proviso to sub-rule (a) of Rule 71 of the Orissa Service Code. The appellant Mr. Baikuntha Nath Das was appointed as a Pharmacist by the Civil Surgeon, Mayurbhanj on March 15, 1951. By an order dated February 13 1976 the Government of Orissa had retired him compulsorily. The said Order was challenged by him in the High Court of Orissa by way of a Writ Petition. His case was that the order was based on no material and that it was the result of ill-will and malice, the Chief District Medical Officer bore towards him. According to him he was transferred by the said officer from place to place and was also placed under suspension at one stage, but his entire service had been spotless and that at no time were any adverse entries in his confidential character rolls communicated to him. In the counter affidavit filed on behalf of the Government it was submitted that the decision to retire him compulsorily was taken by the Review

Committee and not by the Chief Medical Officer and it was stated that besides the remarks made in the confidential character rolls, other material was also taken into consideration by the Review Committee and that it had arrived at its decision bona fide and in public interest which decision was accepted and approved by the Government. In the Counter the allegation of mala fide was denied. The High Court had looked into the proceedings of the Review Committee and the confidential character rolls of the appellant and dismissed the writ petition holding that an order of compulsory retirement after putting in the prescribed qualifying period of service does not amount to punishment. The High Court had observed that the order in question was passed by the State Government and not by the Chief Medical Officer and did not suffer from vice of malice. It was further held by the High Court that it was true that the confidential character roll of the appellant contained several remarks adverse to him which were, no doubt, not communicated to him. On behalf of the appellants who were compulsorily retired reliance was placed upon the decisions of this Court in *Brij Mohan Singh Chopra Vs. State of Punjab,* (1987) 2 SCC 188 and *Baidyanath Mahapatra* (Supra) in support of the contention that it was not permissible to the respondent Government to order compulsory retirement on the basis of material which included uncommunicated adverse remarks, whereas on behalf of the respondent Government reliance was placed upon the decision in *Union of India Vs. M.E. Reddy,* (1980) 2 SCC 15, to contend that it was permissible to the Government to take into consideration uncommunicated adverse remarks also while taking a decision to retire a Government servant compulsorily. A study of the decision rendered by the three Judge Bench of this Court makes it evident that not less than twenty reported decisions of this Court were taken into consideration and thereafter the Court has overruled the decision in *Baidyanath Mahapatra Vs. State of Orissa* (1989) 4 SCC 664, which took the view that uncommunicated adverse remarks cannot be taken into consideration while passing an order of compulsory retirement

against a Government servant.

98. In *Baikuntha Nath Das* case, after referring to decision of this Court in *Brij Mohan Singh Chopra Vs. State of Punjab* (1987) 2 SCC 188, where a three Judge Bench of this Court has specifically affirmed the decision rendered in *Union of India Vs. M.E. Reddy* (1980) 2 SCC 15, this Court has laid down following firm proposition of law stated in paragraph 34 of the reported decision:

"**34.** The following principles emerge from the above discussion:

(*i*) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(*ii*) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.

(*iii*) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (*a*) mala fide or (*b*) that it is based on no evidence or (*c*) that it is arbitrary — in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.

(*iv*) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the

matter — of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/ character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(*v*) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference.

Interference is permissible only on the grounds mentioned in (*iii*) above.."

99. In view of the two three Judge Bench decisions of this Court mentioned above the contention that adverse remarks relating to integrity regarding which no opportunity of making representation was provided or pending representation was not considered and, therefore, orders of compulsory retirement were bad in law cannot be accepted. Therefore, the said contention is hereby rejected.

100. Another point which was canvassed for consideration of the Court was that Rule 31A of DJS Rules incorporated since 1.1.1996 covers entire field of age of retirement and premature retirement of Delhi Judicial Officers and, therefore, premature retirement of the appellants could not have been made before their attaining the age of 58 years. According to the learned counsel for the appellants Rule 31A was added by notification dated 1.1.1996 issued by Lt. Governor on the recommendation of the Delhi High Court under Article 309 of the Constitution to DJS Rules on the subject of retirement, providing the normal

age of retirement as 60 years with proviso of compulsory retirement at the age of 58 years and for voluntary retirement at the age of 58 years and after addition of this Rule, Rule 33 of DJS Rules could not have been invoked for application of Fundamental Rules, on the subject of normal age of retirement, age of premature retirement and assessment of performance as well as age of voluntary retirement. What was emphasized was that after introduction of Rule 31A in DJS Rules the subject of premature retirement cannot be considered to be a residuary matter for which no Rule exists in DJS rules and, therefore, premature retirement of the appellants could not have been ordered before they attained the age of 58 years.

101. The learned counsel for the High Court argued that this point was given up before the High Court and, therefore, the Court should not permit the appellants to agitate the same in appeals arising from grant of special leave. In support of this submission reliance was placed by the learned counsel for the High Court on: (1) *State of Maharashtra Vs. Ramdas Shrinivas Nayak & Anr.,* (1982) 2 SCC 463, (2) *Shankar K. Mandal & Ors. Vs. State of Bihar & Ors.,* (2003) 9 SCC 519, (3) *Mount Carmel School Society Vs. DDA,* (2008) 2SCC 141, and (4) *Bhavnagar University Vs. Palitana Sugar Mill (P) Ltd. & Ors.,* (2003) 2SCC 111.

102. Without prejudice to the above contention, it was argued by the learned counsel for the High Court that in *All India Judge's Association Vs. Union of India & Ors.,* (1992) 1 SCC 119, this Court directed that the age of retirement of the judicial officers be increased to 60, and when a review was filed, this Court in *All India Judges' Association and others vs. Union of India and others* (1993) 4 SCC 288, while maintaining that the judicial officers be permitted to serve up to the age of 60 years, imposed a condition that all judicial officers would not be entitled to the said benefit automatically, but only those who were found fit after the evaluation of their fitness would be permitted to go up to 60 years and this Court expressed the

view that the standard of evaluation could be the same as for compulsory retirement. The learned counsel emphasized that while giving the said direction, this Court expressly and specifically provided that the ordinary provisions relating to compulsory retirement at earlier stages were not dispensed with and they will continue to operate, and, therefore, incorporation of Rule 31A in the Delhi Judicial Service was made but it is wrong to contend that Rule 31A overrides the other provisions of the Rules and in particular, Rule 33 read with Fundamental Rules which provide for compulsory retirement after a judicial officer attains the age of 50 years. According to the learned counsel for the respondent, Rule 31A has no bearing and impact in deciding whether the order of compulsory retirement against the appellant in terms of Rule 33 read with F.R. 56(j) is valid or not.

103. Though High Court in paragraph 45 of the impugned judgment has observed that the plea taken in the writ petition filed by Mr. Gupta that FR 56(j) read with Rule 33 of the DJS Rules is not applicable after the introduction of Rule 31 of the DJS rules, was dropped at the time of argument by the learned counsel for the appellant conceding that the order could have been passed under the aforesaid provision, this Court finds that this was a concession on point of law which would not bind the appellants. Further in the interest of justice it is necessary to settle the controversy once for all and, therefore, though in view of decisions cited by the learned counsel for the High Court, it is accepted as correct by this Court that the point sought to be argued was dropped before the High Court, it would not be in the interest of justice to preclude the learned counsel for the appellants from agitating this point before this Court. Under the circumstances, the Court proposes to examine the said contention on merits.

104. It is well known fact that in *All India Judge's Association* (Supra), this Hon'ble Court in paragraph 63(iii) directed that :

"Retirement age of judicial officers be raised to 60 years and appropriate steps are to be taken by December 31, 1992."

105. In Second *All India Judge's Association & Others Vs. Union of India & Others,* (1993) 4 SCC 288, this Court clarified in paragraph 30 of the said judgment as under :

"The benefit of the increase of the retirement age to 60 years, shall not be available automatically to all judicial officers irrespective of their past records of service and evidence of their continued utility to the judicial system.....The potential for continued utility shall be assessed and evaluated by appropriate Committees of Judges of the respective High Courts constituted and headed by the Chief Justice of the High Courts and the evaluation shall be made on the basis of the judicial officer's past record of service, character rolls, quality of judgments and other relevant matters."

106. In paragraph 31 of the reported decision this Court has inter alia observed that the standard of evaluation shall be as applicable to compulsory retirement. However what is relevant to notice is paragraph 52 wherein this Court observed and directed as under:-

"The assessment directed here is for evaluating the eligibility to continue in service beyond 58 years of age and is in addition to and independent of the assessment for compulsory retirement that may have to be undertaken under the relevant Service Rules, at the earlier stage/s."

107. In *Nawal Singh Vs. State of U.P. & Another,* (2003) 8 SCC 117, this Court had again occasion to consider the observations made in *All India Judge's Association* case (second) and after making reference to the said decision this Court observed as under :

"…….there is no embargo on the competent authority

to exercise its power of compulsory retirement under Rule 56 of the Fundamental Rules. As stated above, we have arrived at the conclusion that because of the increase in retirement age, rest of the Rules providing for compulsory retirement would not be nugatory and are not repealed."

108. Again in *Ramesh Chandra Acharya Vs. Registrary, High Court of Orissa and Another,* (2000) 6 SCC 332, this Court observed in paragraph 8 of the reported decision that "the Court thereafter clarified that the assessment at the age of 58 years is for the purpose of finding out suitability of the officers concerned for the entitlement of the benefit of the increased age of superannuation from 58 years to 60 years; it is in addition to the assessment to be undertaken for compulsory retirement and the compulsory retirement at the earlier stage/s under the respective service rules."

109. In view of the direction contained in *All India Judge's Association* case Rule 31 was inserted in DJS Rules with effect from 1.1.1996 providing that the normal age of retirement of the Delhi Judicial Officers governed by D.J.S. Rules would be 60 years. The potential for continued utility was to be assessed and evaluated at the age of 58 years because the benefit of the increase of the retirement age to 60 years was not available automatically to all judicial officers irrespective of their past records of service. Though this Court observed that the standard of evaluation for determining the potential for continued utility should be the same as for compulsory retirement but it was specifically made clear that the assessment directed was for evaluating the eligibility to continue in service beyond 58 years of age and was in addition to and independent of the assessment for compulsory retirement that might have to be undertaken under the relevant Service Rules at the earlier stage/s. The clarification made by this Court in *All India Judge's Association* case No. 2 leaves the matter in no doubt that the independent assessment for compulsory retirement to be undertaken under the relevant

Service Rules is not affected at all in any manner whatsoever. It is true that the performance of a judicial officer is to be evaluated for determining his utility to continue in service upto the age of 60 years but it is wrong to contend that Rule 31 overrides Rule 33, which deals with residuary matters which includes compulsory retirement of a judicial officer after he attains the age of 50 years. It is rightly contended by the learned counsel for the High Court that Rule 31A has bearing and impact in deciding the question whether the order of compulsory retirement against the appellant in terms of Rule 33 read with F.R. 56(j) is valid or not. The newly added rule does not deal with the aspect of compulsory retirement at all. In terms of Rule 33 the subject of compulsory retirement did remain residuary even after the introduction of Rule 31A in DJS Rules and, therefore, the question of premature retirement will have to be considered only under FR 56(j) and not under the newly added Rule 31A. Thus consideration of the case of the appellant for premature retirement before he attained the age of 58 years cannot be regarded as illegal in any manner at all. This Court does not find any substance in this contention raised on behalf of the appellant and, therefore, the same is rejected.

110. Another point which was pressed into service for consideration of the Court was that the procedure of recording ACR wherein the appellants were given adverse remarks was in violation of rules of principles of natural justice and as there was no material which would justify adverse entries in ACR's of the appellants, the same could not have been taken into consideration while passing orders of compulsory retirement. On behalf of the deceased Mr. Verma it was argued that there was no material to retire him prematurely and it was admitted by the High Court in his case that premature retirement was not ordered because of complaints, but on the bona fide impression and opinion formed by the High Court. It was also argued on behalf of Mr. Verma that no inspection was made, of the judicial work done by him for the years 1998, 1999 and 2000 and as this fact was not denied in the counter affidavit

filed by the High Court, the order retiring him compulsorily from service suffers from vice of malice in law, and should have been set aside by the High Court on judicial side. Mr. Rohilla who had argued his appeal in person had contended that the order of compulsory retirement was expected to have been passed on the basis of all the material available prior to the passing of the order but the material in respect of which he had made representation which was pending to be replied or representation against the material which was still required to be submitted, could not have been relied upon for passing order of compulsory retirement. According to him, the so called material relied upon was only one-sided view and was not the wholesome exercise which was required to be undertaken before passing order of compulsory retirement. Mr. Rohilla had further argued that there was no record of any complaints either oral or in writing nor there was any record to show whether the complaints related to his judicial work on the basis of which ACR of the year 2000 were recorded. The oral communication by members of the Bar or by office bearers of the Bar Association was thoroughly irrelevant in the absence of particulars mentioned in the ACR and, could not have been taken into consideration while passing order of compulsory retirement.

111. On behalf of the appellant Mr. P.D. Gupta, it was contended that for the year 2000 Hon'ble Mr. Justice M.S.A. Siddique was appointed as Inspecting Judge by the High Court but Hon'ble Mr. Justice Siddique had retired on 29.5.2001 without giving any Inspection Report and he had not inspected his Court during the year at all, whereas during the year 2001, three Judges had been appointed as Inspecting Judges namely Hon'ble Mr. Justice Dalveer Bhandari (as he then was), Hon'ble Mr. Justice Mukul Mudgal (as he then was) and Hon'ble Mr. Justice R.C. Chopra, but the report for the year 2000 in his respect was given by Hon'ble Mr. Justice K.S. Gupta who was not the Inspecting Judge either for the year 2000 or for the year 2001 and as Hon'ble Mr. Justice Gupta had visited his Court

on 7.9.2001 and stayed only for ten minutes and asked him to send three judgments delivered in the year 2000 which were sent by the appellant on 10.9.2001, the report given by Hon'ble Mr. Justice Gupta grading him as an average officer could not have been taken into consideration by the High Court while passing the order of compulsory retirement. It was further pointed out on his behalf that Hon'ble Mr. Justice Gupta had observed in his report dated 11.9.2001 that on inquiry from the cross section of Bar, he had come to know that Mr. Gupta did not enjoy good reputation and on the basis of this report, the Full Court in its meeting held on 21.9.2001 had graded his ACR as 'C' (integrity doubtful) without supplying the material to him and, therefore, order retiring him compulsorily from service was bad in law.

112. In reply to abovementioned contentions it was argued by the learned counsel for the High Court that a single adverse entry indicating that the integrity of the officer is doubtful is sufficient to order his compulsory retirement, even if the said adverse entry relates to a distant past and in respect of all the three appellants the last ACR for the year 2000 is C "integrity doubtful", which by itself is sufficient to sustain orders of compulsory retirement passed against them.

113. So far as Mr. M. S. Rohilla is concerned, it was submitted by the learned counsel for the respondent High Court that there were two adverse ACR's for the years 1993 and 1994 indicating that his integrity was doubtful and the representations made by him against the same were considered and rejected, which decisions were not challenged by him by way of a writ petition before the High Court nor there was any challenge to the ACRs either in the earlier writ petition filed by him challenging his reversion from the Delhi Higher Judicial Service to the Delhi Judicial Service nor in the writ petition challenging the order of compulsory retirement and, therefore, order retiring him compulsorily cannot be regarded as illegal or arbitrary.

114. While dealing with the arguments advanced on behalf of the appellant Mr. P.D. Gupta it was stressed that for two years i.e. 1994 and 1995 his ACRs were C "Integrity Doubtful" which were challenged by him by filing a Writ Petition and though the learned Single Judge of the High Court had allowed the Writ Petition, the Division Bench in appeal had set aside the judgment of the learned Single Judge and upheld the adverse ACRs "C Doubtful Integrity" for the years 1994 and 1995, against which Special Leave Petition filed by Mr. P.D. Gupta was also dismissed after which Review Petition was filed by him against the judgment of the Division Bench in Letters Patent Appeal, which was also dismissed and thus those entries having become final, it would be wrong to contend that order of compulsory retirement passed in his case was liable to be set aside.

115. On consideration of rival submissions, this Court finds that there is no manner of doubt that the nature of judicial service is such that the High Court cannot afford to suffer continuance in service of persons of doubtful integrity. Therefore, in *High of Judicature at Bombay Through its Registrar Vs. Shirishkumar Rangrao Patil and Another,* (1997) 6 SCC 339, this Court emphasized that it is necessary that there should be constant vigil by the High Court concerned on its subordinate judiciary and self introspection. It is well settled by a catena of decisions of this Court that while considering the case of an officer as to whether he should be continued in service or compulsorily retired, his entire service record upto that date on which consideration is made has to be taken into account. What weight should be attached to earlier entries as compared to recent entries is a matter of evaluation, but there is no manner of doubt that consideration has to be of the entire service record. The fact that an officer, after an earlier adverse entry, was promoted does not wipe out earlier adverse entry at all. It would be wrong to contend that merely for the reason that after an earlier adverse entry an officer was promoted that by itself would preclude the authority from considering the earlier

adverse entry. When the law says that the entire service record has to be taken into consideration, the earlier adverse entry, which forms a part of the service record, would also be relevant irrespective of the fact whether officer concerned was promoted to higher position or whether he was granted certain benefits like increments etc. Therefore, this Court in *State of Orissa and Others Vs. Ram Chandra Das,* (1996) 5 SCC 331, observed as under in paragraph 7 of the reported decision :-

> "…….. it is settled law that the Government is required to consider the entire record of service……. We find that selfsame material after promotion may not be taken into consideration only to deny him further promotion, if any. But that material undoubtedly would be available to the Government to consider the overall expediency or necessity to continue the government servant in service after he attained the required length of service or qualified period of service for pension."

116. Thus the respondent High Court was justified in taking into consideration adverse ACRs reflecting on integrity of Mr. M.S. Rohilla for the years 1993, 1994 and 2000 while considering the question whether it was expedient to continue him in service on his attaining the age of 50 years. Similarly, in so far as appellant Mr. P.D. Gupta is concerned for two years that is 1994 and again in 1995 his ACRs were "Integrity Doubtful" and again in the year 2000, the position was the same. Further, for two years, i.e., 1994 and 1995 his ACRs "C Integrity Doubtful" were upheld by the Division Bench of the High Court against which his Special Leave Petition was dismissed. At this stage it would be relevant to notice certain observations made by Division Bench of the High Court while allowing the Letters Patent Appeal filed by the High Court against the judgment of the learned Single Judge by which the ACRs for two years were set aside, which are as follows: -

"To summarize, it is held:

(a) The adverse remarks recorded by the High Court in the Confidential Reports of respondent No.1 for the years 1994 and 1995 were not without any 'material'. They were recorded on the basis of material on record and the judgment of the learned Single Judge quashing those remarks is hereby set aside.

(b) The learned Single Judge should not and could not have graded B+ to respondent No.1 as it is the function of the High Court to assign appropriate grading. Therefore, the matter should have been referred to the Full Court for giving appropriate grading. This direction of the learned Single Judge is accordingly set aside.

(c) Direction of the learned Single Judge in treating the petitioner as promoted w.e.f. 18th May, 1996 is not correct in law and is therefore, set aside."

117. The above findings would indicate that the appellant Mr. Gupta is not justified in arguing that there was no material on the basis of which adverse entries could have been made against him for the years 1994 and 1995 nor is he justified in urging that the order of compulsory retirement also based on those two adverse entries is liable to be set aside.

118. In *S.D. Singh vs. Jharkhand High Court through R.G. and others* (2005) 13 SCC 737, benefit of enhanced retirement age from 58 to 60 years was denied to the appellant. The Evaluation Committee, after perusing his service record, recommended that he should not be continued in service beyond the age of 58 years. The Full Court, on assessment and evaluation of service record, resolved that the benefit of extension in age up to 60 years should not be extended to him. The appellant relied upon his promotional order superseding several senior officers. However, he had not alleged mala fide against any one. The Evaluation Committee had, after

considering his ACR, noted that he was an average officer and the vigilance proceedings initiated against him were dropped. While dismissing his appeal, this Court has held that there was material, on the basis of which, an opinion was formed and promotion would not indicate that he was fit to be continued after the age of 58 years. The material, according to this Court, against the appellant in that case, was that he was an average officer and the vigilance proceedings initiated were dropped. If on these materials, benefit of enhanced retirement was denied to Mr. S.D. Singh, this Court has no hesitation in concluding that having regard to the service record of the two appellants and the deceased officer, the High Court was justified in compulsorily retiring them from service.

119. The argument that material was not supplied on the basis of which "'C' Doubtful Integrity" was awarded to the appellants and, therefore, the order of compulsory retirement is liable to be set aside has no substance. Normally and contextually word 'material' means substance, matter, stuff, something, materiality, medium, data, facts, information, figures, notes etc. When this Court is examining as to whether there was any 'material' before the High Court on the basis of which adverse remarks were recorded in the confidential reports of the appellants, this 'material' relates to substance, matter, data, information etc. While considering the case of a judicial officer it is not necessary to limit the 'material' only to written complaints or 'tangible' evidence pointing finger at the integrity of the judicial officer. Such an evidence may not be forthcoming in such cases.

120. As observed by this Court in *R.L. Butail Vs. Union of India and Others,* (1970) 2 SCC 876, it is not necessary that an opportunity of being heard before recording adverse entry should be afforded to the officer concerned. In the said case, the contention that an inquiry would be necessary before an adverse entry is made was rejected as suffering from a misapprehension that such an entry amounts to the penalty of

censure. It is explained by this Court in the said decision that making of an adverse entry is not equivalent to imposition of a penalty which would necessitate an enquiry or giving of a reasonable opportunity of being heard to the concerned Government servant. Further in case where the Full Court of the High Court recommends compulsory retirement of an officer, the High Court on the judicial side has to exercise great caution and circumspection in setting aside that order because it is a complement of all the judges of the High Court who go into the question and it is possible that in all cases evidence would not be forth coming about doubtful integrity of a Judicial Officer.

121. As observed by this Court in *High Court of Punjab & Haryana through R.G. Vs. Ishwar Chand Jain and Another,* (1999) 4 SCC 579, at times, the Full Court has to act on the collective wisdom of all the Judges and if the general reputation of an employee is not good, though there may not be any tangible material against him, he may be given compulsory retirement in public interest and judicial review of such order is permissible only on limited grounds. The reputation of being corrupt would gather thick and unchaseable clouds around the conduct of an officer and gain notoriety much faster than the smoke. Sometimes there may not be concrete or material evidence to make it part of the record. It would, therefore, be impracticable for the reporting officer or the competent controlling officer writing the confidential report to give specific instances of shortfalls, supported by evidence.

122. Normally, the adverse entry reflecting on the integrity would be based on formulations of impressions which would be result of multiple factors simultaneously playing in the mind. Though the perceptions may differ in the very nature of things there is a difficulty nearing an impossibility in subjecting the entries in the confidential rolls to judicial review. Sometimes, if the general reputation of an employee is not good though there may not be any tangible material against him, he may be compulsorily retired in public interest. The duty conferred on the

appropriate authority to consider the question of continuance of a judicial officer beyond a particular age is an absolute one. If that authority bona fide forms an opinion that the integrity of a particular officer is doubtful, the correctness of that opinion cannot be challenged before courts. When such a constitutional function is exercised on the administrative side of the High Court, any judicial review thereon should be made only with great care and circumspection and it must be confined strictly to the parameters set by this Court in several reported decisions. When the appropriate authority forms bona fide opinion that compulsory retirement of a judicial officer is in public interest, the writ Court under Article 226 or this Court under Article 32 would not interfere with the order.

123. Further this Court in *M.S. Bindra's* case (Supra) has used the phrase 'preponderance of probability' to be applied before recording adverse entry regarding integrity of a judicial officer. There is no manner of doubt that the authority which is entrusted with a duty of writing ACR does not have right to tarnish the reputation of a judicial officer without any basis and without any 'material' on record, but at the same time other equally important interest is also to be safeguarded i.e. ensuring that the corruption does not creep in judicial services and all possible attempts must be made to remove such a virus so that it should not spread and become infectious. When even verbal repeated complaints are received against a judicial officer or on enquiries, discreet or otherwise, the general impression created in the minds of those making inquiries or the Full Court is that concerned judicial officer does not carry good reputation, such discreet inquiry and or verbal repeated complaints would constitute material on the basis of which ACR indicating that the integrity of the officer is doubtful can be recorded. While undertaking judicial review, the Court in an appropriate case may still quash the decision of the Full Court on administrative side if it is found that there is no basis or material on which the ACR of the judicial officer was recorded, but while undertaking this exercise of judicial review and trying

to find out whether there is any material on record or not, it is the duty of the Court to keep in mind the nature of function being discharged by the judicial officer, the delicate nature of the exercise to be performed by the High Court on administrative side while recording the ACR and the mechanism/system adopted in recording such ACR.

124. From the admitted facts noted earlier it is evident that there was first a report of the Inspecting Judge to the effect that he had received complaints against the appellants reflecting on their integrity. It would not be correct to presume that the Inspecting Judge had written those remarks in a casual or whimsical manner. It has to be legitimately presumed that the Inspecting Judge, before making such remarks of serious nature, acted responsibly. Thereafter, the Full Court considered the entire issue and endorsed the view of the Inspecting Judge while recording the ACR of the appellants. It is a matter of common knowledge that the complaints which are made against a judicial officer, orally or in writing are dealt with by the Inspecting Judge or the High Court with great caution. Knowing that most of such complaints are frivolous and by disgruntled elements, there is generally a tendency to discard them. However, when the suspicion arises regarding integrity of a judicial officer, whether on the basis of complaints or information received from other sources and a committee is formed to look into the same, as was done in the instant case and the committee undertakes the task by gathering information from various sources as are available to it, on the basis of which a perception about the concerned judicial officer is formed, it would be difficult for the Court either under Article 226 or for this Court under Article 32 to interfere with such an exercise. Such an opinion and impression formed consciously and rationally after the enquiries of the nature mentioned above would definitely constitute material for recording adverse report in respect of an officer. Such an impression is not readily formed but after Court's circumspection, deliberation, etc. and thus it is a case of preponderance of probability for entertaining

a doubt about integrity of an official which is based on substance, matter, information etc. Therefore, the contention that without material or basis the adverse entries were recorded in the ACR of the appellants cannot be upheld and is hereby rejected.

125. On behalf of deceased R.S. Verma his learned Counsel had argued that ACRs for the years 1997, 1998 and 1999 were written in one go which is arbitrary and constitute malice in law. Pointing out to the Court that normal procedure followed by the Delhi High Court for communicating the ACRs is referred to in the circular dated 4.9.1998, according to which conducting of inspection and making of enquiries before condemning a judicial officer as regards his integrity is necessary, but this was not done in the case of the deceased and, therefore, his ACRs for the years 1997, 1998 and 1999 should have been ignored while deciding the question whether he was fit to be retained in service on attaining the age of 50 years. It was emphasized that all the entries should be communicated within a reasonable period so that the employee concerned gets an opportunity to make representation and that the representation is also decided fairly within a reasonable period, but this was not done in the case of the deceased officer. According to the learned counsel for the appellant, the requirement to write ACR on due date and communication thereof to the employee concerned within reasonable time flows from constitutional obligation of fairness, non-arbitrariness and natural justice as laid down in *Dev Dutt Vs. Union of India,* 2008 (8) SCC 725, and *Abhijit Ghosh Dastidar Vs. Union of India,* 2009 (16) SCC 146, and as this requirement was committed breach of in case of the deceased, ACRs for the years 1996 and 1997 had lost their significance and were irrelevant while considering case of the deceased officer for compulsory retirement. On behalf of the respondent High Court it was submitted that it was true that ACRs for the years 1997, 1998 and 1999 were recorded at one point and communicated thereafter, but a detailed note indicating the

circumstances in which ACRs for the years 1997, 1998 and 1999 were placed before the Full Court on 13.12.2000 after which ACRs were recorded and, therefore, in view of the explanation offered in the note which was noted by the Full Court on 13.12.2000, it is wrong to contend that ACRs for those three years could not have been taken into consideration before passing order of compulsory retirement against the deceased officer.

126. On consideration of the argument advanced by the learned counsel for the parties, this Court finds that it has been ruled by this Court that ACRs for several years should not be recorded at one go and communicated thereafter. Normally, entries in confidential records should be made within a specified time soon following the end of the period under review and generally within three months from the end of the year. Delay in carrying out inspections or making entries frustrates the very purpose sought to be achieved. The mental impressions may fade away or get embellished. Events of succeeding years may cast their shadow on assessment of previous years. In a given case, proper inspection might not have been conducted nor notes/findings of inspection might have been properly maintained. In such a case, there is every possibility of a judicial officer being condemned arbitrarily for no fault on his part. Therefore, recording of entries for more than one year, later on, at the same time should be avoided. However, the learned counsel for the respondent is right in contending that no decision has taken the view that merely for the reason that ACRs for more than one years are recorded at one point of time, the same are bad or that they would cease to be ACRs for the relevant years or that they should not be taken into consideration for any purpose or for the purpose of compulsory retirement. As stated earlier, in the normal course it would not be appropriate to record the ACRs of number of years at one point of time. However, at the same time it is not possible to lay down as an absolute proposition of law that irrespective of good, cogent, plausible and acceptable reasons, recording of

ACRs of number of years at once should always be regarded as illegal and bad for all purposes. This Court, while deciding the appeals, has gone through the record of the deceased officer, and other relevant documents produced by the High Court. From the record, this Court finds that all the columns of ACR forms for the years 1997, 1998 and 1999 were filled up by the inspecting judges respectively well in time for all these years, but the inspecting judges had not recorded any remarks concerning the judicial reputation for honesty and impartiality of the deceased officer as a corollary the column regarding **"**Net Result" for these years were left blank by them. Instead the learned inspecting judges had observed that these remarks be recorded by the Full Court. When such a course of action is adopted, the reason is obvious. There was something amiss in the estimation of the learned inspecting Judges which they wanted entire Full Court to consider and, therefore, refrained from making their observations. If everything had been all right, nothing prevented the learned Inspecting Judges from mentioning that the honesty of the deceased officer was not in doubt at all. However, when an inspecting judge receives certain complaints about the integrity of the officer concerned but has no means to verify the same, he leaves the matter to the Full Court, which appoints a Committee to go into the aspects and records relevant entries after report of the Committee is received. This is what precisely happened in the present case as well. Because of the aforesaid course adopted by the learned Inspecting Judges, the consideration of recording the ACR was deferred by the Full Court and ultimately, in its meeting held on 21.4.2001 in respect of the deceased officer the Full Court decided as under :-

> "Deferred. Referred to the Committee constituted to look into the allegations against the judicial Officers."

127. The matter was, therefore, examined by the Committee of two learned judges of the Delhi High Court constituted for this purpose. This committee made certain

discreet inquiries. The concerned Inspecting Judge(s) were also associated in deliberations by the Committee. The Committee gave its report dated 6.12.2001 as per which the information gathered by the Committee from various sources confirmed the allegation of doubtful integrity against the deceased officer. The matter was thereafter placed before the Full Court and the ACRs of the deceased officer were recorded for the years 1997, 1998 and 1999 on 13.12.2000. Thus there is sufficient explanation for recording the ACRs of three years at one time. It is wrong to contend that the ACRs for the years 1997, 1998 and 1999 should have been ignored while passing the order of compulsory retirement against the deceased officer. Therefore, the argument that ACRs for those years could not have been taken into consideration while deciding the question of suitability or otherwise to continue the deceased officer in service on attaining the age of 50 years, is hereby rejected. Even if it is assumed for the sake of argument that ACRs recorded for the three years, i.e., 1997, 1998 and 1999 recorded at one go, irrespective of reasons, good, bad or indifferent, must be ignored for all time to come and for all the purposes, this Court finds that the ACRs for the year 1999 were recorded with promptitude and without any delay in the year 2000. It is not argued on behalf of the deceased officer that there was any delay in recording ACRs for the year 1999. For the year 1999, the deceased officer was assessed as "C Below Average". The ACRs for the year 1999 could have been taken into consideration while assessing the service record of the deceased officer for determining the question whether the deceased officer was fit to be continued in service on his attaining the age of 50 years. What is the effect of ACRs for the year 1999 when taken into consideration along with other service record is proposed to be considered at a little later stage.

128. On behalf of deceased officer Mr. R.S. Verma, it was argued that Mr. Verma's ACRs for the years 1997, 1998 and 1999, which were written at one go and also were

communicated at one go, suffer from arbitrariness, unreasonableness and constitute malice in law. This Court has come to the conclusion that writing of ACRs for the years 1997, 1998 and 1999 at one time as also communication of the same at one time was justified in the circumstances of the case. Therefore, it is difficult to uphold the contention raised on behalf of Mr. Verma that writing of ACRs for three years at one go and communication of the same at one go suffer from arbitrariness, unreasonableness and constitute malice in law.

129. Similarly, the plea raised by Mr. Rohilla that the impugned judgment is not sustainable in law because the act of the High Court in making recommendation to Lt. Governor for retiring him compulsorily emanates from mala fide, arbitrariness and perversity, has no substance. The reason given by Mr. Rohilla to treat the order of his compulsory retirement as mala fide, arbitrary and perverse is that while communicating adverse remarks for the year 2000 vide letter dated 21.9.2001, High Court had granted six weeks' time to make representation, but much before the representation could be caused, the order of compulsory retirement dated 27.9.2001 was communicated, coupled with the fact that on that date, the writ petition filed by him against his reversion was pending. This Court has already taken the view that merely because Mr. Rohilla did not get any opportunity to make representation against the adverse remarks for the year 2000, those remarks could not have been ignored by the competent authority while passing the order of compulsory retirement against him because the settled law is that even uncommunicated adverse remarks can be taken into consideration while passing the order of compulsory retirement. So far as the writ petition, filed by Mr. Rohilla against his reversion is concerned, this Court finds that the order of compulsory retirement was not passed to render the said petition infructuous. The order of compulsory retirement has been passed on assessment of whole service record of Mr. Rohilla. Thus, Mr. Rohilla has failed to substantiate

the plea that the order of his compulsory retirement is either mala fide or arbitrary or perverse.

130. Mr. R. S. Rohilla had argued that the order of the Lt. Governor compulsorily retiring him from service was by invoking FR 56(j) which was not applicable to his case as he was a member of a Delhi Higher Judicial Service and such an order could have been passed only under Rule 27 of the Delhi Higher Judicial Service read with Rule 16 of the Indian Administrative Services and, therefore, the same should be set aside. It is rightly pointed out by the learned counsel for the High Court that though the said plea was raised by Mr. Rohilla the same was given up before the High Court, and it is so recorded by the Division Bench in paragraph 31 of the impugned judgment. Thus, in normal circumstances, Mr. Rohilla would not be justified in arguing the same point before this Court. However, even if it is taken for granted that he is entitled to argue the point before this Court because it is a pure question of law, this Court does not find any substance what so ever in the same. What is relevant to be noticed is that under both the Rules there is power to compulsorily retire a judicial officer after he attains the age of 50 years in public interest. Therefore, whether the Lt. Governor had invoked FR 56 (j) or Rule 27 of the DJS is of little consequence since both the Rules make provision for retirement of a judicial officer compulsorily from service after he attains the age of 50 years in public interest. In fact Mr. Rohilla should have pointed out to the High Court the relevant and material fact that for two years that is for the year 1993 and for the year 1994 he had suffered adverse ACR 'C' "Integrity Doubtful" and that the representations made by him were rejected which were not challenged by him before higher forum. In any view of the matter, it is settled law that when power can be traced to a valid source, the fact that the power is purported to have been exercised under a wrong provision of law, would not invalidate exercise of power.

131. To sum up, this Court finds that so far as deceased

officer Mr. Rajinder Singh Verma is concerned, he was appointed in the year 1995 and as on 21.9.2001 his ACRs for six years were available. The grading given to him for these years was as follows: -

Year	**Grading**	
1995	"B" (Average)	No representation was made against this remark, nor was it challenged before any authority.
1996	"B" (Average)	No representation was made against this remark, nor was it challenged before any authority.
1997	"C" (Below Average)	
1998	"C" (Below Average)	
1999	"C" (Below Average)	
2000	"C" (Integrity doubtful)	

132. The report dated September 21, 2001 of the Screening Committee further reveals that the Screening Committee had considered the entire record relevant to his work and conduct and found that throughout his career, he had been assessed and graded either as "average officer" or "officer below average" and in the year 2000, his integrity was found to be doubtful. The Screening Committee had also found that for the year 1998, the Inspecting Judge of Mr. Verma had made a remark that the judgments and orders written by him were just average; whereas the Inspecting Judges for the year

1996 to 2000 had not recorded any remark concerning his judicial reputation for honesty and impartiality and the column "Net Result" was left to be recorded by the Full Court. The record further shows that the judicial work was withdrawn from him with effect from December 8, 2000 upon the recommendation of the Committee of Judges in its report dated December 6, 2000. This decision was never challenged by him before any authority. It goes without saying that withdrawal of judicial work from a judicial officer is a serious matter and such a drastic order would not have been passed unless the judicial work performed by him was found to be shocking and perverse. Later on, all work including administrative work was withdrawn from him. Further, pursuant to the decision taken by the Full Court in its meeting held on April 21, 2001 referring the matter to a Committee of Judges to make inquiry into his work and conduct, the Committee had submitted its report dated September 8, 2001 in which it was observed and recorded that he did not enjoy good reputation and integrity. There was gradual down fall in his performance as a judicial officer. The service record of the deceased officer is so glaring that on the basis thereof any prudent authority could have come to a reasonable conclusion that it was not in the public interest to continue him in service and that he should be compulsorily retired from service. Therefore, the order of compulsory retirement passed against the deceased officer is not liable to be set aside.

133. So far as Mr. Rohilla is concerned, he was appointed as a Civil/Sub-Judge in the Subordinate Judicial Services on May 5, 1972. On June 17, 1995, he was confirmed as an officer in the Delhi Judicial Services. He was granted Selection Grade on June 3, 1980 and was promoted to the Higher Judicial Services as Additional District and Sessions Judge on November 1, 1989. One anonymous complaint was received against him and after looking into the same, he was reverted to Subordinate Judicial Services by order dated February 15, 1995, which was challenged by him in Writ Petition No. 4589

of 1995. Meanwhile, he was served with a communication from the High Court of Delhi dated October 23, 1997, wherein his ACR for the year 1996 was graded as "C", i.e., below average. Thereupon, he had made a representation, which was rejected on December 2, 1998. No steps were taken by him to challenge the said decision and thus, the grading awarded to him was accepted by him. Thereafter, he received a communication from the High Court in the year 1999, wherein he was informed that in his ACR for the year 1997, he was awarded "B" grade. Again, by a communication dated February 9, 2000 forwarded by the High Court, he was informed that in his ACR for the year 1998, he was graded "B". He made a representation against his ACR for the year 1998 in the year 2000. As noticed earlier, in the year 2000, he was communicated ACR indicating that his integrity was doubtful. Thus, the service record of Mr. Rohilla indicates that he was an officer "below average" or at the best an average officer and his integrity was doubtful. Under the circumstances, the decision taken by the competent authority to retire him from service cannot be said to be illegal in any manner whatsoever.

134. So also, the record of Mr. P.D. Gupta shows that he joined Delhi Judicial Service on January 28, 1978. Admittedly, his work and conduct from 1978 to 1992 was graded as "B", which means his performance was that of an average officer. In the year 1995, the Inspecting Judge had reported that though he had not inspected the court of Mr. Gupta, he had heard complaints about his integrity and, therefore, column Nos. 6 and 7 were left blank to be filled up by the Full Court. On May 18, 1986, the Full Court had recorded his ACR for the year 1994-95 as "C" (integrity doubtful) and on the basis of the same, denied promotion to him. He had filed a representation against the same, but it was rejected by the High Court by an order dated September 5, 1997. Again on September 26, 1997, the Full Court of Delhi High Court had recorded his ACR for the year 1996 as "B". Against rejection of his representation, which was made with reference to ACRs for the year 1994-95, he had

filed Writ Petition (C) No. 4334 of 1997 and in the said writ petition he had made a grievance for his non-promotion to Delhi Higher Judicial Service. Pending the said petition, on May 22, 1998, the Full Court had recorded his ACR for the year 1997 as "B". The writ petition filed by Mr. Gupta was allowed by a Single Judge of the High Court, which decision was set aside in L.P.A. No. 329 of 1999, filed by the High Court administration, and the order passed by the Division Bench was ultimately upheld by this Court when the special leave petition filed by Mr. Gupta against the decision rendered in the L.P.A. was dismissed. In his ACR for the year 2000, he was categorized as an officer having doubtful integrity. Thus, the record shows that for the year 1994-95 his integrity was found to be of doubtful character. For rest of the years, his performance was that of an average officer and in the year 2000, his integrity was again found doubtful. Under the circumstances, the compulsory retirement of Mr. Gupta can never be said to be arbitrary or illegal.

135. Having regard to their entire service record of the three officers, this Court is of the opinion that the competent authority was justified in passing the order retiring them compulsorily from service. Mere glance at the ACRs of the deceased officer and two other appellants makes it so glaring that on the basis thereof the decision to compulsorily retire them would clearly be without blemish and will have to be treated as well founded. This Court finds that before passing the orders in question, whole service record of each of the officer was taken into consideration. Keeping in view the comprehensive assessment of service record, the Screening Committee rightly recommended that the three officers should be prematurely retired in public interest forthwith. The Full Court after considering the report of the Screening Committee and also after taking into consideration the record of work and conduct, general reputation and service record of the three officers correctly resolved that it be recommended to the Lt. Governor of NCT of Delhi to retire the judicial officers forthwith in public

interest. The orders do not entail any punishment in the sense that all the officers have been paid retiral benefits till they were compulsorily retired from service.

136. On a careful consideration of the entire material, it must be held that the evaluation made by the Committee/Full Court, forming their unanimous opinion, is neither so arbitrary nor capricious nor can be said to be so irrational, so as to shock the conscience of this Court to warrant or justify any interference. In cases of such assessment, evaluation and formulation of opinions, a vast range of multiple factors play a vital and important role and no one factor should be allowed to be blown out of proportion either to decry or deify an issue to be resolved or claims sought to be considered or asserted. In the very nature of things, it would be difficult, nearing almost an impossibility to subject such exercise undertaken by the Full Court, to judicial review except in an extraordinary case when the Court is convinced that some real injustice, which ought not to have taken place, has really happened and not merely because there could be another possible view or someone has some grievance about the exercise undertaken by the Committee/Full Court. Viewed thus, and considered in the background of the factual details and materials on record, there is absolutely no need or justification for this Court to interfere with the impugned proceedings. Therefore, the three appeals fail and are dismissed. Having regard to the facts of the case, there shall be no order as to costs.

R.P. Appeals dismissed.

ANIL GILURKER

v.

BILASPUR RAIPUR KSHETRIA GRAMIN BANK & ANR.

(Civil Appeal Nos. 7864-7865 of 2011)

SEPTEMBER 15, 2011

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

Service Law – Dismissal from service – Allegation against appellant, Branch Manager in the Bank that he sanctioned and distributed loans to brick manufacturing units but did not disburse the entire loan amount to the borrowers and misappropriated part of the loan amount – Issuance of charge-sheet – Punishment of removal of service imposed by the disciplinary authority and the same was upheld by the appellate authority – Writ Petition by appellant – Single Judge of the High Court holding that there were no specific charges in the charge-sheet, quashed the order of removal from service and issued direction for reinstatement of the appellant in service with continuity in service – Division Bench of the High Court directed the disciplinary authority to consider the inquiry report, the evidence recorded by the Enquiry Officer and the documents relied upon in the charge-sheet and take a fresh decision in accordance with law – On appeal, held: Charges should be specific, definite and giving details of the incident which formed the basis of charges and no enquiry can be sustained on vague charges – On facts, a plain reading of the charges and the statement of imputations show that only vague allegations were made against the appellant – No statement of imputations giving the particulars of the loan accounts or the names of the borrowers, the amounts of loans sanctioned, disbursed and misappropriated were furnished to the appellant – Thus, the order of the Division Bench is set aside and that of the Single Judge is restored – Direction of the Single Judge to pay Rs.1.5 lacs to the appellant as

compensation in lieu of arrears of salary is deleted.

Surath Chandra Chakrabarty v. State of West Bengal **(1970) 3 SCC 548: 1971 (3) SCR 1;** *Sawai Singh v. State of Rajasthan* **(1986) 3 SCC 454: 1986 (2) SCR 957;** *Union of India and Ors. v. Gyan Chand Chattar* **(2009) 12 SCC 78: 2009 (10) SCR 124 – referred to.**

Case Law Reference:

1971 (3) SCR 1	**Referred to**	**Para 4**
1986 (2) SCR 957	**Referred to**	**Para 4**
2009 (10) SCR 124	**Referred to**	**Para 4**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7864-7865 of 2011.

From the Judgment & Order dated 28.04.2010 of the High Court of Madhya Pradesh, Principal Seat at Jabalpur, M.P. Passed in W.A. Nos. 57 and 82 of 2010.

Ravindra Shrivastava, Anup Jain, Kunal Verma for the Appellant.

Akshat Shrivastava, P.P. Singh, Pooja Shrivastava for the Respondents.

The following order of the Court was delivered by

O R D E R

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

2. These are appeals against the order dated 28.04.2010 of the Division Bench of the Chhattisgarh High Court in Writ Appeal No.57 of 2010 and Writ Appeal No.82 of 2010.

3. The facts very briefly are that on 03.05.1984 the appellant was appointed as a Branch Manager in the Bilaspur

Raipur Kshetriya Gramin Bank by way of direct recruitment and he successfully completed the period of probation. While he was working on the post of Branch Manager in Branch Patewa, he sanctioned and distributed loans to a large number of brick manufacturing units under the Integrated Gram Development Programme. The disciplinary authority placed the appellant under suspension and issued a charge-sheet dated 31.01.1989 against him for misconduct punishable under Regulation 30(1) of the Staff Service Regulations. In the charge-sheet, it was alleged that the appellant sanctioned and distributed loans to a large number of brick manufacturing units in a very short period of time, but had not in fact disbursed the entire loan amount to the borrowers and part of the loan amount was misappropriated by him. The appellant was asked to submit his written defence in reply to the charges. On 11.02.1989, the appellant submitted his written defence denying the allegations made in the charge-sheet. An Inquiry Officer enquired into the charges against the appellant and submitted his report with a finding that the witnesses produced by the Bank had not said that what was actually advanced was less than the loan amount, and although there were some serious irregularities, the charge of financial corruption against the appellant had not been proved. The disciplinary authority in his order dated 10.09.1991 disagreed with the findings of the Inquiry Officer and held that the charge of financial corruption against the appellant had been proved and that the appellant had not only violated the Rules of the Bank, but had also tried to cause financial loss to the Bank and by abusing his position, had lowered down the reputation of the Bank. In the order dated 10.09.1991, the disciplinary authority proposed to impose the punishment of removal of the appellant along with forfeiture of the contribution of the Bank to the Provident Fund of the appellant under Section 50(1) of the Staff Regulations. By the order dated 10.09.1991, the disciplinary authority directed that a copy of the order and report of the Inquiry Officer be sent to the appellant to show-cause why he should not be punished as

proposed. On 18.09.1991, the appellant submitted his reply to the show-cause notice and on 25.11.1991, the disciplinary authority passed the order of removal. Aggrieved, the appellant filed an appeal against the order of the disciplinary authority, but the appeal was dismissed by the appellate authority.

4. The appellant then filed a Writ Petition before the Madhya Pradesh High Court challenging the order of removal passed by the disciplinary authority. After the reorganization of the Madhya Pradesh in the year 2000, the Writ Petition was transferred to the Chhattisgarh High Court and was heard by a learned Single Judge of the Chhattisgarh High Court. The learned Single Judge in his judgment dated 22.02.2010 found that in the charge-sheet, there is no reference to any specific documents or to the names of the persons who had not been given the loan amounts and accordingly took the view that in the charge-sheet there were no specific charges. Relying on the decisions of this Court in *Surath Chandra Chakrabarty v. State of West Bengal* [(1970) 3 SCC 548], *Sawai Singh v. State of Rajasthan* [(1986) 3 SCC 454] and *Union of India & Ors. v. Gyan Chand Chattar* [(2009) 12 SCC 78], the learned Single Judge held that when the charges levelled against the delinquent officer in the charge-sheet were vague and not specific and the entire enquiry is vitiated. The learned Single Judge quashed the orders of the disciplinary authority and the appellate authority and directed reinstatement of the appellant in service with continuity in service and without loss of seniority in the post to which he would be entitled to. The learned Single Judge further directed that the appellant will be entitled to compensation of Rs.1.5 lacs in lieu of arrears of his salary.

5. Aggrieved by the order of the learned Single Judge granting only Rs.1.5 lacs as compensation in lieu of arrears of salary, the appellant filed Writ Appeal No.57 of 2010 and aggrieved by the impugned order of learned Single Judge in the Writ Petition quashing the orders of the disciplinary authority

and the appellate authority, the respondents filed Writ Appeal No.82 of 2010. After hearing the Writ Appeals, the Division Bench of the Chhattisgarh High Court held in the impugned order that the charges against the appellant as described in the charge-sheet were not vague as on the basis of documents mentioned in the charge-sheet, it has been alleged that the appellant had sanctioned the loans and had shown the loans only on paper but had not actually disbursed the loans to the borrowers. The Division Bench of the High Court, however, held that as the disciplinary authority had disagreed with the findings in the inquiry report, he should have furnished his reasons for the disagreement to the appellant before passing the order of punishment. The Division Bench of the High Court further held that the disciplinary authority cannot conduct further enquiry *suo motu* to fill up the lacuna in the enquiry. The Division Bench of the High Court allowed both the appeals and directed that the disciplinary authority will consider the inquiry report, the evidence recorded by the Enquiry Officer and the documents relied upon in the charge-sheet and take a fresh decision in accordance with law. The Division Bench of the High Court further observed in the impugned order that if the disciplinary authority takes a view on reconsideration of the matter not to take any further action against the appellant, he shall be given all the consequential benefits along with reinstatement.

6. We have heard Mr. Ravindra Shrivastava, learned counsel for the appellant and Mr. Akshat Shrivastava, learned counsel for the respondents, and we are of the considered opinion that the Division Bench of the High Court was not correct in taking a view in the impugned order that the charges against the appellant were not vague. The English translation of the charges and the statement of imputations extracted from the charge-sheet dated 31.01.1989 served on the appellant is reproduced hereinbelow:

Charge Sheet No. D/A/756 dated 31.1.89	
Statement of imputations	Charge
While working as Branch Manager in Branch Patewa, in the first quarter of the year 1988, have sanctioned and distributed loan of brick manufacturing in large number under the Integrated Gram Development Programme by committing unauthorized irregularities contrary to the rules and interest of the bank and administration. In most of these loan cases you have shown cash distribution of the entire loan and has given only one minor part of the loan amount to the Borrower in cash and from the balance amount, some amount has been deposited in their saving accounts (deducting contribution amount equivalent to the amount for closing the loan account) and the remaining amount has been grabbed by you, branch employees and in collusions with the Gram Sewaks. After a very little time adjusting the contribution amount in these loan accounts, you have withdrawn the amount from the Saving Accounts of the concerned borrowers, you have closed most of the loan accounts much before the time fixed for the repayment.	Tempted with his malafide intention serious violation of the Rules and interests of the Bank and Administration, in a very short period of time sanction the loan of Brick manufacturing in large scale under the "I. Gram. Dev. Prog." And distributed and in most of the loan cases, without actually distribution of the entire loan amount, you have completed the documentary proceedings, and showing the cash distribution of the entire loan amount, only a minor share of the loan has been given cash to the concerned borrower and from the remaining amount some amount has been deposited in the account of the borrower and the balance amount in connivance with other persons have been grabbed. With the intention to cover up your this act, only after a few time of the loan distribution, you have withdrawn the amount from the saving accounts of the concerned borrowers and most of the accounts have been closed before time. As such for the fulfillment of your personal gain you have deliberately misused the position of your post and has committed financial corruption in large scale. From which cause serious shock the interests of the bank administration and the borrower also, the reputation of the bank has also been lowered down. Your this act is a misconduct under Sections 17, 19 and 30(1) of the Employees Collection Service Regulations.

7. A plain reading of the charges and the statement of imputations reproduced above would show that only vague allegations were made against the appellant that he had sanctioned loans to a large number of brick manufacturing units by committing irregularities, but did not disburse the entire loan amount to the borrowers and while a portion of the loan amount was deposited in the account of the borrowers, the balance was misappropriated by him and others. The details of the loan accounts or the names of the borrowers have not been mentioned in the charges. The amounts of loan which were sanctioned and the amounts which were actually disbursed to the borrowers and the amounts alleged to have been misappropriated by the appellant have not been mentioned.

8. We also find that along with the charge-sheet dated 31.01.1989 no statement of imputations giving the particulars of the loan accounts or the names of the borrowers, the amounts of loans sanctioned, disbursed and misappropriated were

furnished to the appellant, and yet the disciplinary authority has called upon the appellant to submit his written defence statement in reply to the charges. We fail to appreciate how the appellant could have submitted his written statement in defence in respect of the charges and how a fair enquiry could be held unless he was furnished with the particulars of the loan accounts or the names of the borrowers, the amounts of loan sanctioned, the amounts actually disbursed and the amounts misappropriated were also furnished in the charge-sheet.

9. As has been held by this Court in *Surath Chandra Chakrabarty v. State of West Bengal* (supra):

> "5. .....The grounds on which it is proposed to take action have to be reduced to the form of a definite charge or charges which have to be communicated to the person charged together with a statement of the allegations on which each charge is based and any other circumstance which it is proposed to be taken into consideration in passing orders has also to be stated. This rule embodies a principle which is one of the basic contents of a reasonable or adequate opportunity for defending oneself. If a person is not told clearly and definitely what the allegations are on which the charges preferred against him are founded he cannot possibly, by projecting his own imagination, discover all the facts and circumstances that may be in the contemplation of the authorities to be established against him....."

10. This position of law has been reiterated in the recent case of *Union of India & Ors. v. Gyan Chand Chattar* (supra) and in Para 35 of the judgment as reported in the SCC, this Court has observed that the law can be summarized that an enquiry is to be conducted against any person giving strict adherence to the statutory provisions and principles of natural justice and the charges should be specific, definite and giving details of the incident which formed the basis of charges and no enquiry can be sustained on vague charges.

11. We, therefore, allow these appeals, set aside the impugned order of the Division Bench and restore the order of the learned Single Judge. Considering the peculiar facts and circumstances, we delete the direction of the learned Single Judge to pay Rs.1.5 lacs to the appellant as compensation in lieu of arrears of salary and we are also not inclined to grant any backwages to the appellant. There shall be no order as to costs.

N.J. Appeals allowed.