ARULMIGHU LAKSHMI NARAYANASWAMY TEMPLE, REP. BY ITS CHAIRMAN, BOARD OF TRUSTEES
v.
NALLAMMAL (DEAD) THR. LRS. & ORS.
(Civil Appeal No.3537 of 2002)

SEPTEMBER 15, 2011

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

Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act, 1963:

Object of the Act – Discussed.

ss.2(5), 8 – Lands in question notified as minor Inam lands under the Act – The Inams held not only by the appellant-Temple but also by other four temples and these particulars reflected in the Inam settlement proceedings and title deeds issued to the grantees – Whether proceedings can be taken for issue of Ryotwari patta under the Act – Held: Once the lands are notified as minor Inam lands under the Act, the same is binding on the authorities constituted under the Act and they cannot go beyond the Act and decide the character of the lands, namely, whether the lands are minor Inam lands or not – Proceedings can be taken for issue of Ryotwari patta under the Act.

***Words and phrases**: Inam, Inam lands, Melvaram, Kudiwaram – Meaning of.*

The question which arose for consideration in the instant appeal was whether the lands in question situated in Komarapatayam Agraharam hamlet were not minor inam lands and, therefore, they were not liable to be resumed and converted into Ryotwari lands after the commencement of the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act, 1963.

Dismissing the appeal, the Court

HELD: 1. The Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act, 1963 was enacted to provide for the acquisition of the rights of Inamdars in minor Inams in the State of Tamil Nadu and the introduction of Ryotwari settlement in such Inams. By virtue of Section 2(5), "Inam" means (i) a grant of the melvaram in any inam land; or (ii) a grant of both the melvaram and the kudiwaram in any inam land which grant has been made, confirmed or recognized by the Government. The expression "Malevarm" referred to in Section 2(5) means the share of the produce due to the landlord and the expression "Kudiwaram" means the cultivator's share of the produce. Chapter III of the Act deals with "Grant of Ryotwari Pattas". Section 8 deals with grant of Ryotwari Pattas. In terms of Section 8, any person claiming to be entitled to Kudiwaram right has to prove the same by virtue of any grant in his favour or in favour of his predecessors-in-interest and the Kudiwaram interest being a peculiar concept, depending upon the status and grant only, could not be claimed to have been acquired by mere possession or cultivation of lands for any length of time. Such rights as an ordinary cultivating tenant, have got to be asserted or sustained or substantiated under the ordinary tenancy law. [Paras 6, 7] [633-H; 634-A-C-E-G]

2. It was not in dispute that in respect of suit lands, the Inam grant was confirmed by the British Government and title deed was also issued in favour of the appellant-Temple by the Inam Commissioner. Inasmuch as the lands were Minor Inam lands, they were notified and taken over by the Tamil Nadu Government under 1963 Act, therefore, patta proceedings were initiated under the said Act and the Assistant Settlement Officer granted Ryotwari Patta in favour of the appellant-Temple at Komarapalyam

in respect of Survey Nos. 2/1, 2/2, 3/1 and 3/3 and classified Survey No. 3/2 as Cart track Poramboke. [Para 8] [635-C-D]

K.M. Sengoda Goundar & Ors. v. State of Madras & Anr. **(1973) 2 SCC 662;** *Sellappa Goundan & Ors. v. Bhaskaran & Ors.* **(1960) 2 MLJ 363 –Distinguished.**

3. It is clear that these Inams were held not only by the appellant-Temple but also by other four temples and these particulars were reflected in the Inam settlement proceedings and title deeds were issued to those grantees. The extracts from the Fair Inam Register, clearly supported the stand of the respondents. Once the lands are notified as minor Inam lands under 1963 Act, the same is binding on the authorities constituted under the Act. Thereafter, they cannot go beyond the Act and decide the character of the lands, namely, whether the lands are minor Inam lands or not. The impugned order passed by the High Court is upheld. In as much as the High Court remanded the matter to the Tribunal to decide the case on merits, the Tribunal is directed to dispose of the same as directed by the High Court. [Paras 11-13] [638-A-E]

Case Law Reference:

(1973) 2 SCC 662	**referred to**	**Paras 2, 4**
(1960) 2 MLJ 363	**relied on**	**Para 4**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3537 of 2002.

From the Judgment & Order dated 09.10.2000 of High Court of Judicature at Madras in S.T.A. No. 12 of 1996.

R. Venkataramani, K. Ramamoorthy, R. Sundravardhan, L. Dakshinamurhty, Alto K. Joseph, R. Nedumaran, A.T.M. Sampath, T.S. Shanthi, P. Siva Kumar, Ram Pal Roy, R.N. Keshwani for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM,J. 1. This appeal is filed against the final judgment and order dated 09.10.2000 passed by the High Court of Judicature at Madras in S.T.A. No. 12 of 1996 whereby the Division Bench of the High Court allowed the appeal filed by the respondents herein and set aside the judgment and order dated 15.07.1996 passed by the Minor Inams Abolition Tribunal (Subordinate Judge), Salem (hereinafter referred to as "the Tribunal") in M.I.A. No. 1 of 1993 in favour of the appellant-Temple herein.

2. **Brief facts:**

(a) According to the appellant-Temple, in the year 1760, Krishna Raja Udayar, the Rajah of Mysore, granted the village of Jagadapady or Nattapatti together with 12 hamlets, to certain Brahmins. Komarapalayam was one of the 12 hamlets. The grant, however, was not by way of gift of either the land or any portion of the assessment thereon. A number of Brahmins subscribed and collected a sum of Rs.50,000/- "Rajagopala Pagodas". Four of them, who represented the others as well, paid the amount into the treasury and obtained a grant of Jagadapady and 12 hamlets rent free from the ruler. When Tippu Sultan came to power, he resumed six of the 12 hamlets, allowing the successors of the original grantees to remain in possession of the rest without any obligation to pay any rent on that portion of the village. On the assumption of sovereignty by the British, Captain Macleod confirmed the title on the successors of the grantees in regard to the lands in their possession. During the enquiry by the Inam Commission, it was found that the inam was enjoyed in 110 vritties, however, only persons holding 90 vritties appeared and filed statements and there was no claim for about 20 vritties. The Inam Commissioner confirmed the inam on 26.01.1863 subject to an assessment of Rs. 566-11-3 in addition to the quit rent of Rs. 299-12-0 and Title Deed No. 1164 was issued in the name of the appellant-Temple.

(b) When the Madras Inam Estates (Abolition and Conversion into Ryotwari) Act, 1963 (Act No. 26 of 1963) was enacted, the aggrieved parties challenged the validity of the Notification issued by the State Government by filing a writ petition before the High Court on the ground that Komarapalayam hamlet is not an inam and, therefore the Notification has no application to that hamlet. They also challenged the validity of the aforesaid Act. The High Court, by order dated 24.06.1966, upheld the validity of the Act. On appeal, this Court, by judgment dated 17.08.1973, confirmed the decision of the High Court in *K.M. Sengoda Goundar & Ors. vs. State of Madras & Anr.,* (1973) 2 SCC 662.

(c) However, *suo motu* proceedings were taken by the Assistant Settlement Officer, Salem under the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act, 1963 (Act No. 30 of 1963) (in short "Act No. 30 of 1963"), on the ground that the lands in question situated in Komarapalayam Agraharam hamlet are minor inam lands and, therefore, they are liable to be resumed and converted into Ryotwari lands after the commencement of Act No. 30 of 1963. The Assistant Settlement Officer, by order dated 20.04.1981, granted Ryotwari Patta in favour of the appellant-Temple for Survey Nos. 2/1, 2/2, 3/1 and 3/3 and classified Survey No. 3/2 as Cart track Poramboke.

(d) Against the said classification, the appellant-Temple filed M.I.A. No. 27 of 1981 before the Tribunal and the other claimants – respondents herein filed M.I.A. Nos. 29-31 and 35 of 1981. By order dated 21.10.1982, the Tribunal allowed all the appeals and remanded the matter to the Assistant Settlement Officer for fresh disposal.

(e) Against the said order of the Tribunal, the appellant-Temple filed S.T.A. Nos. 34-37 of 1983 before the High Court. The High Court, vide order dated 17.08.1988, dismissed the appeals. In the meanwhile, portion of Survey Nos. 3/1 and 3/3 was acquired by the State Government under the Land

Acquisition Act for Municipal Shandy and compensation amount was deposited in the Court by the Land Acquisition Officer by his award being L.A. No. 2 of 1983 dated 01.07.1983.

(f) Remand Enquiry was taken up by the Assistant Settlement Officer, Dharapuram in S.R. No.4/90 and by order dated 16.10.1992, the patta was granted in favour of the Temple in respect of all the lands except Survey No. 3/1A in favour of the respondents. The other lands in Survey Nos. 3/1B and 3/3 were registered in the name of the Municipality.

(g) Aggrieved by the said order of the Assistant Settlement Officer granting patta in respect of Survey No. 3/1A in favour of the respondents, the appellant-Temple preferred an appeal before the Tribunal in M.I.A. No.1 of 1993. The Tribunal, by order dated 15.07.1996, allowed the appeal and set aside the order passed by the Assistant Settlement Officer, Dharapuram.

(h) Against the said order of the Tribunal, respondent Nos. 1-4 preferred an appeal being S.T.A. No. 12 of 1996 before the High Court of Madras. The Division Bench of the High Court, by impugned judgment dated 09.10.2000, allowed the appeal and set aside the order passed by the Tribunal and remanded the matter to the Tribunal to decide the case on merits.

(i) Aggrieved by the said judgment of the High Court, the appellant-Temple has preferred this appeal by way of special leave petition before this Court.

3. Heard, Mr. R. Venkataramani, learned senior counsel for the appellant-Temple and Mr. K. Ramamoorthy and Mr. R. Sundaravardhan, learned senior counsel for the respondents.

Submissions:

4. Mr. Venkataramani, learned senior counsel for the appellant-Temple, after taking us through the order of the original authority-Assistant Settlement Officer, the Tribunal and the impugned order of the High Court submitted that the High Court

has committed a grave error in not following the judgment of this Court in *K.M. Sengoda Goundar* (supra) wherein, this Court, while dealing with the same Act, i.e., Act No. 30 of 1963 has categorically held that the entire Komarapalayam village in which properties in question are situated is not an Inam village as the original grant was made in consideration of payment of money by the grantees and, therefore, the grant was not an Inam grant. He also submitted that the High Court is not correct in law in reversing the order of the Tribunal holding that the Act No. 30 of 1963 is not applicable to the properties in question. On the other hand, Mr. K. Ramamoorthy and Mr. R. Sundaravardhan, learned senior counsel for the respondents submitted that the Tribunal, by order dated 15.07.1996 erroneously held that the lands are outside the purview of the provisions of Act 30 of 1963 and, therefore, lands cannot be subjected to the grant of Ryotwari Patta under the provisions of the said Act. On this sole ground, the order of the Assistant Settlement Officer was set aside by the Tribunal. They further submitted that the decisions in *K.M. Sengoda Goundar* (supra) and *Sellappa Goundan & Ors. vs. Bhaskaran & Ors.,* (1960) 2 MLJ 363, relied on by the appellant, are related only to the village of Komarapalayam Agraharam and not to the minor Inam grants existing in the said village. They further highlighted that these two decisions have nothing to do with the minor inam grants that were in existence in Komarapalayam Agraharam and notified under the Act No. 30 of 1963. They also submitted that the impugned order of the High Court is in order and the matter has to be remitted to the Tribunal to decide the issue on merits as directed by the High Court.

5. We have carefully considered the rival submissions and perused the relevant materials.

6. Though Mr. Venkataramani, learned senior counsel has highlighted certain provisions from the Madras Estates Land Act, 1908 and the Tamil Nadu Estates (Abolition and Conversion into Ryotwari) Act, 1948, for the disposal of the

present appeal, we are concerned only with the Tamil Nadu Act No. 30 of 1963. The Act was enacted to provide for the acquisition of the rights of Inamdars in minor Inams in the State of Tamil Nadu and the introduction of Ryotwari settlement in such Inams. Relevant provisions of the said Act as mentioned in Section 2 are as under:-

> "(5) "**inam**" means—
>
> (i) a grant of the melvaram in any inam land; or
>
> (ii) a grant of both the melvaram and the kudiwaram in any inam land which grant has been made, confirmed or recognized by the Government.
>
> (6) "**inamdar**" in respect of any inam means the person who held the inam immediately before the appointed day;
>
> (7) "**inam land**" means any land comprised in a minor inam;"

7. The expression "**Malevarm"** referred to in Section 2(5) means the share of the produce due to the landlord and the expression "**Kudiwaram"** means the cultivator's share of the produce. Chapter III of the Act deals with "Grant of Ryotwari Pattas". Section 8 deals with grant of Ryotwari Pattas. In terms of Section 8, any person claiming to be entitled to Kudiwaram right has to prove the same by virtue of any grant in his favour or in favour of his predecessors-in-interest and the Kudiwaram interest being a peculiar concept, depending upon the status and grant only, could not be claimed to have been acquired by mere possession or cultivation of lands for any length of time. Such rights as an ordinary cultivating tenant, have got to be asserted or sustained or substantiated under the ordinary tenancy law. Inasmuch as further details are not required, there is no need to delve into other provisions of the Act.

8. From the materials placed, it is seen that the following lands were granted as "Devadayam Inam" in favour of the

appellant-Temple in Komarapalayam village, Salem District, Tamil Nadu:

"S.No.	**Extent**
2/1	0-51-0
2/2	1-41-5
3/1	3-92-5
3/3	1-08-0
3/2	0-12-0"

It is also not in dispute that the Inam grant was confirmed by the British Government and title deed was also issued in favour of the appellant-Temple by the Inam Commissioner. Inasmuch as the lands were Minor Inam lands, they were notified and taken over by the Tamil Nadu Government under Act 30 of 1963, therefore, patta proceedings were initiated under the said Act and the Assistant Settlement Officer, Thiruchengodu, by order dated 20.04.1981 granted Ryotwari Patta in favour of the appellant-Temple at Komarapalyam in respect of Survey Nos. 2/1, 2/2, 3/1 and 3/3 and classified Survey No. 3/2 as Cart track Poramboke.

9. Aggrieved by the above order of the Assistant Settlement Officer, the Temple filed an appeal to the Tribunal being M.I.A. No. 27 of 1981 against the classification of Survey No. 3/2 as Cart track and the respondents and other claimants filed M.I.A. Nos. 29-31 and 35 of 1981 in respect of the first four items mentioned above. By order dated 21.10.1982, the Tribunal allowed all the appeals and remanded the matter to the Assistant Settlement Officer for fresh disposal. Against the order of the Tribunal, the appellant-Temple filed S.T.A. Nos. 34-37 of 1983 before the High Court. By order dated 17.08.1988, the High Court dismissed those appeals and confirmed the order of the Tribunal. In the meanwhile, the portion of Survey Nos. 3/1 and 3/3 was acquired by the Government under the Land Acquisition Act for Municipal Shandy and compensation amount was deposited in the Court by the Land Acquisition Officer by his award being L.A. No. 2 of 1983 dated 01.07.1983.

10. It is further seen that pursuant to the remand order by the Tribunal, fresh enquiry was taken up by the Assistant Settlement Officer, Dharapuram in SR No. 4 of 1990 and by order dated 16.10.1992, the patta was granted in favour of the appellant-Temple in respect of Survey Nos. 2/1, 2/2, 3/1B and 3/3, classifying Survey No. 3/2 as Cart track and also granted patta in respect of Survey No. 3/1A to an extent of 2-39-0 hectares in favour of the respondents herein. The other lands in Survey Nos. 3/1B and 3/3 were registered in the name of Municipality. It is brought to our notice by the learned senior counsel for the respondents that up to this stage, the appellant-Temple never questioned about the character of the lands as minor Inam lands. However, the Temple filed an appeal before the Tribunal against the grant of Ryotwari Patta in favour of the respondents herein in respect of land in Survey No. 3/1A. It was highlighted that only in this appeal, for the first time, a contention was raised that the lands notified and taken over by the State Government are not minor Inam lands and no proceedings can be taken for issue of patta under this Act. In support of the above claim, they also relied on *Sellappa Goundan and Others (supra)* and *K.M. Sengoda Goundar (supra)*. It was the stand of the appellant-Temple before the Tribunal that since the village Komarapalayam Agraharam is not an Inam estate as defined under the Act No. 26 of 1948 as decided in *Sellappa Goundan (supra)* and not an Inam within the meaning of Section 2(4) or part of an Inam village within Section 2(11) of the Act No. 26 of 1963, the lands notified under Act No. 30 of 1963 cannot be notified as minor Inam lands and they cannot fall within the ambit of the said Act. While accepting the contention of the appellant-Temple, the Court held that the lands are outside the purview of the Act No. 30 of 1963 and, therefore, cannot be subjected to grant of Ryotwari Patta. Only on this ground, the order of Assistant Settlement Officer was set aside. When this was challenged by way of Special Tribunal Appeal (STA) to the High Court, by impugned order dated 09.10.2000, the High Court allowed the appeal and remanded the case to the Tribunal.

11. Inasmuch as the learned senior counsel for the appellant heavily relied on the above referred two decisions stating that the lands are not minor Inam lands, we perused the factual details, issues raised and ultimate conclusion in both the decisions. In the first decision, namely, *Sellappa Goundan* (supra), the question was whether the village Komarapalayam Agraharam was an Inam estate coming within the purview of Act No. 26 of 1948. In Komarapalayam Agraharam, there were a number of minor Inam lands granted in favour of various temples including the appellant-Temple which has been clearly set out in the Inam Register. The decision in that case relates only to the village Komarapalayam Agraharam and not to the minor Inam grants existing in the said village. Even, in the decision of this Court, namely, *K.M. Sengoda Goundar* (supra), the question for consideration was whether the Komarapalayam Agraharam village is an existing Inam estate or a part of village Inam estate within the meaning of Act No. 26 of 1963. On going through the entire decision and factual details, we agree with the submission of the learned senior counsel for the respondents and conclude that these two decisions have nothing to do with the minor Inam grants that were in existence in Komarapalayam Agraharam and notified under the Act No. 30 of 1963. In *Sellappa Goundan* (supra), there was a reference to the Inam Register Extract which shows that there were certain Inam lands in the Komarapalayam Agraharam village. After extracting Column Nos. 11, 12 and 21 of the Inam Register Extract describing the history of the grant, the Court has concluded as under:

> "The Inam Register Extract shows that there were certain minor inams in the Komarapalayam village. Those inams were held by (1) Sri Damodaraswami temple (2) Sri Kailasanathawami temple, (3) Sri Badrakali temple, (4) Sri Lakshminarayanaswami temple and (5) Sri Angaliamman temple. The minor inams were also confirmed at the inam settlement proceedings, and separate title-deeds were issued to the respective grantees. Exhibits A-2 to A-6 are the extracts from the Fair Inam Register relating to them."

It is clear that these Inams were held not only by the appellant-Temple but also by other four temples and these particulars were reflected in the Inam settlement proceedings and title deeds were issued to those grantees. Exs. A2-A6 mentioned therein, which are extracts from the Fair Inam Register, clearly support the stand of the respondents.

12. Once the lands are notified as minor Inam lands under Act No. 30 of 1963, the same is binding on the authorities constituted under the Act. Thereafter, they cannot go beyond the Act and decide the character of the lands, namely, whether the lands are minor Inam lands or not. With these factual details, we agree with the conclusion arrived at by the High Court, particularly, in para 5 of its order.

13. In the light of the above discussion, we are unable to accept the stand taken by the appellant-Temple and we fully agree with the conclusion arrived at by the High Court. In view of the same, the appeal is liable to be dismissed as devoid of any merit. Inasmuch as the High Court, by impugned order dated 09.10.2000, remanded the matter to the Tribunal to decide the case on merit, we direct the Tribunal to dispose of the same as directed by the High Court within a period of six months from the date of receipt of copy of this judgment, after affording opportunity to all the parties concerned. The appeal is dismissed with the above direction. However, there shall be no order as to costs.

D.G. Appeal dismissed.

MACHAVARAPU SRINIVASA RAO AND ANOTHER
v.
THE VIJAYAWADA, GUNTUR, TENALI, MANGALAGIRI URBAN DEVELOPMENT AUTHORITY AND OTHERS
(Civil Appeal No.7935 of 2011)

SEPTEMBER 19, 2011

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

ANDHRA PRADESH URBAN AREAS (DEVELOPMENT) ACT, 1975:

s.12 – Change of land use – Site in question earmarked for recreational purpose in the Zonal Development Plan duly approved by the State Government – Grant of permission by Development Authority to respondent-society to construct a temple at the site in question – HELD: Development Authority erred in granting permission to respondent-society to construct a temple at the site in question – Once the Master Plan or the Zonal Development Plan is approved by the State Government, no one including the State Government/ Development Authority can use land for any purpose other than the one specified therein – There is no provision in the Act under which the Development Authority can sanction construction of a building etc. or use of land for a purpose other than the one specified in the Master Plan/Zonal Development Plan – The power vested in the Development Authority to make modification in the development plan is also not unlimited – It cannot make important alterations in the character of the plan – Such modification can be made only by the State Government and that too after following the procedure prescribed u/s.12(3) – Therefore, Development Authority could not have entertained the application made by respondent-society and granted permission for construction of temple at the site reserved for recreational use and that too

by ignoring that the same had not been allotted to respondent-society by any public authority.

s.5(1) – Powers and duties of the Development Authority – Discussed.

***WORDS AND PHRASES**: Word 'development' – Meaning of, in the context of s.2(e) of the Andhra Pradesh Urban Areas (Development) Act, 1975.*

Respondent No.1 was constituted under Section 3(1) of the Andhra Pradesh Urban Areas (Development) Act, 1975 to promote and secure the development of different parts of the four towns, namely, Vijayawada, Guntur, Tenali and Mangalagiri. In 1978, respondent No.1 acquired 91 acres land at Chenchupet, Tenali and prepared a layout plan for development. As per the approved plan, 10 sites were earmarked for parks. These included an area of 75 cents comprised in Town Survey No.2/3, Block No.1, Ward No.1, Chenchupet. The Master Plan was approved by the State Government. After about 15 years, the State Government decided that the Master Plans be replaced by a comprehensive Zonal Development Plan. The land in question was shown in the Zonal Development Plan earmarked for recreational purpose. Respondent No.3-society submitted an application to respondent No.1 for grant of permission to construct Sri Venkateswara Swamy Vari Temple at the site which formed part of Town Survey No.2/3. Respondent No.1 passed resolution for grant of permission to the Residents Welfare Association to construct the Temple. In furtherance of that decision, Vice-Chairman of respondent No.1 issued order dated 30.3.2010.After about one month and ten days, the Vice Chairman of respondent No.1 issued amended order dated 10.5.2010 in the name of respondent No.3 because by mistake permission for construction of temple was issued in favour of the Residents Welfare Association, which had not even submitted application.

Respondent Nos. 1 and 3 made efforts for securing an order from the State Government for change of land use. The appellants filed a writ petition by way of public interest litigation questioning the decision of respondent No.1 to sanction construction of temple. They pleaded that the Zonal Development Plan prepared by respondent No.1 and approved by the State Government was statutory in character and land covered by the Zonal Development Plan could not be used for a purpose other than the one specified in the Plan and respondent No.1 did not have the jurisdiction to sanction construction of temple at the site of which land use was shown as recreational (park). In the counter affidavit filed on behalf of respondent No.1, it was pleaded that mere allotment of land for construction of temple did not give any cause to challenge order dated 30.3.2010.

The High Court declined the appellant's prayer for quashing order dated 30.3.2010 on the premise that respondent No.1 had merely allotted land to respondent No.3. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1. None of the documents produced before the High Court and this Court showed that respondent No.3 had applied for allotment of land for construction of temple and respondent No.1 had allotted the site after following some procedure consistent with the doctrine of equality enshrined in Article 14 of the Constitution. Not only this, a bare reading of order dated 30.3.2010 showed that respondent No.1 had granted permission to respondent No.3 for construction of temple at the site in question. There was nothing in the language of that order or the conditions enshrined therein from which it could be inferred that respondent No.1 had allotted land to

respondent No.3. Therefore, the High Court was clearly in error in deciding the writ petition by assuming that it was only a case of allotment of land. [Para 11] [651-D-F]

2. Section 2(e) of the Andhra Pradesh Urban Areas (Development) Act, 1975 contains the definition of term "development". The definition of the "development" is comprehensive. It takes within its fold the carrying out of all or any of the works contemplated in a Master Plan or Zonal Development Plan and the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the existing building or land. Redevelopment is also included within the ambit of the term "development". The proviso to the definition excludes certain works, which are of temporary nature. Section 13 of the Act empowers the Government to declare an urban area or group of urban areas to be a development area for proper development of such area or areas. Once an urban area or a group of urban areas is declared to be a development area, the Government is obliged to constitute an Urban Development Authority under Section 3(1). The Development Authority is enjoined with the task of promoting and ensuring development of all or any of the areas comprised in the development area according to the sanctioned plan and for that purpose, the Authority has the power to acquire, by way of purchase or otherwise, hold, manage, plan, develop and mortgage or otherwise dispose of land and other property, to carry out by or on its behalf building, engineering, mining and other operations, to execute works in connection with supply of water and electricity, disposal of sewerage and control of pollution, other services and amenities [Section 5(1)]. Chapter III of the Act contains provisions for preparation of Master Plan and Zonal Development Plan. Section 12(1) empowers the Development Authority

to make appropriate modifications in the plan which do not effect important alterations in the character of the plan and which do not relate to the extent of land uses or the standards of population density. Section 12(2) empowers the State Government to make any modification in the plan either on its own or on a reference made by the Development Authority. Section 12(3) and (4) lays down the procedure for making modification of plan which is substantially similar to the procedure prescribed for preparation of the plan. Section 15 prohibits the use of land otherwise than in conformity with the plan. An analysis of these provisions showed that once the Master Plan or the Zonal Development Plan is approved by the State Government, no one including the State Government/Development Authority can use land for any purpose other than the one specified therein. There is no provision in the Act under which the Development Authority can sanction construction of a building etc. or use of land for a purpose other than the one specified in the Master Plan/Zonal Development Plan. The power vested in the Development Authority to make modification in the development plan is also not unlimited. It cannot make important alterations in the character of the plan. Such modification can be made only by the State Government and that too after following the procedure prescribed under Section 12(3). [Paras 12-14] [651-G-H; 654-G-H; 655-A-D-H; 656--A-C]

3. In the pleadings filed before the High Court, the respondents had not controverted the assertion made by the appellants that in the approved Zonal Development Plan, land comprised in Town Survey No.2/3 was earmarked for recreational use. Therefore, in the absence of change of land use which could have been sanctioned only by the State Government, respondent No.1 had no jurisdiction to grant permission to respondent No.3 to construct temple at the site. Respondent No.1 was very

much alive to this legal position and this was the reason why its Vice Chairman had written letter dated 15.6.2010 to the Principal Secretary to the Government for change of land use by stating that a mistake had been committed at the time of preparation of Zonal Development Plan. It is a different thing that the State Government has not sanctioned change of land use by modifying the zonal development plan in accordance with the procedure prescribed under Section 12(3) and (4). Respondent No.1 could not have entertained the application made by respondent No.3 and granted permission for construction of temple at the site reserved for recreational use and that too by ignoring that the same had not been allotted to respondent No.3 by any public authority. As a corollary, it must be held that the High Court committed serious error by refusing to quash order dated 30.3.2010 by assuming that it was merely a case of allotment of land. [Para 15] [656-F-H; 657-A-D]

Bangalore Medical Trust v. B.S. Muddappa **(1991) 4 SCC 54: 1991(3) SCR 102 – referred to.**

4. The matter deserves to be considered from another angle. It was neither the pleaded case of respondent No.3 nor any document was produced before the High Court and none was produced before this Court to show that 15 cents land forming part of Town Survey No. 2/3 was allotted to it by any public authority after following a recognized mode of disposal of public property. Even though respondent No.3 was not an owner of the site, it made an application for grant of permission to construct the temple and functionaries of respondent No.1 accepted the same without making any inquiry about the title of respondent No.3. Thus, the illegality committed by respondent No.1 in issuing order dated 30.3.2010 was writ large on the face of the record. [Para 17] [660-A-D]

Case Law Reference:

1991 (3) SCR 102 referred to Para 16

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7935 of 2011 etc.

From the Judgment & Order dated 13.09.2010 of the High Court of Judicature, Andhra Pradesh Hyderabad in Writ Petition No. 12766 of 2010.

WITH

Contempt Pet. (C) No. 300 of 2011 in Civil Appeal No. 7835 of 2011.

T. Kanaka Durga for the Appellants.

P.S. Narasimha, Satya Mitra, Venkateswara Rao Anumolu, N. Rajaraman, P. Prabhkar, Sanjeev Kumar, Ajit Singh for the Respondents.

THe Judgment of the Court was delivered by

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

2. The questions which arise for consideration in this appeal are whether respondent No.1 – the Vijayawada, Guntur, Tenali, Mangalagiri Urban Development Authority had the jurisdiction to grant permission to respondent No.3 – Sri Venkateswara Swamivari Alaya Nirmana Committee for construction of temple at the site of which land use was shown as recreational in the Zonal Development Plan approved by the State Government and whether the Division Bench of the High Court of Andhra Pradesh was justified in refusing to nullify the decision taken by respondent No.1 by assuming that it was only a case of allotment of site.

3. Respondent No.1 was constituted under Section 3(1) of the Andhra Pradesh Urban Areas (Development) Act, 1975 (for short, 'the Act') to promote and secure the development of

different parts of the four towns, namely, Vijayawada, Guntur, Tenali and Mangalagiri. In 1978, respondent No.1 acquired 91 acres land at Chenchupet, Tenali and prepared a layout plan for development. As per the approved plan, 10 sites were earmarked for parks. These included an area of 75 cents comprised in Town Survey No.2/3, Block No.1, Ward No.1, Chenchupet.

4. The Master Plan of Tenali town was approved by the State Government vide G.O.Ms. No.969 dated 21.11.1978 and the Master Plan of the urban area of respondent No.1 was approved vide G.O. Ms. No.144 dated 3.3.1988. After about 15 years, the State Government decided that the Master Plans be replaced by a comprehensive Zonal Development Plan. For this purpose, the Vice Chairman of respondent No.1 was authorized to take necessary steps. Thereafter, the area covered by the urban region of respondent No.1 was divided into 23 planning zones and it was decided that Zonal Development Plans be prepared on priority basis in respect of 15 zones including Tenali zone. The draft Zonal Development Plan of Tenali was published in the local newspapers and objections/suggestions were invited from the public. In the final Zonal Development Plan of Tenali town, which was approved by the State Government vide G.O. Ms. No.689 dated 30.12.2006, land use was divided into the following 9 (main) categories:

"1. Residential use Zone

2. Mixed Residential use Zone.

3. Commercial use Zone [Local, Central and General Commercial use].

4. Industrial use Zone

5. Public and Semi public use Zone

6. Recreational use Zone.

7. Transportation and Communication use Zone (Roads, Railways, Airports, Bus Depots and Truck Terminals)

8. Agricultural use zone.

9. Water Bodies."

5. Respondent No.3, which was registered as a society in March, 2009 under the Andhra Pradesh Societies Registration Act, 2001, submitted an application dated 28.5.2009 to respondent No.1 for grant of permission to construct a temple at the site which formed part of Town Survey No.2/3. After considering the objections received from the public, respondent No.1 passed resolution dated 4.2.2010 for grant permission to the Residents Welfare Association to construct Sri Venkateswara Swamy Vari Temple. In furtherance of that decision, Vice-Chairman of respondent No.1 issued order dated 30.3.2010, the relevant portions of which, as contained in Annexure P-4 of the SLP paper book, are extracted below:

"Therefore the 'Residential Welfare Association' is permitted to construct Sri Venkateswara Swamy Vari Temple in the earmarked site and orders are issued accordingly.

The said 'Residential Welfare Association' Alaya Committee is directed to follow the following conditions:

1. The said Association has no ownership rights on the site earmarked for Religious center in the IDSMT Scheme. The said Association has right to construct the temple only. The complete rights on the site and building shall rest with the UDA only.

3. The Association should not make use of allotted site for other purposes except for the construction of temple.

4. Temple should be constructed within three years from the date of issue of this order. Or else the UDA is having every right to take over the site along with the incomplete building.

5. In the said site activities pertaining to Temple alone should be conducted and it should not be used for commercial and business purposes.

6. The meetings and activities of Alaya Committee should be conducted as per laws.

7. The conditions made by the Government/VGTM UDA from time to time shall be in force.

8. If the conditions are violated the said site along with the building shall be taken over."

After about one month and ten days, the Vice Chairman of respondent No.1 issued amended order dated 10.5.2010 in the name of respondent No.3 because by mistake permission for construction of temple was issued in favour of the Residents Welfare Association, which had not even submitted application.

6. Having succeeded in convincing respondent No.1 to grant permission for construction of temple at the site, which did not even belong to it, respondent No.3 approached the State Government for change of land use from recreational (park) to public/semi public. Simultaneously, the Vice Chairman of respondent No.1 addressed letter dated 15.6.2010 to the Principal Secretary to Government, Municipal Administration and Urban Development Department for change of land use. He pointed out that in the Integrated Development of Small and Medium Towns Scheme, 1981 (for short, 'the 1981 Scheme') 15 cents land comprised in Town Survey No.2/3 was reserved for religious center but, by mistake the same was shown as earmarked for recreational use in the Zonal Development Plan.

7. While respondent Nos. 1 and 3 were making efforts for

securing an order from the State Government for change of land use, the appellants filed writ petition by way of public interest litigation questioning the decision of respondent No.1 to sanction construction of temple. They pleaded that the Zonal Development Plan prepared by respondent No.1 and approved by the State Government is statutory in character and land covered by the Zonal Development Plan cannot be used for a purpose other than the one specified in the Plan and respondent No.1 did not have the jurisdiction to sanction construction of temple at the site of which land use was shown as recreational (park). In the counter affidavit filed on behalf of respondent No.1, it was pleaded that mere allotment of land for construction of temple did not give any cause to the writ petitioners to challenge order dated 30.3.2010 and as and when an application is made for construction of temple, respondent No.1 will consider whether land can be used for a purpose other than the one specified in the Zonal Development Plan. In the affidavit filed on behalf of respondent No.3, it was pleaded that as per the Zonal Development Plan, land coming under the Residential Use Zone can be utilized for construction of Kalyana Mandapams without creating any noise pollution, function halls/ public assembly halls, religious center etc. and in the absence of any bar in the Zonal Development Plan, no exception can be taken to the permission granted by respondent No.1 for construction of temple.

8. The Division Bench of the High Court noticed that as per the approved Zonal Development Plan, Town Survey No.2/ 3 is earmarked for recreational use (park) and held that unless the State Government relaxes the use of land, respondent No.1 cannot grant permission for construction of temple. However, the appellants' prayer for quashing order dated 30.3.2010 was declined by making the following observations:

> *"Once the land was earmarked for the parks/recreational use in the modification of the Master Plan of Tenali Town as approved in G.O.Ms.No.689, dated 30.12.2006, unless the Government relaxes the use of the land for any other purpose than the one notified, the first respondent cannot grant permission for construction of temple if it is prohibited under G.O.Ms.No.689, dated 30.12.2006. Mere allotment of the land for construction of temple will not give rise any cause of action unless permission for construction of temple is accorded by the first respondent on submitting the plans. As and when the plans are submitted with specific proposal for construction of temple, the first respondent is under obligation to consider the prohibition contained under the modified Master Plan issued in G.O.Ms.No.689, dated 30.12.2006.* It is under obligation to invite the objections from the residents of the locality including the petitioners and consider the said objections before granting permission. If such construction of temple is prohibited, it is also open for the third respondent to move the Government by filing an application seeking relaxation of the land use and if any relaxation is granted by the Government, it can make its application to the first respondent."
>
> (emphasis supplied)

9. Learned counsel for the appellants argued that the impugned order is liable to be set aside because the High Court disposed of the writ petition by erroneously assuming that order dated 30.3.2010 was only for allotment of land to respondent No.3. Learned counsel emphasized that in the approved Zonal Development Plan, land use of Town Survey No.2/3 has been shown as recreational (park) and argued that respondent No.1 committed a jurisdictional error by sanctioning construction of temple at the site without even making an effort to find out whether the site belongs to respondent No.3.

10. Learned counsel for the respondents supported the impugned order and argued that the permission granted by respondent No. 1 cannot be faulted merely because land use of the site has not been changed by the State Government.

Learned counsel for respondent No.1 submitted that while preparing the Zonal Development Plan the competent authority had overlooked the fact that in the 1981 Scheme 15 cents land forming part of Town Survey No.2/3 was reserved for religious center and this is the reason why the Vice Chairman of respondent No.1 had written to the State Government to rectify the mistake. He then argued that the appellants do not have the locus to question resolution dated 4.2.2010 and order dated 30.3.2010 because they did not file objection against the proposed construction of temple at the site of which land use has been shown in the Zonal Development Plan as recreational.

11. We shall first consider whether the High Court was justified in declining relief to the appellants on the premise that respondent No.1 had merely allotted land to respondent No.3. In this context, it is apposite to observe that none of the documents produced before the High Court and this Court show that respondent No.3 had applied for allotment of land for construction of temple and respondent No.1 had allotted the site after following some procedure consistent with the doctrine of equality enshrined in Article 14 of the Constitution. Not only this, a bare reading of order dated 30.3.2010 leaves no manner of doubt that respondent No.1 had granted permission to respondent No.3 for construction of temple at the site in question. There is nothing in the language of that order or the conditions enshrined therein from which it can be inferred that respondent No.1 had allotted land to respondent No.3. Therefore, the High Court was clearly in error in deciding the writ petition by assuming that it was only a case of allotment of land.

12. The next question, which merits consideration is whether respondent No.1 had the jurisdiction to allow construction of temple at the site which was reserved for recreational use in the Zonal Development Plan. Section 2(e) which contains the definition of term "development" and Sections 7, 12(1), (2), (3) and (4) and 15 of the Act, which have

bearing on the decision of this question read as under:

> "2(e) 'development' with its grammatical variations means the carrying out of all or any of the works contemplated in a master plan or zonal development plan referred to in this Act, and the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in any building or land and includes redevelopment.
>
> Provided that for the purposes of this Act, the following operations or uses of land shall not be deemed to involve development of the land that is to say-
>
> (i) the carrying out of any temporary works for the maintenance, improvement or other alteration of any building, being works which do not materially affect the external appearance of the building:
>
> (ii) the carrying out by a local authority of any temporary works required for the maintenance or improvement of a road, or works carried out on land within the boundaries of the road;
>
> (iii) the carrying out by a local authority or statutory undertaking of any temporary works for the purpose of inspecting, repairing or renewing any sewers, mains, pipes, cables or other apparatus, including the breaking open of any street or other land for that purpose:
>
> (iv) the use of any building or other land within the cartilage purpose incidental to the enjoyment of the dwelling house as such; and
>
> (v) the use of any land for the purpose of agriculture, gardening or forestry (including afforestation) and the use for any purpose specified in this clause of any building occupied together with the land so used;

7. Zonal development plans: – (1) Simultaneously with the preparation of Master Plan or as soon as may be thereafter the Authority shall proceed with the preparation of zonal development plan for each of the zones into which the development area may be divided.

(2) A zonal development plan may,-

(a) contain a site plan and land use plan for the development of the zone and show the approximate locations and extents of land uses proposed in the zones for such purposes as roads, housing, schools, recreation, hospitals, industry, business, markets, public works and utilities, public buildings, public and private open spaces and other categories of public and private uses;

(b) xxx xxx xxx

(c) xxx xxx xxx

(d) in particular, contain provisions regarding all or any of the following matters, namely—

(i) xxx xxx xxx

(ii) the allotment or reservation of lands for roads, open spaces, gardens, recreation grounds, schools, markets and other public purposes;

(iii) to (xii) xxx xxx xxx

12. Modifications to plan: – (1) The Authority may make such modifications to the plan as it thinks fit, being modifications which, in its opinion, do not effect important alterations in the character of the plan and which do not relate to the extent of land uses or the standards of population density.

(2) The Government may *suo motu* or on a reference from

the Authority make any modifications to the plan, whether such modifications are of the nature specified in sub-section (1) or otherwise.

(3) Before making any modifications to the plan, the Authority or, as the case may be, the Government shall publish a notice in such form and manner as may be prescribed inviting objections and suggestions from any person with respect to the proposed modifications before such date as may be specified in the notice and shall consider all objections and suggestions that may be received by the Authority or the Government.

(4) Every modification made under the provisions of this section shall be published in such manner as the Authority or the Government, as the case may be, may specify and the modifications shall come into operation either on the date of the publication or on such other date as the Authority or the Government may fix.

15. Use of the land and buildings in contravention of plans: – After the coming into operation of any of the plans in a zone, no person shall use or permit to be used any land or building in that zone otherwise than in conformity with such plan:

Provided that it shall be lawful to continue to use upon such terms and conditions as may be determined by regulations made in this behalf, any land or building for the purpose for which, and to the extent to which, it is being used on the date on which such plan comes into force."

13. The definition of the "development" is comprehensive. It takes within its fold the carrying out of all or any of the works contemplated in a Master Plan or Zonal Development Plan and the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the existing building or land. Redevelopment

is also included within the ambit of the term "development". The proviso to the definition excludes certain works, which are of temporary nature. Section 13 of the Act empowers the Government to declare an urban area or group of urban areas to be a development area for proper development of such area or areas. Once an urban area or a group of urban areas is declared to be a development area, the Government is obliged to constitute an Urban Development Authority under Section 3(1). The Development Authority is enjoined with the task of promoting and ensuring development of all or any of the areas comprised in the development area according to the sanctioned plan and for that purpose, the Authority has the power to acquire, by way of purchase or otherwise, hold, manage, plan, develop and mortgage or otherwise dispose of land and other property, to carry out by or on its behalf building, engineering, mining and other operations, to execute works in connection with supply of water and electricity, disposal of sewerage and control of pollution, other services and amenities [Section 5(1)]. Chapter III of the Act contains provisions for preparation of Master Plan and Zonal Development Plan. Section 7(1) provides for preparation of Zonal Development Plan for each of the zones into which the development area may be divided. Section 7(2) enumerates the matter, which may be specified in the Zonal Development Plan. Clause (a) thereof speaks among other things of land use plan for the development of the zone and the approximate locations and extents of land uses proposed in the zones for purposes like roads, housing, schools, recreation, hospitals, industry, business, markets, public works and utilities, public buildings, public and private open spaces and other categories of public and private uses. Sections 8 and 9 lay down the procedure for preparation and approval of the Master Plan/Zonal Development Plan. Section 10 lays down that immediately after approval of Plan by the State Government, the authority shall publish a notice evidencing such approval and from the date of first publication of notice the Plan shall come into operation. Section 12(1)

empowers the Development Authority to make appropriate modifications in the plan which do not effect important alterations in the character of the plan and which do not relate to the extent of land uses or the standards of population density. Section 12(2) empowers the State Government to make any modification in the plan either on its own or on a reference made by the Development Authority. Section 12(3) and (4) lays down the procedure for making modification of plan which is substantially similar to the procedure prescribed for preparation of the plan. Section 15 prohibits the use of land otherwise than in conformity with the plan.

14. An analysis of the above noted provisions shows that once the Master Plan or the Zonal Development Plan is approved by the State Government, no one including the State Government/Development Authority can use land for any purpose other than the one specified therein. There is no provision in the Act under which the Development Authority can sanction construction of a building etc. or use of land for a purpose other than the one specified in the Master Plan/Zonal Development Plan. The power vested in the Development Authority to make modification in the development plan is also not unlimited. It cannot make important alterations in the character of the plan. Such modification can be made only by the State Government and that too after following the procedure prescribed under Section 12(3).

15. In the pleadings filed before the High Court, the respondents had not controverted the assertion made by the appellants that in the approved Zonal Development Plan, land comprised in Town Survey No.2/3 was earmarked for recreational use. Therefore, in the absence of change of land use which could have been sanctioned only by the State Government, respondent No.1 had no jurisdiction to grant permission to respondent No.3 to construct temple at the site. Respondent No.1 was very much alive to this legal position and this is the reason why its Vice Chairman had written letter dated

15.6.2010 to the Principal Secretary to the Government for change of land use by stating that a mistake had been committed at the time of preparation of Zonal Development Plan. It is a different thing that the State Government has not sanctioned change of land use by modifying the zonal development plan in accordance with the procedure prescribed under Section 12(3) and (4). In this scenario, there is no escape from the conclusion that respondent No.1 could not have entertained the application made by respondent No.3 and granted permission for construction of temple at the site reserved for recreational use and that too by ignoring that the same had not been allotted to respondent No.3 by any public authority. As a corollary, it must be held that the High Court committed serious error by refusing to quash order dated 30.3.2010 by assuming that it was merely a case of allotment of land.

16. The view taken by us on the legality of order dated 30.3.2010 finds support from the judgment of this Court in *Bangalore Medical Trust v. B.S. Muddappa* (1991) 4 SCC 54. In that case, allotment of land, which was shown as open space in the sanctioned development plan, for construction of a nursing home was challenged on the ground that the State Government and the Bangalore Development Authority did not have the jurisdiction to make such allotment. The learned Single Judge negatived the challenge but the Division Bench allowed the appeal and quashed the allotment. The judgment of the Division Bench was approved by this Court. R.M. Sahai, J., who delivered the main judgment highlighted the importance of reservation of land for the public park in a development plan and adversely commented upon use thereof for construction of nursing home in the following words:

> "Public park as a place reserved for beauty and recreation was developed in 19th and 20th century and is associated with growth of the concept of equality and recognition of importance of common man. Earlier it was a prerogative

> of the aristocracy and the affluent either as a result of royal grant or as a place reserved for private pleasure. Free and healthy air in beautiful surroundings was privilege of few. But now it is a, 'gift from people to themselves'. Its importance has multiplied with emphasis on environment and pollution. In modern planning and development it occupies an important place in social ecology. A private nursing home on the other hand is essentially a commercial venture, a profit oriented industry. Service may be its motto but earning is the objective. Its utility may not be undermined but a park is a necessity not a mere amenity. A private nursing home cannot be a substitute for a public park. No town planner would prepare a blueprint without reserving space for it. Emphasis on open air and greenery has multiplied and the city or town planning or development Acts of different States require even private house owners to leave open space in front and back for lawn and fresh air. In 1984 the B.D. Act itself provided for reservation of not less than 15 per cent of the total area of the layout in a development scheme for public parks and playgrounds the sale and disposition of which is prohibited under Section 38-A of the Act. Absence of open space and public park, in present day when urbanisation is on increase, rural exodus is on large scale and congested areas are coming up rapidly, may give rise to health hazard. May be that it may be taken care of by a nursing home. But it is axiomatic that prevention is better than cure. What is lost by removal of a park cannot be gained by establishment of a nursing home. To say, therefore, that by conversion of a site reserved for low lying park into a private nursing home social welfare was being promoted was being oblivious of true character of the two and their utility."

T.K. Thommen, J., who agreed with R.M. Sahai, J. referred to the provisions of the Bangalore Development Authority Act, 1976 and observed:

"The scheme is meant for the reasonable accomplishment of the statutory object which is to promote the orderly development of the city of Bangalore and adjoining areas and to preserve open spaces by reserving public parks and playgrounds with a view to protecting the residents from the ill-effects of urbanisation. It meant for the development of the city in a way that maximum space is provided for the benefit of the public at large for recreation, enjoyment, 'ventilation' and fresh air. This is clear from the Act itself as it originally stood. The amendments inserting Section 16(1)(*d*), 38-A and other provisions are clarificatory of this object. The very purpose of the BDA, as a statutory authority, is to promote the healthy growth and development of the city of Bangalore and the areas adjacent thereto. The legislative intent has always been the promotion and enhancement of the quality of life by preservation of the character and desirable aesthetic features of the city. The subsequent amendments are not a deviation from or alteration of the original legislative intent, but only an elucidation or affirmation of the same.

Protection of the environment, open spaces for recreation and fresh air, playgrounds for children, promenade for the residents, and other conveniences or amenities are matters of great public concern and of vital interest to be taken care of in a development scheme. It is that public interest which is sought to be promoted by the Act by establishing the BDA. The public interest in the reservation and preservation of open spaces for parks and playgrounds cannot be sacrificed by leasing or selling such sites to private persons for conversion to some other user. Any such act would be contrary to the legislative intent and inconsistent with the statutory requirements. Furthermore, it would be in direct conflict with the constitutional mandate to ensure that any State action is inspired by the basic values of individual freedom and dignity and addressed to

the attainment of a quality of life which makes the guaranteed rights a reality for all the citizens."

17. The matter deserves to be considered from another angle. It is neither the pleaded case of respondent No.3 nor any document was produced before the High Court and none has been produced before this Court to show that 15 cents land forming part of Town Survey No. 2/3 was allotted to it by any public authority after following a recognized mode of disposal of public property. It has surprised us that even though respondent No.3 was not an owner of the site, it made an application for grant of permission to construct the temple and functionaries of respondent No.1 accepted the same without making any inquiry about the title of respondent No.3. Thus, the illegality committed by respondent No.1 in issuing order dated 30.3.2010 is writ large on the face of the record.

18. In the result, the appeal is allowed and the impugned order is set aside. As a corollary, the writ petition filed by the appellants is also allowed and order dated 30.3.2010 as also amended order dated 10.5.2010 issued by respondent No.1 are quashed. The parties are left to bear their own costs.

19. Since we have allowed the main appeal, the contempt petition filed by the appellants is disposed of as infructuous.

D.G. Appeal allowed.

REGISTRAR GEN., HIGH COURT OF JUDICATURE AT MADRAS
v.
R. PERACHI & ORS.
(Civil appeal No. 7936 of 2011)

SEPTEMBER 19, 2011

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

Service law:

State Judicial Ministerial Service – Transfer of employee in the subordinate judiciary on administrative grounds – Decision of Chief Justice to transfer – On facts, respondent working as Sheristadar in the State Judicial Ministerial Service was transferred outside the District by the Chief Justice – Writ petition – High Court held that the Chief Justice had no power to transfer the respondent unilaterally and the transfer was punitive and set aside the transfer because it would affect his promotion as P.A., directing the High Court to restore him in his District and confer him the post of P.A. – On appeal, held: Action of transfer against the respondent was on the basis of the report of the Registrar (Vigilance) – Relevant material clearly show that the Full Court had passed a resolution under which the subject of vigilance enquiries was retained with the Chief Justice – District Judge had opined that retention of the respondent in his district was undesirable from the administration point of view – More so, the respondent did not dispute the power of the High Court to transfer him outside the district, nor the Division Bench interfered on that ground – Respondent himself clearly stated in his affidavit that there was no malafide exercise in his transfer – Transfer is an incident of service – One cannot make grievance if transfer is made on administrative grounds, without attaching any stigma – Pay, position and seniority of the respondent was not affected by the transfer, and thus, the transfer was not

punitive merely because his promotional chances got affected due to the transfer – There is no right of promotion available to an employee – He has a right to be considered for promotion – Furthermore, the integrity of the officers functioning in the administration is of utmost importance to retain the confidence of the litigants in the fairness of the judicial system – If there is any complaint in this behalf, the Chief Justice is expected to act on behalf of the High Court to see to it that the stream of justice does not get polluted at any level – Thus, the decision of Chief Justice to transfer respondent outside that district could not be faulted – Order passed by the High Court is set aside.

Transfer of employee in the subordinate judiciary on administrative grounds – Passing of judicial orders by the High Courts – Scope of – Held: Is limited – Transfer is an incident of service – One cannot make grievance if transfer is made on administrative grounds, without attaching any stigma.

Constitution of India, 1950 – Control of the High Court over the subordinate courts under – Held: Includes general superintendence of the working of the subordinate courts and their staff, since their appeals against the orders of the District Judges lie to the High Court – Word control in Article 235 is used in the comprehensive sense – It includes the control and superintendence of the High Court over the subordinate courts and the persons manning them both on the judicial and administrative side – Control over the subordinate courts vests in the High Court as a whole – However, it does not mean that a Full Court cannot authorize the Chief Justice in respect of any matter whatsoever.

Judicial Discipline – Judges deciding a subsequent case overlooking judgment of a co-ordinate Bench – Propriety of – Held: Judges are bound by the earlier decision – They are not expected to take a different view from point of view of judicial discipline.

First respondent was working as Sheristadar in the State Judicial Ministerial Service and was holding the additional charge of the post of P.A. to the District Judge at place 'P'. The first respondent along with two head clerk were transferred outside the District by the order issued by the appellant on behalf of the High Court on administrative grounds. The two head clerks filed writ petitions but the same were dismissed. The first respondent did not challenge his transfer at that time and joined the office at District 'R'. Thereafter, he came to know that the post of P.A. to District Judge 'T' was being filled and he made a representation for consideration for the said post. The first respondent learnt that he was not considered for the post because he was already transferred outside the District. Aggrieved, the first respondent filed a Writ Petition. The Division Bench of the High Court set aside the transfer of the first respondent from District 'T' to District 'R' and directed the High Court to restore him in District 'T' with his seniority and confer on him the post of P.A. to the District Judge at place 'T'. Therefore, the appellant filed the instant appeal.

The appellant contended that the decision of the Division Bench was erroneous on both the grounds on which the Division Bench decided against the appellant viz. that the transfer was punitive and that it was not passed by a competent authority.

Allowing the appeal, the Court

HELD: 1. **The action of transfer against the first respondent was on the basis of the report of the Registrar (Vigilance). Besides, the District Judge had also opined that retention of the appellant in his district was undesirable from the point of view of administration, pending enquiry. Thus, it involved inter-district transfer. The respondent No.1 did not dispute the power of the High Court to transfer him outside the district, nor did the**

Division Bench interfered therein on that ground. This is apart from the fact that transfer is an incident of service, and one cannot make a grievance if a transfer is made on the administrative grounds, and without attaching any stigma which was so done in the instant case. [Para 21] [679-G-H; 670-A-B]

N.K. Singh vs. Union of India **AIR 1995 SC 423: 1994 (2) Suppl. SCR 772 ;** *State of Madhya Pradesh vs. S.S. Kourav*, **AIR 1995 SC 1056: 1995 (1) SCR 482;** *Airports Authority of India vs. Rajeev Ratan Pandey* **2009 (8) SCC 337: 2009 (13) SCR 343 – referred to**

2.1 The first ground on which the Division Bench of the High Court interfered with the order of transfer was that the transfer order was passed by the then Chief Justice initially, and he did not have the competence therefore. The appellant produced the relevant material before this Court which clearly shows that the Full Court had passed a resolution under which the subject of vigilance enquiries was retained with the Chief Justice. It is, therefore, difficult to accept the view of the Division Bench that the Chief Justice unilaterally transferred the appellant outside the district, and the decision ought to have been taken either by the Full Court or a Committee appointed by the Full Court. [Para 26] [682-F-G; 683-F-H]

2.2 The control of the High Court over the subordinate courts under Article 235 of the Constitution includes general superintendence of the working of the subordinate courts and their staff, since their appeals against the orders of the District Judges lie to the High Court. The word control referred to in Article 235 of the Constitution has been used in the comprehensive sense and includes the control and superintendence of the High Court over the subordinate courts and the persons manning them both on the judicial and administrative side'. This control over the subordinate courts vests in

the High Court as a whole. However, the same does not mean that a Full Court cannot authorize the Chief Justice in respect of any matter whatsoever. [Para 26] [682-H; 683-A-C]

2.3 The Full Court of the Madras High Court had passed a resolution way back in the year 1993 to retain the subject of "Vigilance Cell" with the Chief Justice. Therefore, it was fully within the authority of the then Chief Justice to take the decision to transfer the appellant outside district 'T'. The transfer was particularly necessary in view of the complaint that was pending against him. The Division Bench observed that the complaint was an anonymous one. Even so, the same had been looked into by the Vigilance Cell, and the District Judge had reported that departmental enquiries were pending against the appellant and the other employees against whom the complaint had been made. In view of all these factors, the Chief Justice had to take the necessary decision. [Para 26] [683-D-G]

R.M. Gurjar Vs. High Court of Gujarat **AIR 1992 SC 2000: 1992 (3) SCR 775;** *Gauhati High Court Vs. Kuladhar Phukan* **2002 (4) SCC 524;** *High Court of Rajasthan Vs. P.P. Singh & Anr.* **2003 (4) SCC 23 – relied on.**

3.1 The other ground on which the Division Bench interfered with the transfer order is that according to the Division Bench, but for this transfer order there was no other impediment for the District Judge to promote the respondent No.1. The Division Bench was of the view that the first respondent had lost the opportunity of getting promoted to the post of P.A. to the District Judge on account of this transfer, and therefore, the same was punitive. The Bench ought to have noted that the transfer is an incident of service, and the first respondent himself had clearly stated in his affidavit in support of the petition that there was no malafide exercise in the present

transfer. The transfer was purely on the administrative ground in view of the pending complaint and departmental enquiry against first respondent and other employees, with respect to their integrity. When a complaint against the integrity of an employee is being investigated, very often he is transferred outside the concerned unit. That is desirable from the point of view of the administration as well as that of the employee. In the circumstances the decision of the then Chief Justice to transfer him outside that district could not be faulted. [Para 27] [684-A-E]

3.2 There is no right of promotion available to an employee. He has a right to be considered for promotion which has been held to be a fundamental right. However, though a right to be considered for promotion is a condition of service, mere chance of promotion is not. [Para 28] [684-G]

S.B. Bhattacharjee Vs. S.D. Majumdar **2007 (10) SCC 513: 2007 (6) SCR 743;** *Mohd. Shujat Ali Vs. Union of India* **AIR 1974 SC 1631: 1975 (1) SCR 449 – referred to**

3.3 The fact that the first respondent could not be considered for promotion to the post of P.A. in district 'T' was undoubtedly the consequence of this transfer outside that district. However, that itself cannot make his transfer a punitive one. The then Registrar General rightly stated in her affidavit before the High Court that the first respondent would be retaining his original seniority though he was transferred in another district. He was in the cadre of Sheristadar and he continued in that cadre in district 'R' after he was transferred to that district. In district 'T', he was officiating as P.A to the District Judge since that post was vacant, but his substantive post was that of Sheristadar. The officiating work did not create any right in him to be continued in the post of P.A. That was not also his case, and that is how he had sought to

be empanelled for being considered for the promotion to the post of P.A, though in district 'T'. Since the first respondent was no longer in district 'T', obviously he could not be included in the panel prepared for consideration for the post of P.A. in that district. [Para 29] [684-H; 685-A-C]

3.4 In the instant case, the pay, position and seniority of the first respondent was not affected by the impugned transfer, and therefore, the same could not be said to be punitive merely because his promotional chances got affected due to the transfer. Thus, there was no question of providing him any opportunity of hearing at that stage before effecting the transfer, and the order of transfer could not be faulted on that count as well. [Para 30] [685-H; 686-A-B]

Paresh Chandra Nandi Vs. Controller of Stores, N.F. Railway **AIR 1971 SC 359 – referred to.**

3.5 Noting that the respondent No. 1 was transferred on account of an anonymous complaint, the Division Bench had referred to a few judgments wherein this Court has emphasized the responsibility of the Higher Judiciary to guard the judicial officers in the Subordinate Courts against unjustified complaints. In the instant case, a Sheristadar was transferred on receiving a complaint, although an anonymous one, but against whom a departmental inquiry is pending. He was transferred to another district though retaining him in the same cadre with the same pay as well as his seniority. Such an action was fully justified and within the authority of the High Court. No observations were made against him, nor was any stigma attached. The reliance on the said three judgments to interfere in such an order clearly shows a non-application of mind by the Division Bench to the problem which the High Court Administration was faced with, and which was being attended in accordance with

the relevant rules. [Paras 31, 32] [686-C-H; 687-A-B]

Ishwar Chand Jain Vs. High Court Punjab and Haryana **1988 (3) SCC 370: 1988 (1) Suppl. SCR 396; *K.P.** *Tiwari Vs. State of M.P.* **1994 Suppl. (1) SCC 540:1993 (3) Suppl. SCR 497;** *Ramesh Chander Singh Vs. High Court Allahabad* **2007 (4) SCC 247: 2007 (3) SCR 198 - referred to.**

4. The Division Bench also erred in ignoring that the first respondent had been transferred under a common order alongwith two other employees-Head Clerks. The writ petitions filed by them had been dismissed. Besides, a judgment of a co-ordinate bench in *A.K. Vasudevan*'s case was cited before the Division Bench wherein the facts were almost identical. It was therefore, not expected of the Division Bench to take a different view from the point of view of judicial discipline. [Para 33] [687-F-H]

Sri Venkateswara Rice Ginning & Groundnut Oil Mill Vs. State of Andhra Pradesh **AIR 1972 SC 51: 1972 (1) SCR 346 – relied on.**

The Registrar of High Court of Madras Vs. Vasudevan, A.K. **1996 (1) MLJ 153 - referred to.**

5. It cannot be ignored that the integrity of the officers functioning in the administration is of utmost importance to retain the confidence of the litigants in the fairness of the judicial system. If there is any complaint in this behalf, the Chief Justice is expected to act on behalf of the High Court to see to it that the stream of justice does not get polluted at any level. The decisions on the judicial side such as the one in the instant case create unnecessary difficulties for the High Court Administration. [Para 34] [688-A-D]

High Court Judicature for Rajasthan Vs. Ramesh Chand Paliwal **(1998) 3 SCC 72: 1998 (1) SCR 961– relied on.**

6. The impugned judgment and order are wholly unsustainable, and in complete disregard of the law laid down by this Court. The judgment and order dated passed by the High Court is set-aside. [Para 35] [689-C-D]

Jagdish Lal Vs. State of Haryana **1997 (6) SCC 538;** *High Court of Judicature at Bombay Vs. Shirishkumar Rangrao Patil,* **(1997) 6 SCC 339: 1997 (3) SCR 1131** *Centre for Public Interest Litigation Vs. Union of India* **2005 (8) SCC 202: 2005 (4) Suppl. SCR 77 – referred to**

Case Law Reference:

1994 (2) Suppl. SCR 772	**Referred to**	**Para 22**
1995 (1) SCR 482	**Referred to**	**Para 23**
2009 (13) SCR 343	**Referred to**	**Para 23**
1992 (3) SCR 775	**Relied on**	**Para 26**
2002 (4) SCC 524	**Relied on**	**Para 26**
2003 (4) SCC 239	**Relied on**	**Para 26**
AIR 1971 SC 359	**Referred to**	**Para 30**
2007 (6) SCR 743	**Referred to**	**Para 28**
1975 (1) SCR 449	**Referred to**	**Para 28**
AIR 1971 SC 359	**Referred to**	**Para 30**
1988 (1) Suppl. SCR 396	**Refered to**	**Para 31**
1993 (3) Suppl. SCR 497	**Referred to**	**Para 31**
2007 (3) SCR 198	**Referred to**	**Para 31**
1972 (1) SCR 346	**Relied on**	**Para 33**
1998 (1) SCR 961	**Relied on**	**Para 34**
1997 (6) SCC 538	**Referred to**	**Para 15**

1997 (3) SCR 1131	**Referred to**	**Para 16**
2005 (4) Suppl. SCR 77	**Referred to**	**Para 17**
1996 (1) MLJ 153	**Referred to**	**Para 17, 18, 33**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7936 of 2011.

From the Judgment & Order dated 28.08.2008 of the High Court of Judicature at Madras, Madurai bench in W.P. (MD) No. 7121 of 2007.

V. Balachandran for the Appellant.

T.R.B. Siva Kumar, K.V. Vijayakumar for the Respondents.

The Judgment of the Court was delivered by

H.L. GOKHALE, J. 1. Leave Granted.

2. This appeal by Special Leave seeks to challenge the judgment and order dated 28.08.2008 passed by a Division Bench of the Madras High Court (at Madurai Bench) in W.P. (MD) No.7121/2007. The Division Bench has allowed the writ petition filed by the first respondent who is working as a Sheristadar in the District Judicial Service in the State of Tamil Nadu.

3. The Division Bench by its impugned judgement and order has quashed and set-aside the transfer of the first respondent from District Thoothukudi to District Ramanathapuram, and directed the High Court to restore him in District Thoothukudi with his seniority, and confer on him the post of Personal Assistant (P.A.) to the District Judge, Thoothukudi.

Facts leadings to this appeal are as follows -

4. The first respondent joined the Tamil Nadu Judicial

Ministerial Service as a Typist on 11.4.1979, and was initially posted in the Court of Judicial Magistrate II Class at Kovilpatti in District Thoothukudi (formerly known as Tuticorin). Over the period he was promoted from time to time and from 15.10.2001 onwards he was working as Sheristadar Category I in Court of Principal District Judge, Thoothukudi. He was also holding the additional charge of the post of P.A. to the District Judge, Thoothukudi, since that post had fallen vacant. It is his case that he was expecting the regular promotion in the post of P.A. to the District Judge.

5. It so transpired that the first respondent alongwith other two employees in the District, that is one S. Kuttiapa Esakki, Sheristadar, Sub-Court, Kovilpatti and one T.C. Shankar, Head Clerk in the Court of Principal District Judge, Thoothukudi came to be transferred outside the district by order dated 19.9.2006 issued by the appellant on behalf of the High Court on administrative grounds. These other two employees filed writ petitions bearing nos. WP (MD) No.9378 and 10528 of 2006 before the Madurai Bench of Madras High Court, but the petitions came to be dismissed by the High Court by its order dated 20.4.2007. The first respondent did not challenge his transfer at that time and joined at the place where he was transferred in district Ramanathapuram.

6. The first respondent came to know that the post of P.A. to the District Judge, Thoothukudi was being filled, and on 21.4.2007 he made a representation to the Principal District Judge, Thoothukudi, the respondent no.2 herein for being considered for that post. The first respondent learnt that the fourth respondent was promoted to that post of P.A. to the District Judge though he was due to retire shortly on 31.8.2007. He is junior to the first respondent as well as to the third respondent. Third respondent went on medical leave in July 2007 and that is how fourth respondent was promoted to that post. Later on, the first respondent learnt that he was not considered for this post for the reason that he was already

transferred outside that district, and the reasons for the decision were recorded in the proceeding of the second respondent dated 6.6.2007.

7. At this stage the first respondent obtained necessary information by filing an application under the Right to Information Act, 2005 and then filed a writ petition on 24.8.2007 bearing W.P. (MD) No.7121/2007 before the Madurai Bench, and prayed that the proceeding dated 6.6.2007 bearing No.2697 concerning his non-consideration for that post be called from the file of the second respondent, and be quashed and set-aside. He also prayed that a selection panel be prepared for the post of P.A. to the District Judge, Thoothukudi by including his name in that panel, and necessary orders be passed. The Principal District Judge was joined as the first respondent, the High Court was joined as the respondent no.2, and the two concerned employees were joined as respondent no.3 and 4 in that petition.

8. The first respondent contended in his petition that in spite of his transfer from District Thoothukudi, he retained his lien on his post in that district. That was the basis of his prayers. He did not challenge his transfer from that district. It is material to note what is stated in paragraph 8 of his affidavit in support of his writ petition. This para reads as follows:-

> **"*8.*** *I submit that the 2nd respondent is well within his powers to transfer any employee from one district to another district on administrative grounds and there was no malafide exercise in the present transfers. However, the 3rd and 4th respondents were left out though they too were the candidates. In any case, one cannot challenge the transfers but the same shall not have the effect of obliterating the lien I hold and any right to be considered for the promotion as PA to the District Judge, Thoothukudi."*

Thus, it would be seen that the first respondent accepted

that it was within the powers of the appellant, i.e. the Registrar General representing High Court Administration to transfer the employees from one district to another, and there was no malafide exercise in the present transfer. His only submission was that he retained his lien on his post in district Thoothukudi in spite of his transfer therefrom, and he should be considered for promotion to the post of P.A. in that district.

9. The writ petition was opposed by the second respondent herein i.e. by the District Judge, Thoothukudi by filing an affidavit dated 20.3.2008. He pointed out that the first respondent was transferred outside district Thoothukudi alongwith earlier mentioned two employees S. Kuttiapa Esakki and T.C. Shankar by the High Court under a common order on the basis of a confidential letter received from the then Principal District Judge, Thoothukudi. The District Judge also pointed out in his affidavit that the first respondent can claim appropriate promotion in the district where he was transferred on the basis of his original seniority, but he can no longer claim it in district Thoothukudi wherein he had lost his lien. He referred to Rule 14(A) (d) of the Fundamental Rules of Tamil Nadu Government which lays down that the lien of a Government servant on his post shall stand terminated on his acquiring lien on another permanent post.

10. It was therefore, pointed out in the affidavit that after the writ petitions filed by the earlier mentioned two employees were dismissed, the employees who were in the zone of consideration were considered for the promotion to the post of P.A. to District Judge, Thoothukudi, and the selection was made after considering the merit, ability and seniority of the candidates concerned as per rules 8 and 19 of Tamil Nadu Judicial Ministerial Service Rules. As far as the claim of the first respondent to the lien on a post in Thoothukudi is concerned, it was pointed out that first respondent had not challenged his transfer from Thoothukudi. It was, therefore, submitted that the petition be dismissed. Since, the above referred Rule 14-A was

relied upon, we may quote the same which reads as follows:-

"14-A:

(a) Except as provided in clauses (c) and (d) of this rule, a Government servant's lien on a post may, in no circumstances be terminated, even with his consent, if the result will be to leave him without a lien or a suspended lien upon a permanent post.

(b) Deleted.

(c) Notwithstanding the provisions of Rule 14(a), the lien of a Government servant holding substantively a permanent post shall be terminated while on refused leave granted after the date of retirement under Rule 86 or corresponding other rules. Vide G.O.829, Personnel and Administrative Reforms Department, dated 26.8.1985.

(d) A Government servant's lien on a post shall stand terminated on his acquiring a lien on a permanent post (whether under the Government or the Central Government or any other State Governments) outside the cadre on which he is borne."

11. A counter affidavit dated 18.7.2008 was filed by the then Registrar of the High Court, and it was pointed out that the first respondent himself had not alleged any malafides to challenge his transfer. He had also admitted that transfer was within the powers of the High Court Administration. The affidavit stated that the transfers were effected on the basis of the report/directions received from the Vigilance Cell of the Madras High Court, however, the transferred employee will retain his seniority in the Ramanathapuram district under explanation 1 of Rule 39 of the Tamil Nadu Judicial Ministerial Service Rule right from the date of his first appointment in Thoothukudi district.

12. In view of these affidavits filed in reply to his petition, the first respondent amended his petition nearly after nine months by filing an application dated 21.4.2008 with supporting affidavit, and now sought to add the prayer that the records relating to the transfer order dated 19.9.2006 be also called from the files of the High Court, and the same be quashed and set-aside.

13. The amended petition was opposed by the then Registrar General of the High Court by filing one more affidavit dated 1.8.2008. She pointed out that the first respondent was transferred along with two other employees outside the district Thoothukudi on administrative grounds by the High Court under administrative proceeding dated 19.9.2006. She also pointed out that a complaint had been received from the staff of the judicial department of that district by the Vigilance department of the High Court on 2.1.2006. The complaint stated that the first respondent along with some other employees had formed a coterie in the District Court and they were dominating the District Administration whereby the Court was suffering in its work, and therefore these employees be transferred to other district. That letter was forwarded to the District Judge, Thoothukudi for his comments, who in turn wrote back to the High Court on 28.4.2006 placing it on record that departmental enquiries were pending against the first respondent and three other employees on the charges of corruption. The District Judge had also opined that if these employees were continued in the district, the administration would be very much spoiled. It is, therefore, that the High Court Administration directed that the first respondent and the concerned employees be transferred outside the district on administrative grounds. There was no malafide intention whatsoever in these transfers.

14. Thereafter the first respondent sent a mercy petition to the High Court submitting that he was on the verge of promotion to a higher post viz., that of P.A., and therefore, he may be promoted in district Thoothukudi and if necessary be

transferred to the nearest district Tirunelveli. The High Court considered that representation but rejected it by its proceeding dated 8.5.2007. Incidentally, Ramanathapuram is also a district adjoining Thoothukudi.

15. The writ petition was thereafter considered by a Division Bench of the Madras High Court at Madurai which passed the impugned order. The High Court did not accept the plea of the first respondent that he retained a lien in district Thoothukudi. It held that his lien in that district stood terminated in view of the above referred Rule 14 (A) (d) of the Fundamental Rules, and also in view of the proposition laid down by this Court in *Jagdish Lal Vs. State of Haryana* reported in [1997 (6) SCC 538], that an employee cannot simultaneously claim a lien on two posts. The Division Bench also did not find any error in the proceeding / order dated 6.6.2007 of the Principal District Judge, Thoothukudi wherein he had recorded that the first respondent could not be taken up for consideration for promotion in district Thoothukudi, since he had been transferred outside that district.

16. The Division Bench, however, held that although the High Court had the power to transfer the first respondent from one District unit to another unit, it had to be seen whether such power had been exercised by a competent authority or not. The Division Bench further held in para 20 of its judgment that as per Article 216 of the Constitution, High Court means 'the Chief Justice and his companion Judges and the matter should have been placed before the full Court'. The bench also observed that in any case no committee had been constituted by the High Court in that matter before taking the decision to transfer, and the impugned transfer was a unilateral decision taken by the then Honourable Chief Justice of Madras High Court. If such prior steps were taken, the order could have been held to be valid as per the judgment of this Court in *High Court of Judicature at Bombay Vs. Shirishkumar Rangrao Patil*

reported in [1997 (6) SCC 339]. At the end of para 20 of its judgment, the Court held as follows:-

> **"20…**…….At the cost of repetition it is to be held that no such Committee has been appointed or the matter has been placed before the Full Court and painfully the impugned decision has been taken unilaterally by the then Honourable Chief Justice of the Madras High Court, which has been communicated through the second respondent/Registrar General, which cannot be said to be satisfying the meaning of 'High Court' embodied in the Constitution. On this ground also, the impugned transfer order is liable to be set aside."

17. The Division Bench thereafter noted that the impugned order of transfer had been passed on an anonymous letter and thereafter on the basis of a report from the District Judge and after ordering of a vigilance enquiry. The Division Bench referred to three judgments of this Court in *Ishwar Chand Jain Vs. High Court Punjab and Haryana* reported in [1988 (3) SCC 370], *K.P. Tiwari Vs. State of M.P.* reported in [1994 Suppl. (1) SCC 540] and *Ramesh Chander Singh Vs. High Court Allahabad* reported in [2007 (4) SCC 247] and also to *Centre for Public Interest Litigation Vs. Union of India* reported in [2005 (8) SCC 202] and thereafter observed in paragraph 25 and 26 as follows:-

> "**25.** Thus, it has been time and again held by the Honourable Apex Court that it is the duty of the higher judiciary to protect the officers of the lower judiciary from the persons, who make reckless, baseless and unfounded allegations, by way of anonymous petitions. The same reasoning would apply even in the case of staff members. Admittedly, in the case on hand, the impugned action has been initiated pursuant to an anonymous petition received……."
>
> **26.** None of these aspects have been taken into consideration before ordering transfer of the petitioner. No doubt, transfer is an incidence of service. But, since in the peculiar facts and circumstances of the case on hand, where the impugned order of transfer has served as a punishment on the petitioner, that too without conducting any enquiry, since it has impaired his chances of promotion besides reducing his cadre to that of the Sheristadar of the Chief Judicial Magistrate's Court from that of the P.A. to the District Judge, which he was enjoying even though as an additional charge, as there are many more seniors in the Ramanathapuram District, now a question would arise as to whether such an order of transfer which worked as a punishment on the petitioner, is sustainable under law."

18. The appellant had drawn the attention of the Division Bench to the judgment of another Division Bench of Madras High Court in the case of *The Registrar of High Court of Madras Vs. Vasudevan, A.K.* reported in [1996 (1) MLJ 153]. In that matter complaints were received against court bailiffs working in the City Civil Court at Madras. After the vigilance cell held discreet enquiries, they were transferred to various courts outside Madras on administrative grounds. A Single Judge had set-aside those transfers by holding them to be punitive. Allowing the Writ Appeal, the Division Bench had held that the employer is entitled to consider whether the particular employee is suitable to work in a particular place or to continue there. It is however to be seen that transfer has not affected the service conditions in any way. The Division Bench held that the order of transfer had not affected any of the service conditions of the bailiffs and their chances of promotion were also not diluted. Therefore, there was no question of providing any hearing as well.

19. The impugned judgment distinguished the judgment in Vasudevan's case by observing that the promotional prospects of the first respondent were affected in the present matter which

was not so in Vasudevan's case. The Division Bench observed that after obtaining the remarks of the District Judge, the appellant ought to have issued a notice and sought the explanation from the first respondent. It was therefore, of the view that the first respondent had not been provided with any opportunity to explain and the transfer was punitive. The Court, therefore, passed an order setting aside the transfer, directing the appellant and the District Judge to immediately restore the respondent no.1 and 2 at District Thoothukudi alongwith his seniority, and confer on him the post of P.A. in that district, since, according to the Division Bench except the order of impugned transfer, there was no other impediment for his promotion. It is this order which is challenged in this appeal. This Court has passed an order of status quo with respect to that order during the pendency of this appeal.

Consideration of rival submissions -

20. We have heard the counsel for the appellant and for respondent No. 1. There is no appearance for the other respondents though served. It was submitted on behalf of the appellant that the decision of the Division Bench was erroneous on both the grounds on which the Division Bench decided against the appellant viz. (i) that the transfer was punitive and (ii) that it was not passed by a competent authority. On the other hand, the counsel for the first respondent reiterated the submissions made on his behalf before the High Court, and submitted that the order did not deserve to be interfered with in any manner whatsoever.

21. We have considered the submissions of both the counsel. As far as the action of transfer against the first respondent was concerned, the same was on the basis of the report of the Registrar (Vigilance). Besides, the District Judge had also opined that retention of the appellant in his district was undesirable from the point of view of administration. Thus, it involved inter-district transfer. The respondent no.1 had not

disputed the power of the High Court to transfer him outside the district, nor did the division bench interfere therein on that ground. This is apart from the fact that transfer is an incident of service, and one cannot make a grievance if a transfer is made on the administrative grounds, and without attaching any stigma which was so done in the present case.

22. In the context of transfer of a govt. servant we may refer to the dicta of this Court in *N.K. Singh Vs. Union of India* reported in [AIR 1995 SC 423] where this Court observed in para 22 as follows:-

"*22….. Transfer of a government servant in a transferable service is a necessary incident of the service career. Assessment of the quality of men is to be made by the superiors taking into account several factors including suitability of the person for a particular post and exigencies of administration. Several imponderables requiring formation of a subjective opinion in that sphere may be involved, at times. The only realistic approach is to leave it to the wisdom of the hierarchical superiors to make the decision. Unless the decision is vitiated by mala fides or infraction of any professed norm of principle governing the transfer, which alone can be scrutinized judicially, there are no judicially manageable standards for scrutinizing all transfers and the courts lack the necessary expertise for personnel management of all government departments. This must be left, in public interest, to the departmental heads subject to the limited judicial scrutiny indicated.*"

23. In *State of Madhya Pradesh Vs. S.S. Kourav* reported in [AIR 1995 SC 1056], the Administrative Tribunal had interfered with the transfer order of the respondent and directed him to be posted at a particular place. It is relevant to note that while setting aside the order of the tribunal this Court observed in para 4 of its judgment as follows:-

"4……*The Courts or Tribunals are not appellate forums to decide on transfers of officers on administrative grounds. The wheels of administration should be allowed to run smoothly and the Courts or Tribunals are not expected to interdict the working of the administrative system by transferring the officers to proper places. It is for the administration to take appropriate decision and such decisions shall stand unless they are vitiated either by mala fides or by extraneous consideration without any factual background foundation. In this case we have seen that on the administrative grounds the transfer orders came to be issued. Therefore, we cannot go into the expediency of posting an officer at a particular place."*

We may mention that this Court has reiterated the legal position recently in *Airports Authority of India Vs. Rajeev Ratan Pandey* reported in [2009 (8) SCC 337] that 'in a matter of transfer of a govt. employee, the scope of judicial review is limited and the High Court would not interfere with an order of transfer lightly, be it at interim stage or final hearing. This is so because the courts do not substitute their own decision in the matter of transfer.'

24. The Division Bench has however interfered with the order of transfer on the ground that the transfer order was passed by the then Chief Justice unilaterally, and he did not have the competence therefor. In rebuttal, the appellant relied upon a Full Court Resolution dated 19.7.1993, and the text thereof was placed before this Court. Item 3 thereof was regarding services of Judicial Officers, and Ministerial and Menial Staff. The subject of "Vigilance Cell" alongwith certain other subjects was specifically included therein as falling within the jurisdiction of the Chief Justice alone. It was submitted that all residuary subjects not allocated to the committee of Judges or any individual Judge, remain within the jurisdiction of Chief Justice. Further, the Chief Justice has to supervise the administration in the subordinate Courts also and has to take

the decisions in emergencies, on all necessary matters. It was also submitted on behalf of the appellant that the Division Bench erred in not accepting the propositions emanating from the judgment of the other Division Bench in the case of *A.K. Vasudevan* (supra) which judgment had been left undisturbed by this Court when a Special Leave Petition against the same was dismissed.

25. The other ground on which the Division bench has set-aside the transfer of the first respondent is that the transfer affected the promotional prospects of the first respondent, and therefore it was punitive in nature. According to the Division Bench but for the transfer there was no impediment for the promotion of the first respondent, and therefore it directed his promotion. The appellant pointed out in this behalf that an employee does not have a right of promotion as such. He has only a right to be considered for promotion, and even in the present case the District Judge had considered a panel of persons who came in the zone of consideration, and thereafter effected the promotion. The first respondent could not be included in that panel since he was already transferred outside that district. It was therefore, submitted that the Division Bench had erred in directing the promotion of the first respondent to the post of P.A. to the District Judge and the order deserved to be set-aside.

26. As far as the first ground on which the High Court has interfered with the order of transfer is concerned, namely that it was not passed by a competent authority, the appellant has produced the relevant material before this Court which clearly shows that the Full Court had passed a resolution under which the subject of vigilance enquiries was retained with the Chief Justice. Besides, in view of the pending inquiry against the appellant, the District Judge of Thoothukudi had expressed that it was not desirable to retain the appellant in that district. The control of the High Court over the subordinate courts under Article 235 of the Constitution includes general superintendence

of the working of the subordinate courts and their staff, since their appeals against the orders of the District Judges lie to the High Court. (see *R.M. Gurjar Vs. High Court of Gujarat* reported in AIR 1992 SC 2000). 'The word control referred to in Article 235 of the Constitution has been used in the comprehensive sense and includes the control and superintendence of the High Court over the subordinate courts and the persons manning them both on the judicial and administrative side'. (see para 14 of *Gauhati High Court Vs. Kuladhar Phukan* reported in [2002 (4) SCC 524]. This control over the subordinate courts vests in the High Court as a whole. 'However, the same does not mean that a Full Court cannot authorize the Chief Justice in respect of any matter whatsoever'. (see para 18 and 19 of *High Court of Rajasthan Vs. P.P. Singh & Anr.* [2003 (4) SCC 239]. The Full Court of the Madras High Court had passed a resolution way back in the year 1993 to retain the subject of "Vigilance Cell" with the Chief Justice. Therefore, it was fully within the authority of the then Chief Justice to take the decision to transfer the appellant outside district Thoothukudi. The transfer was particularly necessary in view of the complaint that was pending against him. The Division Bench has observed that the complaint was an anonymous one. Even so, the same had been looked into by the Vigilance Cell, and the District Judge had reported that departmental enquiries were pending against the appellant and the other employees against whom the complaint had been made. The District Judge had also opined that it was undesirable to retain the appellant in his district from the point of view of the administration of that district. In view of all these factors, the Chief Justice had to take the necessary decision. It is, therefore, difficult to accept the view of the Division Bench that the Chief Justice unilaterally transferred the appellant outside the district, and the decision ought to have been taken either by the Full Court or a Committee appointed by the Full Court. In view of what is pointed out above, there was no reason for the Division Bench to take such a view in the facts of the present matter.

27. The other ground on which the Division Bench has interfered with the transfer order is that according to the Division Bench, but for this transfer order there was no other impediment for the District Judge to promote the respondent no.1. The Division Bench was of the view that the first respondent had lost the opportunity of getting promoted to the post of P.A. to the District Judge on account of this transfer, and therefore the same was punitive. As far as this finding of the bench is concerned, it ought to have noted that the transfer is an incident of service, and the first respondent himself had clearly stated in para 8 of his affidavit in support of the petition that there was no malafide exercise in the present transfer. As seen above, the transfer was purely on the administrative ground in view of the pending complaint and departmental enquiry against first respondent. When a complaint against the integrity of an employee is being investigated, very often he is transferred outside the concerned unit. That is desirable from the point of view of the administration as well as that of the employee. The complaint with respect to the first respondent was that he was dominating the administration of the District Judiciary, and the District Judge had reported that his retention in the district was undesirable, and also that departmental enquiries were pending against him and other employees, with respect to their integrity. In the circumstances the decision of the then Chief Justice to transfer him outside that district could not be faulted.

28. Besides, there is no right of promotion available to an employee. He has a right to be considered for promotion which has been held to be a fundamental right (see para 13 of *S.B. Bhattacharjee Vs. S.D. Majumdar,* [2007 (10) SCC 513]. However, though a right to be considered for promotion is a condition of service, mere chance of promotion is not (see para 15 of the Constitution Bench judgment in *Mohd. Shujat Ali Vs. Union of India,* [AIR 1974 SC 1631].

29. The fact that the first respondent could not be

considered for promotion to the post of P.A. in district Thoothukudi was undoubtedly the consequence of this transfer outside that district. However, in view of what is stated above, that itself cannot make his transfer a punitive one. As rightly stated by the then Registrar General in her affidavit before the High Court, the first respondent would be retaining his original seniority though he was transferred in another district. He was in the cadre of Sheristadar and he continued in that cadre in district Ramanathapuram after he was transferred to that district. In district Thoothukudi, he was officiating as P.A to the District Judge since that post was vacant, but his substantive post was that of Sheristadar. The officiating work did not create any right in him to be continued in the post of P.A. That was not also his case, and that is how he had sought to be empanelled for being considered for the promotion to the post of P.A, though in district Thoothukudi. Since the first respondent was no longer in district Thoothukudi, obviously he could not be included in the panel prepared for consideration for the post of P.A. in that district.

30. The first respondent was contending that his transfer was punitive only because his promotional chances were affected. This controversy is no longer res-integra. In *Paresh Chandra Nandi Vs. Controller of Stores, N.F. Railway* [AIR 1971 SC 359] the situation was almost similar though the grievance of the appellant was that on account of transfer of respondents 4 to 8 into his department alongwith their lien, his chances for promotion were materially affected. The appellant was working in the stores department of the North East Frontier Railway. This Court however, noted that the transfer was effected under the relevant rules on administrative grounds, and it did not affect his pay in any way. The court held that the transfer of a permanent employee alongwith the consequent transfer of his lien cannot be challenged when the transfer is to a permanent post in the same cadre not carrying less pay, even if such transfer materially affects chances for promotion. In the present case the pay, position and seniority of the first respondent was not affected by the impugned transfer, and

therefore, the same could not be said to be punitive merely because his promotional chances got affected due to the transfer. Hence, there was no question of providing him any opportunity of hearing at that stage before effecting the transfer, and the order of transfer could not be faulted on that count as well.

31. Noting that the respondent No. 1 was transferred on account of an anonymous complaint the Division Bench had referred to a few judgments wherein this Court has emphasized the responsibility of the Higher Judiciary to guard the judicial officers in the Subordinate Courts against unjustified complaints. *Ishwar Chand Jain* (supra) was a case where the Advocates who were not satisfied with the orders passed by the Appellant Judicial Officer had made unjustified complaints against him. This Court had set-aside the order of termination of services of the appellant which was based on these complaints, and in that context observed that if complaints are entertained on trifling matters relating to judicial orders which may have been upheld by the High Court on the judicial side, no judicial officer would feel protected. In *K.P. Tiwari* (supra) the High Court had made disparaging remarks, against the appellant, a Judicial Officer, while recalling an unjustified bail order granted by him. This Court had deprecated attributing of improper motives to the subordinate officers. In *Ramesh Chandra Singh* (supra) disciplinary proceedings were initiated by the High Court against the Appellant Judicial Officer for a bail order which order could not be said to be unjustified. The Disciplinary action was disapproved by this Court and the matter was remitted to the Full Court for its consideration.

32. As can be seen from these judgments, they were all rendered in altogether different context. In the present case we are concerned with a Sheristadar who has been transferred on receiving a complaint, although an anonymous one, but against whom a departmental inquiry is pending. He has been transferred to another district though retaining him in the same

cadre with the same pay as well as his seniority. Such an action was fully justified and within the authority of the High Court. No observations were made against him, nor was any stigma attached. The reliance on the above three judgments to interfere in such an order clearly shows a non-application of mind by the Division Bench to the problem which the High Court Administration was faced with, and which was being attended in accordance with the relevant rules. In *Centre for Public Interest Litigation* (supra), the grievance was with respect to the likely appointment of respondent No. 3 to the post of Chief Secretary, Uttar Pradesh when she was facing criminal prosecution. This Court had therefore directed that she be transferred to some other post in the cadre/grade to which she belonged. It was in this context that the Court made a general observation that, postings in sensitive posts should be made in transparent manner so that there is no scope for making grievance, though grievances can be made for ulterior motive with the intention of damaging the reputation of an officer who is likely to be appointed in a sensitive post. These observations have also no application in the present case since all that has happened is that first respondent has been transferred from one district to another in view of a complaint received against him and a pending inquiry. It cannot be said that the action was with a view to deny him any post. In fact the first respondent himself had stated in his Writ Petition to the High Court that there was no malafide exercise in his transfer.

33. The Division Bench also erred in ignoring that the first respondent had been transferred under a common order alongwith two other employees i.e. S. Kuttiapa Esakki, and one T.C. Shankar. The Writ Petitions filed by them had been dismissed. Besides, a judgment of a co-ordinate bench in A.K. Vasudevan was cited before the Division Bench wherein the facts were almost identical. It was therefore, not expected of the Division Bench to take a different view from the point of view of judicial discipline. To put it in the words of this Court in *Sri Venkateswara Rice Ginning & Groundnut Oil Mill Vs. State*

of Andhra Pradesh reported in [AIR 1972 SC 51], 'it is regrettable that the learned Judges who decided the latter case overlooked the fact that they were bound by the earlier decision' (para 9 of the report in AIR).

34. We cannot ignore that the integrity of the officers functioning in the administration is of utmost importance to retain the confidence of the litigants in the fairness of the judicial system. If there is any complaint in this behalf, the Chief Justice is expected to act on behalf of the High Court to see to it that the stream of justice does not get polluted at any level. We are pained to observe but we must state that the decisions on the judicial side such as the one in the present case create unnecessary difficulties for the High Court Administration. In *High Court Judicature for Rajasthan Vs. Ramesh Chand Paliwal* reported in [1998 (3) SCC 72], the order under challenge was with respect to the issue whether the post of Deputy Registrar should be filled from amongst the officers belonging to the establishment of the High Court, or from the judicial side. A Division Bench of Rajasthan High Court had opined that the subject be placed before the Full Court, since according to the bench the Chief Justice ought not to have brought in the officers from the judicial side for an administrative post. This Court set-aside that direction by holding that it amounted to encroachment upon the authority of the Chief Justice, and was contrary to the constitutional scheme. This was a matter concerning an officer of the High Court covered under Article 229 of the Constitution. What the Apex Court has observed in para 38 of this judgment is quite relevant for the present matter and worth reproducing. This para 38 reads as follows:-

> **"38.** As pointed out above, under the constitutional scheme, Chief Justice is the supreme authority and the other Judges, so far as officers and servants of the High Court are concerned, have no role to play on the administrative side. Some Judges, undoubtedly, will

become Chief Justices in their own turn one day, but it is imperative under the constitutional discipline that they work in tranquillity. Judges have been described as "hermits". They have to live and behave like "hermits" who have no desire or aspiration, having shed it through penance. Their mission is to supply light and not heat. This is necessary so that their latent desire to run the High Court administration may not sprout before time, at least, in some cases."

35. Thus it is very clear that the impugned judgment and order are wholly unsustainable, and in complete disregard of the law laid down by this Court. This Court has, therefore, to allow this appeal and to set-aside the judgment and order dated 28.8.2008 passed by the Madras High Court on W.P.(MD) No. 7121 of 2007. Accordingly, this appeal is allowed and the order dated 28.8.2008 passed by the Madras High Court on Writ Petition (MD) No. 7121 of 2007 is set-aside. The said writ petition shall stand dismissed. There will, however, not be any order as to the costs.

N.J. Appeal allowed.

PANCHMAHAL VADODARA GRAMIN BANK & ORS.
v.
D.M. PARMAR
(Civil Appeal No. 2093 of 2007)

SEPTEMBER 21, 2011

[A.K. PATNAIK AND H.L. GOKHALE, JJ.]

Service Law – Dismissal from service – Charges against bank officer (manager of the bank) alleging grave lapses in sanction/disbursement in many loan accounts – Order of dismissal by the Disciplinary Authority – Representation thereagainst rejected – Writ petition by the bank officer – Single Judge of the High Court holding that though the Enquiry Officer had fully and properly scrutinized the relevant material and gave reasonable opportunity to the bank officer during the course of inquiry, there was non-application of mind by the disciplinary authority with regard to the quantum of punishment – Order of dismissal quashed and direction issued for reinstatement of the bank officer but without any backwages – Matter remanded back to the disciplinary authority for passing appropriate order with regard to the quantum of punishment – Said order upheld by the Division Bench – On appeal, held: Plea of the bank officer that non-furnishing/non-inspection of the documents showing irregularities committed by the previous manager of the bank, by the Enquiry Officer was violative of principle of natural justice, cannot be accepted – Enquiry Officer rightly took a view that the said documents had no relevance to the charges against the bank officer in the instant case – There were ten charges against the bank officer which were of serious nature and out of these almost eight were proved – Findings of the Enquiry Officer which include serious acts of negligence as also acts of dishonesty and lack of probity were based on adequate material, mainly bank records referred to, in the

inquiry report – As such the High Court rightly did not interfere with the findings of the Enquiry Officer – Thus, the bank officer cannot avoid the punishment of dismissal from service – It cannot be held that punishment of dismissal was shockingly or strikingly disproportionate to the gravity of charges proved against the bank officer – Order passed by the High Court is set aside.

Disciplinary Authority-cum-Regional Manager vs. Nikunja Bihari Patnaik **1996 (9) SCC 69: 1996 (1) Suppl. SCR 314;** *Chairman and M.D., United Commercial Bank* vs. *P.C. Kakkad* **(2005) 4 SCC 364;** *General Manager(P), Punjab and Sind Bank and Ors.* vs. *Daya Singh* **(2010) 11 SCC 233: 2010 (9) SCR 71;** *Narinder Mohan Arya* vs. *United India Insurance Co.Ltd. and Ors* **(2006) 4 SCC 713: 2006 (3) SCR 932;** *Union of India and Ors.* vs. *Prakash Kumar Tandon* **(2009) 2 SCC 541: 2008 (17) SCR 855;** *Kailash Nath Gupta* Vs. *Enquiry Officer, (R.K. Rai), Allahabad Bank and Ors.* **(2003) 9 SCC 480;** *Administrator, Union Territory of Dadra and Nagar Haveli* vs. *Gulabhia M. Lad* **(2010) 5 SCC 775: 2010 (5) SCR 309;** *General Manager(P), Punjab and Sind Bank and Ors.* vs. *Daya Singh* **(2010) 11 SCC 233: 2010 (9) SCR 71 – referred to.**

Case Law Reference:

1996 (1) Suppl. SCR 314	**Referred to**	**Para 6**
(2005) 4 SCC 364	**Referred to**	**Para 6**
2010 (9) SCR 71	**Referred to**	**Para 6**
2006 (3) SCR 932	**Referred to**	**Para 7, 9**
2008 (17) SCR 855	**Referred to**	**Para 7**
(2003) 9 SCC 480	**Referred to**	**Para 8**
2010 (5) SCR 309	**Referred to**	**Para 8**

2010 (9) SCR 71 Referred to Para 10

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2093 of 2007.

From the Judgment and Order dated 05.08.2005 and 28.09.2005 of the High Court of Gujarat at Ahmedabad in LPA No. 1736 of 2004 and MCA No. 1883 of 2005 in LPA No. 1736 of 2004.

WITH

Civil Appeal No. 2094 of 2007.

C.U. Singh, Pramod B. Agarwala, Praveena Gautam and Anuj P. Agarwala for the Appellants.

Nachiketa Joshi for the Respondent.

The following order of the Court was delivered

O R D E R

1. These are two appeals filed by way of special leave under Article 136 of the Constitution of India against the common order dated 5.8.2005 in Letters Patent Appeals No. 1736/2004 and 1869/2004 passed by the Division Bench of the Gujarat High Court.

2. The facts briefly are that D.M. Parmar was appointed in Panchmahal Vadodara Gramin Bank, 'the Bank' for short, as an officer by order dated 16.4.1988. He joined the bank on 25.4.1988 and was confirmed in service on 9.5.1991. He worked as a Manager at Chundadi branch of the bank during 25.3.1996 to 21.6.1997 and during this period he had granted advances, renewed various loan accounts and extended more finance to the borrowers under Crop Loan Scheme. A show cause notice dated 15/20.5.1999 was issued to him to show cause why disciplinary action should not be initiated against him for various acts of omission and commission committed during

his posting as a Manager of Chundadi branch of the bank during the period 25.3.1996 to 21.6.1997. He replied saying that he was not fully experienced in handling a big branch and in discharging duties as a Branch Manager and the acts of omission and commission were on account of his inexperience. The reply furnished by him was not accepted by the bank and a charge-sheet dated 20.26.4.1999 was issued to him alleging various acts of misconduct committed by him. He submitted his reply dated 2.5.2009 and denied the charges. An Enquiry Officer was appointed to conduct the enquiry and the Enquiry Officer submitted his findings in his report dated 30.10.2000 holding that D.M. Parmar is guilty of most of the charges. The disciplinary authority thereafter gave an opportunity to D.M Parmar to make a representation against the findings of the Enquiry Officer and he submitted his representation. The disciplinary authority granted a personal hearing to him to show cause as to why the proposed punishment of dismissal should not be imposed on him. He appeared before the disciplinary authority and prayed that leniency be showed to him. The disciplinary authority, however, passed an order of dismissal dated 6.12.2000.

3. D.M. Parmar then carried an appeal against the order of disciplinary authority. The appeal was dismissed by the appellate authority by order dated 17.2.2001. Aggrieved, he filed a writ petition registered as Special Civil Application No.6260/2001 before the Gujarat High Court. The writ petition was, however, withdrawn on 2.7.2002 by D.M. Parmar to enable him to make a representation to the concerned authority of the bank. He made a representation to the bank against the order of dismissal but the representation was rejected by order dated 6.8.2002.

4. D.M. Parmar then filed a fresh writ petition No.6260/2001 before the High Court. A learned single Judge of the High Court heard the writ petition and passed the judgment dated 13.8.2004. In the judgment, the learned single Judge observed that he had heard learned counsel for the respective parties

extensively and gone through the entire records of the Enquiry Office and he was of the opinion that the Enquiry Officer has fully and properly scrutinised the relevant material before him before recording the findings on the charges levelled against D.M. Parmar and that reasonable opportunity had been given to him during the course of enquiry. The learned single Judge, however, held in the judgment that no reason had been mentioned in the order of dismissal as to why the disciplinary authority selected the penalty of dismissal although in the rules there were other minor and major penalties mentioned. The learned single Judge also found in his judgment that there was almost total non-application of mind with regard to the quantum of punishment. The learned single Judge was of the view that the disciplinary authority was required to consider the fact that there was no finding that there was dishonest intention or dishonest act on the part of D.M. Parmar. The learned single Judge further observed in his judgment that in the absence of any adverse past record, he could not have been lightly dismissed from service on the charges. The learned single Judge has, therefore, quashed the order of dismissal and directed reinstatement of D.M. Parmar but further directed that he should not get any backwages since he had not done any work since he was dismissed from service. The learned single Judge remanded the matter to the disciplinary authority for passing appropriate order with regard to quantum of punishment with the observation that the disciplinary authority may impose any penalty except the penalty of dismissal, removal or termination from service.

5. Aggrieved by the judgment of the learned single Judge, the bank filed Letters Patent Appeal No.1736/2005 and D.M. Parmar filed Letters Patent Appeal No.1869/2005. The Division Bench of the High Court, after hearing learned counsel for the parties, however, sustained the judgment of the learned single Judge and dismissed both the appeals. The bank has, therefore, filed C.A. No.2093/2007 and D.M. Parmar has filed C.A. No.2094/2007 before this Court.

6. Mr. C.U. Singh, learned senior counsel appearing for the bank, the appellant in C.A. No.2093/2007, submitted that the findings of the Enquiry Officer would show that D.M. Parmar was guilty of very serious charges and was required to be dismissed from service on account of acts of integrity and dishonesty and lack of probity on the part of D.M Parmar. He referred to the order of disciplinary authority dated 6.12.2000 to show that disciplinary authority after careful consideration of findings of the Enquiry Officer and the entire records of enquiry had come to the conclusion that grave lapses in sanction/ disbursement in many loan accoutns had been established against him and the magnitude of irregularities and blatant disregard of set procedures and norms for sanction/ disbursement were of a serious nature. He submitted that the disciplinary authority after considering the nature of irregularities had come to the conclusion that the acts of misconduct committed by D.M. Parmar could not be viewed leniently and that he had abused his position and power which was detrimental to the interest of the bank. He was of the opinion that ends of justice would be met if the punishment of dismissal was imposed on him. Mr. Singh vehemently submitted that the finding of the learned single Judge which has been sustained by the Division Bench that the disciplinary authority did not apply his mind before deciding to impose the penalty of dismissal on D.M Parmar was, therefore, factually not correct. He submitted that considering the serious nature of misconduct committed by D.M. Parmar, this is a fit case in which the order of dismissal should have been passed by the disciplinary authority and the High Court should not have interfered with the order of dismissal. In support of his submissions, he relied on the decisions of this Court in *Disciplinary Authority-cum-Regional Manager Vs. Nikunja Bihari Patnaik (*1996) 9 SCC 69 and in *Chairman & M.D., United Commercial Bank Vs. P.C. Kakkad*, (2005) 4 SCC 364 in which this Court has taken a view that officers/employees of the bank should be seriously dealt with for charges of misconduct in the interest of discipline of the bank and such officers are required to discharge their

duties with utmost integrity, honesty, devotion and diligence and should not do anything which is unbecoming of a bank officer. He also relied on a recent decision of this Court in *General Manager(P), Punjab & Sind Bank & Ors. Vs. Daya Singh,* (2010) 11 SCC 233 in which this Court has taken a view that conclusions arrived at by the Enquiry Officer on the basis of evidence should not be interfered with by the High Court lightly.

7. Mr. Nachiketa Joshi, learned counsel appearing for D.M. Parmar, the appellant in C.A. No. 2094/2007, on the other hand, submitted that there has been gross violation of principles of natural justice in as much as D.M. Parmar had filed a petition dated 3.11.1999 before the Enquiry Officer making a prayer that he should be furnished some papers, namely, chargesheet served on his predecessor in office, one L.K. Parmar, information in regard to working and functioning of L.K Parmar in Chundadi branch at the relevant time, copies of inspection report, completion report and rectification certificate issued by the Head Office of the bank during his tenure as the branch manager of Chundadi branch, statement of loans disbursed, crop loan schedules, extracts of land holding, renewal forms and Ikrarnama issued by him, P.S.S. Statement of loan accounts during his tenure and copies of letters written by him requesting the authority to post a second officer in the branch. He submitted that the prayer was not granted by the Enquiry Officer and instead the prayer was opposed by the Presenting Officer on behalf of the bank. He vehemently argued that these documents mentioned in his application dated 3.11.1999 before the Enquiry Officer were relevant for the defence of D.M. Parmar and as these have not been furnished to him, there was violation of principles of natural justice. Mr. Joshi cited the decision of this Court in *Narinder Mohan Arya Vs. United India Insurance Co.Ltd. & Ors*, (2006) 4 SCC 713 and *Union of India & Ors. Vs. Prakash Kumar Tandon*, (2009) 2 SCC 541, in which this Court has held that principles of natural justice and fair play have to be observed by the Enquiry Officer in a disciplinary enquiry. He submitted that in the latter case of

Union of India & Ors. Vs. *Prakash Kumar Tandon* (supra), this Court also held that when an application was filed for summoning the witnesses by delinquent officer, it was obligatory on the part of the enquiry officer to pas an order on such an application. Relying on this observation in the aforesaid case, he submitted that in the present case, although an application was filed for furnishing the documents by D.M. Parmar, no order was passed by the enquiry officer and, therefore, this is case where principles of natural justice have been violated.

8. Mr. Joshi further submitted that this Court has held in *Kailash Nath Gupta Vs. Enquiry Officer, (R.K. Rai), Allahabad Bank & Ors.,* (2003) 9 SCC 480 that where the quantum of punishment is disproportionate to the gravity of charge, the Court will interfere with the quantum of punishment. He pointed out that in the aforesaid case, the Court, after going through the charge against the delinquent officer, held that the charge was only in respect of some procedural irregularities which did not warrant the extreme punishment of dismissal from service. He submitted that in this case also the charges, if held to be proved, are only acts of irregularities and no charge of misappropriation has been established against D.M. Parmar. He also relied on the decision of this Court in *Administrator, Union Territory of Dadra and Nagar Haveli Vs. Gulabhia M. Lad,* (2010) 5 SCC 775 wherein it has been held that exercise of discretion in imposition of punishment is dependent on host of factors such as gravity of misconduct, past conduct, the nature of duties assigned to the delinquent, responsibility of the position that the delinquent holds, previous penalty, if any, and the discipline required to be maintained in the department or establishment he works. He submitted that all these factors have not been taken into consideration by the disciplinary authority by imposing the punishment of dismissal from service.

9. We have considered the submissions of learned counsel for the parties and we find that in the enquiry report, the Enquiry Officer has dealt with the request of D.M. Parmar

with regard to the documents he had asked for and he has held that the documents were asked for in connection with the irregularities of L.K. Parmar but these irregularities committed by the earlier officer have no connection with the serious irregularities committed by D.M. Parmar. The Enquiry Officer has further held that if any irregularities were committed by the earlier officer L.K. Parmar, the same have not to be included in the chargesheet issued to D.M. Parmar. Thus, the Enquiry Officer has taken a view, and we think it is a right view, that the documents to show the irregularities committed during the time of the previous manager of the bank L.K. Parmar had no relevance to the charges against D.M. Parmar. As has been held by this Court in *Narinder Mohan Arya* Vs. *United India Insurance Co.Ltd.* (supra) cited by Mr. Joshi, it is not possible to lay down any rigid rules of principles of natural justice which depends on the facts and circumstances of each case but the concept of fair play in action is the basis. In the facts and circumstances of the case, we find that the documents called for by D.M. Parmar during the enquiry have been found by the Enquiry Officer as not to be relevant for the charges against D.M. Parmar and we are of the considered view that if the said documents were not allowed to be inspected by D.M. Parmar as delinquent officer, there has been no violation of principles of natural justice.

10. On an examination of the enquiry report, we find that there were as many as ten charges against D.M. Parmar and the charges were of serious nature and out of these charges, only one charge was not fully proved, one charge was partly proved and one charge was deleted and rest of the charges were proved. In the conclusion, the enquiry officer has recorded the following findings:

"FINDINGS

(1) He did not take all possible steps to ensure and protect the interest of the Bank. In fact he took such steps and did such acts of omission and commission, which were

derogatory, detrimental, prejudicial and injurious to the interest of the Bank. ..... Proved.

(2) He showed gross negligence and indifference in discharge of his duties. ..... Proved.

(3) He did not discharge his duties with utmost integrity and honesty but in fact did such acts of lack of probity on his part. .... Proved.

(4) He did not maintain discipline in all transactions and in discharging his duties s a Manager. In fct, he misused and abused his position as a Manager of the branch. ..... Proved

(5) He did not perform his duties with devotion and diligence and violated and flouted the rules of the Bank. ..... Proved.

(6) He committed acts of breach of trust. .....Proved.

(7) By his acts of misdeeds, he tarnished the image of the bank. ..... Proved.

(8) He did acts of unbecoming of a Bank Officer. ....Proved."

These findings are all based on adequate material referred to in the inquiry report and these materials are mainly bank records. As has been held by this Court in the recent decision in *General Manager(P), Punjab & Sind Bank & Ors. Vs. Daya Singh,* (2010) 11 SCC 233, in which one of us (H.L. Gokhale, J.) was a party, as long as there are materials and evidence in support of the findings, the High Court cannot interfere with such findings in exercise of powers of judicial review under Article 226 of the Constitution of India. The learned single Judge of the High Court and the Division Bench of the High Court have, therefore, rightly not interfered with the findings. Once the

findings of the Enquiry Officer, which have been quoted above, are not interfered with, we fail to see how the delinquent officer can avoid the punishment of dismissal from service. The findings include not only serious acts of negligence but also acts of dishonesty and lack of probity. The Court cannot probably take a view that punishment of dismissal was shockingly or strikingly disproportionate to the gravity of charges proved against D.M. Parmar.

11. In the result, the impugned judgment of the Division Bench and the learned single Judge are set aside and the writ petition filed by D.M. Parmar is dismissed. Accordingly, C.A. No.2093/2007 is allowed and C.A. NO.2094/2007 is dismissed. There shall be no order as to costs.

N.J. Appeals disposed of.

GAJRAJ

v.

STATE (NCT) OF DELHI

(Criminal Appeal No.2272 of 2010)

SEPTEMBER 22, 2011

[R.M. LODHA AND JAGDISH SINGH KHEHAR, JJ.]

Penal Code, 1860: s.302 – Murder – Conviction for – Dead body of the victim found in a house – His mobile phone, licenced revolver and a sum of Rs.3 lacs were missing – Investigation revealed that IMEI of the mobile handset of the victim was used for the SIM number of accused immediately after the alleged murder – Based on circumstantial evidence, trial court convicted the accused which was upheld by High Court – On appeal, held: The evidence produced by the prosecution was based on the irrefutable fact that every mobile handset has an exclusive IMEI number – Every time a mobile handset is used for making a call, besides recording the number of the caller as well as the person called, the IMEI numbers of the handsets used are also recorded by the service provider – Evidence on record indicated that the SIM number of the victim became dead on the date on which he was murdered – It was from the use of his mobile handset that the police traced the accused – The use of mobile handset of the victim on which the accused made calls from his own registered mobile phone (SIM) immediately after the occurrence of the murder was a legitimate basis for the identification of the accused – The nexus of the accused with the victim at the time of occurrence stood fully substantiated from the said SIM/IMEI details – The revolver of the victim was also recovered from the accused – Prosecution was able to prove the charges – Conviction upheld – International Mobile Equipment Identity (IMEI).

Tele-communication: International Mobile Equipment Identity (IMEI) – Identification of accused with the aid of IMEI.

Evidence: Denial in evidence – Recovery of revolver and mobile of the victim from the accused – Signatures of the brother and father of the accused on the recovery memo – The brother of the accused denied having signed the recovery memo – He asserted that his signatures were taken on blank papers, which were then used in preparing the recovery memo – Similar statement made by father of the accused – Held: It is apparent that the brother and father of the accused would make attempts to ensure the acquittal of the accused – Despite that neither brother nor father of the accused disputed the veracity of their signatures on the recovery memos – It was, therefore, apparent that their signatures, on the recovery memos, were authentic – If the signatures of the brother and father of the accused were taken forcibly by the investigating agency, not only the accused but also his brother and his father would have raised a hue and cry and would have made representations to the concerned authorities pointing out, that the police had obtained their signatures on blank papers – Their statements did not reveal any such action at their hands – Therefore, there is no doubt that they had duly affixed their signatures on the recovery memos, by which the revolver of the deceased, as also, the mobile handset of the victim were recovered at the behest of accused – Penal Code, 1860 – s.302.

The prosecution case was that a dead body was found in a house in Delhi. On enquiry, it was found that dead body was of husband of PW-23. The statement of wife of the deceased was recorded in which she stated that when her husband had left Chandigarh for Delhi, he had in possession a licenced revolver, mobile phone SIM (9871879824) as also a sum of Rs.3 lakhs which was taken by him to Delhi for negotiating a settlement. During the course of investigation, the police was able to

ascertain that mobile phone (9871879824) was used on a mobile handset of the deceased bearing IMEI no.35136304044030. Further investigation revealed that the said IMEI was used for the mobile phone SIM 9818480558 belonging to the accused-appellant immediately after the murder of the victim-deceased. This helped the police in apprehending the appellant and in recovery of three mobile handsets one of which bore IMEI no.35136304044030. The police also recovered from the appellant, the licensed revolver of the deceased. The amount of Rs.3 lakhs was not found, however, there was a deposit entry in the account of the appellant of Rs.9000 two days after the murder.

Based on circumstantial evidence, the trial court convicted the appellant under Sections 302 and 404 IPC and sentenced him to undergo rigorous imprisonment for life and to pay a fine of Rs.50000 for the offence punishable under Section 302, IPC. The appellant was also sentenced to undergo rigorous imprisonment for three years and to pay Rs5000 for offence punishable under Section 404, IPC. He was, however, acquitted of the charges framed against him under Sections 380 and 452, IPC. The High Court dismissed the appeal against conviction, however, modified the sentence inasmuch as in the event of non-payment of fine imposed on the appellant for the offence punishable under Section 302, IPC, the High Court reduced the period of imprisonment in lieu thereof from three years to six months.

In the instant appeal, the appellant contented that he had been implicated on the basis of allegedly being in possession of mobile handset bearing IMEI No.35136304044030; that the said mobile handset with the said IMEI number, was traced by the police on the disclosure of the wife of the deceased (PW23) and that such projection in the evidence produced by the

prosecution was to fabricate a false story to implicate the appellant; that there was discrepancy in the evidence of PW23 who while deposing before the trial court had stated that her husband had called her at around 12 noon, and thereafter, at around 3 p.m.; the call details revealed that two incoming calls were received from a Chandigarh telephone, at around the time expressed by PW23 and that as per the deposition of PW23, it should have been outgoing calls from mobile phone (SIM) no.9871879824 (as wife of the deceased had claimed to have received the said two calls from her husband), yet as per call records, these were incoming calls; based on this discrepancy, it was contended for the appellant, that the factum of tracing the appellant from the mobile phone (SIM) of the deceased was a complete concoction at the hands of the investigating agency; it was also sought to be suggested, that if the investigating agency's theory of reaching the appellant was based on the call details of mobile phone (SIM) no.9871879824, the same was unacceptable; that it was natural to infer, that the police could not have reached the appellant on the basis of call details of phone no. 9871879824; and therefore, the question of recovery of the revolver, as also, the mobile handset (owned by the deceased), from his possession, did not arise and they must have been planted on the appellant to implicate him.

Dismissing the appeal, the Court

HELD: 1.1. Even though the accused-appellant was fully justified in pointing out the discrepancy referred to by him in so far as the statement of PW23 was concerned, yet the manner in which the appellant came to be identified and traced, (during the course of investigation) fully established the veracity of the prosecution case. The evidence produced by the prosecution was based on one irrefutable fact, namely, every mobile handset has an

exclusive IMEI number. No two mobile handsets have the same IMEI number. And every time a mobile handset is used for making a call, besides recording the number of the caller as well as the person called, the IMEI numbers of the handsets used are also recorded by the service provider. The said factual position has to be kept in mind while examining the prosecution evidence. The first step in the process of investigation was the receipt of information from PW23 that the deceased was using mobile phone (SIM) no.9871879824. Evidence on record indicated that the said SIM number became dead on 23.7.2005, i.e., the date on which deceased came to be murdered. In the process of investigation it then emerged, that the mobile handset bearing IMEI No.35136304044030 was used with mobile phone (SIM) no. 9818480558. This happened soon after the murder on 23.7.2005 itself. The same SIM was used to make calls from the same handset upto 2.8.2005. Through the statement of PW22, Nodal Officer, Bharati Airtel Limited, it came to be established, that mobile phone (SIM) no.9818480558 was registered in the name of accused-appellant. It is from the use of the mobile handset bearing IMEI no.35136304044030, that the police came to trace the accused-appellant. The use of Mobile handset bearing IMEI no.35136304044030 on which the accused-appellant made calls from his own registered mobile phone (SIM) no.9818480558, immediately after the occurrence of the murder of deceased was a legitimate basis for the identification of the accused-appellant. The accused-appellant was arrested on 6.8.2005. The nexus of the accused-appellant with the deceased at the time of occurrence stood fully substantiated from the said SIM/ IMEI details. In the said sense of the matter, the discrepancy in the statement of PW23 became insignificant. The process by which the accused-appellant came to be identified during the course of investigation, was legitimate and unassailable. The IMEI

number of the handset, on which the accused-appellant was making calls by using a mobile phone (SIM) registered in his name, being evidence of a conclusive nature, cannot be overlooked on the basis of such like minor discrepancies. In fact even a serious discrepancy in oral evidence, would have had to yield to the said scientific evidence. [Para 10] [713-E-H; 714-A-H; 715-A-B]

1.2. The revolver and the mobile handset were, allegedly, recovered at the instance of the accused-appellant. PW12, the brother of the appellant denied having signed the recovery memo. He asserted that his signatures had been taken on blank papers, which had then been used in preparing the recovery memo. A similar statement was made by PW13, the father of the appellant. It is apparent that PW12 and PW13 would have left no stone unturned to ensure the acquittal of the accused-appellant. Despite that neither PW12 nor PW13, disputed the veracity of their signatures on the recovery memos. It was, therefore, apparent that their signatures, on the recovery memos, were authentic. If the signatures of the brother and father of the accused-appellant had been taken forcibly by the investigating agency, not only the accused-appellant but also his brother PW12 and his father PW13, would have raised a hue and cry. They would have made representations to the concerned authorities pointing out, that the police had obtained their signatures on blank papers. The statements of PW12 and PW13 did not reveal any such action at their hands. Therefore, there is no doubt that they had duly affixed their signatures on the recovery memos, by which the revolver of the deceased, as also, the mobile handset of Panasonic make bearing IEMI no.35136304044030 were recovered at the behest of accused-appellant. In view of that there is no merit even in the second contention advanced at the hands of the accused-appellant. [Paras 11, 12] [715-D-E; G-H; 716-A-D]

1.3. The amount of Rs.9,000/-, deposited by the accused in his bank account out of the total sum of Rs.3 lakhs may not be a justifiable basis to establish, that the alleged crime was committed by the accused-appellant. But then, keeping in mind overwhelming evidence produced by the prosecution in establishing the crime, namely, the recovery of revolver of the deceased from accused-appellant along with live and spent cartridges, the recovery of mobile handset of Panasonic make bearing IMEI No.35136304044030 from the custody of the accused-appellant, and the fact that the accused-appellant was using the same soon after the murder of the deceased with mobile phone (SIM) no.9818480558 which was registered in the name of the accused-appellant (and that he continued to use it till his arrest), leaves no room for any doubt, that the prosecution has brought home the charges as have been found to be established against the accused-appellant, by the trial court as also by the High Court. [Para 14] [717-A-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2272 of 2010.

From the Judgment and Order dated 18.03.2009 of the High Court of Delhi in Criminal Appeal No. 461 of 2008.

Sanjay K. Agarwal for the Appellant.

J.S. Attri, P.K. Dey and Sadhna Sandhu (for Anil Katiyar) for the Respondent.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. The facts, as they emerge from the judgment rendered by the Trial Court at Karkardooma in Sessions Case no.68 of 2005, decided on 21.4.2008, the judgment of High Court of Delhi in Criminal Appeal no.461 of 2008 decided on 18.3.2009, and the statement of witnesses examined durin g the course of

prosecution of the accused-appellant herein (which have been made available to us, in the form of additional documents), reveal that on 23.7.2005 at about 6.25 p.m., a telephone call was received at Police Station Krishna Nagar, conveying information, that a dead body was lying in House No.F-9/33, Krishna Nagar, Delhi. On receipt of the aforesaid telephone call, Daily Diary no.31A was recorded at Police Station Krishna Nagar. Police officials were immediately deputed to the site. On enquiry it came to be concluded, that the dead body was that of Harish Kumar, resident of House no.303, Gagan Vihar, Delhi. The deceased Harish Kumar, had suffered bullet injuries on the left side of the temporal region, as also, on the left side of the abdomen. Accordingly, First Information Report bearing no.297 of 2005 was registered at Police Station Krishna Nagar for offences punishable under sections 302, 452 and 380 of the Indian Penal Code on 7.1.2006. On 14.12.2007, an additional charge under section 404 of the Indian Penal Code was also framed against the accused-appellant.

2. Minakshi, the wife of the deceased, who was at Chandigarh, reached Delhi on receiving information that her husband Harish Kumar (deceased) had been murdered. She identified the body of the deceased in the mortuary. Minakshi informed the police, that her husband was also with her at Chandigarh. And that, when he left Chandigarh for Delhi, he had in his possession a licensed revolver, a mobile phone (sim) no.9871879824, as also, a sum of Rs.3 lakhs which was taken by him to Delhi, for negotiating a settlement.

3. During the course of investigation, the police was able to ascertain, that mobile phone (sim) no.9871879824 was being used on a mobile handset bearing IEMI no.35136304044030. On further investigation it was found, that the aforesaid mobile handset bearing IEMI no.35136304044030 was being used for mobile phone (sim) no.9818480558 immediately after the murder of the deceased Harish Kumar. Sim no.9818480558 was registered in the name

of the accused-appellant. It is through this investigative process, that the police eventually reached the accused-appellant Gajraj Singh, son of Veer Singh, resident at 12/2, Kundan Nagar, Lakshmi Nagar, Delhi. The police recovered from the accused-appellant three mobile handsets, one of which was of Panasonic make bearing IEMI no.35136304044030, i.e., the handset in which sim no.9871879824 was used by the deceased. The police also recovered from the accused-appellant, the licensed revolver of the deceased Harish Kumar. Complete and effective recovery was not made of the sum of Rs.3 lakhs which Minakshi (wife of the deceased Harish Kumar) had stated was in possession of the deceased, at the time he had departed Chandigarh for Delhi. The police, in order to establish that the accused-appellant was in possession of funds in excess of his earnings, referred to a deposit of Rs.9,000/- in the account of the accused-appellant in the State Bank of India, Kundan Nagar Branch, Delhi. The said deposit had been made on 25.7.2005 (the murder in question had been committed two days earlier, on 23.7.2005).

4. In order to bring home the charges, the prosecution examined a total of 29 witnesses. A perusal of the statements of the prosecution witnesses reveal, that the conviction of the accused-appellant was sought merely on circumstantial evidence, namely, the use (and possession) of mobile handset bearing IEMI no.35136304044030 on the date of murder itself, i.e., on 23.7.2005 by the accused-appellant for mobile phone (sim) no.9818480558 (which was registered in the name of the accused-appellant), the recovery of the revolver of the deceased Harish Kumar along with live and spent cartridges, as well as, the deposit of Rs.9,000/- in the account of the accused-appellant with the State Bank of India, Kundan Nagar Branch, Delhi.

5. The Additional Sessions Judge, Karkardooma, Delhi disposed of Sessions Case No.68 of 2005 on 21.4.2008. It was sought to be concluded, that the prosecution had been able to

establish its case against the accused-appellant for offences punishable under section 302 and 404 of the Indian Penal Code. The accused-appellant was, however, acquitted of the charges framed against him under sections 380 and 452 of the Indian Penal Code. Thereupon by an order dated 28.4.2008, the accused-appellant was sentenced to undergo rigorous imprisonment for life, and to pay a fine of Rs.50,000/-, for the offence punishable under section 302 of Indian Penal Code (in the event of default of payment of fine the accused-appellant was required to undergo further rigorous imprisonment for an additional period of three years). The accused was also sentenced to undergo rigorous imprisonment for three years, and to pay a fine of Rs.5,000/- for the offence punishable under section 404 of Indian Penal Code (in case of default of payment of fine, the accused-appellant was required to undergo further rigorous imprisonment for four months). The aforesaid sentences, awarded by the Trial Court, were to run concurrently.

6. Dissatisfied with the order passed by the Trial Court, the accused-appellant preferred Criminal Appeal No.461 of 2008 before the High Court of Delhi. The appeal preferred by the accused-appellant, came to be dismissed on merits, on 18.3.2009. The sentence awarded by the Trial Court was however modified, inasmuch as, in the event of non payment of fine, imposed on the accused-appellant for the offence punishable under section 302 of Indian Penal Code, the High Court reduced the period of imprisonment in lieu thereof, from three years to six months.

7. The accused-appellant has approached this Court by filing the instant appeal so as to assail the orders passed in Sessions Case No.68 of 2005 (dated 21.4.2008) and in Criminal Appeal no.461 of 2008 (dated 18.3.2009).

8. During the course of hearing, learned counsel for the accused-appellant raised three contentions. The first of the aforesaid contention was the basis of his primary emphasis.

The contention advanced was, that the accused-appellant had been implicated on the basis of allegedly being in possession of mobile handset bearing IEMI No.35136304044030. In so far as the instant aspect of the matter is concerned, it was the submission of the learned counsel for the accused-appellant, that the aforesaid mobile handset with the said IEMI number, was traced by the police on the disclosure of the wife of the deceased Harish Kumar. And also because the accused-appellant was using mobile phone (sim) no.9871879824 on the aforesaid handset. Since the accused-appellant was using a mobile phone (sim) registered in his (Gajraj Singhs) name on the mobile handset of the deceased (Harish Kumar), the police was able to ascertain his identity, and thereupon reach him. The object of the learned counsel, while advancing the first contention, was to establish that the instant projection in the evidence produced by the prosecution, was to fabricate a false story to implicate the accused-appellant. According to learned counsel, discrepancy in the prosecution evidence would establish the objective of the first contention. The sole discrepancy sought to be pointed out, was based on the statement of Minakshi, the wife of the deceased Harish Kumar. Minakshi while deposing before the Trial Court as PW23, had stated that her husband had called her at around 12 noon, and thereafter, at around 3 p.m. It was sought to be asserted, that the call details from exhibit PW25/DX reveal, that two incoming calls were received from a Chandigarh telephone, at around the time expressed by Minakshi PW23. It was pointed out, that as per the deposition of PW23, it should have been outgoing calls from mobile phone (sim) no.9871879824 (as Minakshi had claimed to have received the said two calls from her husband), yet as per Exhibit PW25/DX, these were incoming calls. Based on the aforesaid discrepancy, it was the vehement contention of the learned counsel for the accused-appellant, that the factum of tracing the accused-appellant from the mobile phone (sim) of the deceased Harish Kumar was a complete concoction at the hands of the investigating agency. It was also

sought to be suggested, that if the investigating agency's theory of reaching the accused-appellant was based on the call details of mobile phone (sim) no.9871879824, the same becomes clearly unacceptable. According to learned counsel, it would be natural to infer, that the police could not have reached the accused-appellant on the basis of call details of phone no. 9871879824. And therefore, the question of recovery of the revolver, as also, the mobile handset (owned by the deceased Harish Kumar), from his possession, does not arise. It was sought to be suggested that they must have been planted on the accused-appellant to implicate him.

9. In so far as the first contention advanced at the hands of the learned counsel for the accused-appellant is concerned, learned counsel also invited our attention to the reasoning depicted in the impugned order passed by the High Court (dated 18.3.2009), wherein the accused-appellant has been linked to the incident on the basis of the following reasoning:

> "26. Holding that the call record Ex.PW-22/A evidences that two calls from Chandigarh were received on the mobile number 9871879824 in the afternoon of 23.7.2005, corroborates the testimony of the wife of the deceased who was staying at Chandigarh on 23.7.2005 that she had talked to the deceased over telephone in the afternoon of 23.7.2005, which in turn establishes that the mobile number 9871879824 was being used by the deceased on the date of his death; that the call records Ex.PW-22/A and Ex.PW22/B establishes that the handset having IEMI No.350608101231170, which handset was used by the accused on a regular basis, was used by the deceased on 10th and 11th July, 2005 and that this establishes that the deceased and the accused were in touch with each other; the call record Ex.PW-22/B evidences that the handset which was used by the deceased on the date of his death was in possession of the accused soon after the death of the deceased and that the same is a strong

incriminating circumstance against the accused; that the prosecution has been able to establish that the handset which was used by the deceased before his death and the revolver which was the weapon of offence were recovered at the instance of the accused….."

It is the assertion of the learned counsel for the accused-appellant, that the accused-appellant could never have been traced on the basis of the mobile phone (sim) no.9871879824, as no call was ever made by the deceased Harish Kumar from the aforesaid mobile number to the accused-appellant. Likewise, no call was ever made by the accused-appellant from his mobile phone (sim) no.9818480558 to the deceased Harish Kumar. As such it is submitted, that the conclusions drawn by the Trial Court, as also, by the High Court, are clearly unacceptable, and deserve to be set aside.

10. We have given our thoughtful consideration to the first contention advanced at the hands of the learned counsel for the accused-appellant, as have been brought out in the foregoing two paragraphs. We are however of the view, that the submission advanced by the learned counsel for the accused-appellant cannot be accepted, keeping in mind the evidence produced by the prosecution. Even though we are of the view, that the learned counsel for the accused-appellant is fully justified in pointing out the discrepancy referred to by him, in so far as the statement of Minakshi PW23 is concerned and the reasoning rendered by the High Court, as has been extracted hereinabove, may not be fully justified, yet we have no doubt, that the manner in which the accused-appellant came to be identified and traced, (during the course of investigation) fully establishes the veracity of the prosecution case. The evidence produced by the prosecution is based on one irrefutable fact, namely, every mobile handset has an exclusive IEMI number. No two mobile handsets have the same IEMI number. And every time a mobile handset is used for making a call, besides recording the number of the caller as well as

the person called, the IEMI numbers of the handsets used are also recorded by the service provider. The aforesaid factual position has to be kept in mind while examining the prosecution evidence. The first step in the process of investigation was the receipt of information from Minakshi (the wife of deceased Harish Kumar), that the deceased was using mobile phone (sim) no.9871879824. Evidence on record indicates, that the aforesaid sim number became dead on 23.7.2005, i.e., the date on which deceased Harish Kumar came to be murdered. In the process of investigation it then emerged, that the mobile handset bearing IEMI No.35136304044030 was used with mobile phone (sim) no. 9818480558. This happened soon after the murder of Harish Kumar, on 23.7.2005 itself. The same sim was used to make calls from the same handset upto 2.8.2005. Through the statement of R.K. Singh PW22, Nodal Officer, Bharati Airtel Limited, it came to be established, that mobile phone (sim) no.9818480558 was registered in the name of accused-appellant Gajraj Singh. It is from the use of the mobile handset bearing IEMI no.35136304044030, that the police came to trace the accused-appellant Gajraj Singh. It is only this aspect of the matter which is relevant for the purpose of present controversy. The use of Mobile handset bearing IEMI no.35136304044030 on which the accused-appellant made calls from his own registered mobile phone (sim) no.9818480558, immediately after the occurrence of the murder of deceased Harish Kumar, was a legitimate basis for the identification of the accused-appellant. The accused-appellant was arrested on 6.8.2005. The nexus of the accused-appellant with the deceased at the time of occurrence stands fully substantiated from the aforesaid sim/IEMI details. In the aforesaid sense of the matter, the discrepancy in the statement of Minakshi PW23, pointed out by the learned counsel for the accused-appellant, as also, the reasoning rendered by the High Court in the impugned judgment becomes insignificant. We are satisfied, that the process by which the accused-appellant came to be identified during the course of investigation, was legitimate and unassailable. The IEMI number of the handset,

on which the accused-appellant was making calls by using a mobile phone (sim) registered in his name, being evidence of a conclusive nature, cannot be overlooked on the basis of such like minor discrepancies . In fact even a serious discrepancy in oral evidence, would have had to yield to the aforesaid scientific evidence. For the reasons recorded hereinabove, we find no merit in the first contention advanced at the hands of the learned counsel for the accused-appellant.

11. The second contention advanced at the hands of the learned counsel for the accused-appellant was, that there were only two independent witnesses associated with the recovery of the revolver, and the mobile handset bearing IEMI no.35136304044030 (belonging to deceased Harish Kumar), namely, Yuvraj PW12 and Veer Singh PW13. The said revolver and the mobile handset were, allegedly, recovered at the instance of the accused-appellant Gajraj Singh. Yuvraj, while appearing as PW12, denied having signed the recovery memo. He asserted that his signatures had been taken on blank papers, which had then been used in preparing the recovery memo. A similar statement was made by Veer Singh PW13. Pointing out to the statement made by the accused-appellant under Section 313 Cr.P.C., it was submitted, that the accused-appellant had clearly maintained, that the investigating officer(s) in the case, had intentionally and deliberately implicated the accused-appellant.

12. We have examined the second submission advanced at the hands of the learned counsel for the accused-appellant. Before evaluating the statement of Yuvraj PW12 and Veer Singh PW13, it is necessary to keep in mind their relationship with the accused-appellant. While Yuvraj PW12 is the brother of accused-appellant, Veer Singh PW13 is his father. It is apparent, that they would leave no stone unturned to ensure the acquittal of the accused-appellant. Despite the aforesaid, it is clear from the submissions advanced at the hands of the learned counsel for the accused-appellant, that neither Yuvraj

PW12 nor Veer Singh PW13, disputed the veracity of their signatures on the recovery memos. It is, therefore, apparent that their signatures, on the recovery memos, were authentic. If the signatures of the brother and father of the accused-appellant had been taken forcibly by the investigating agency, we have no doubt in our minds, that not only the accused-appellant but also his brother Yuvraj PW12 and his father Veer Singh PW13, would have raised a hue and cry. They would have made representations to the concerned authorities pointing out, that the police had obtained their signatures on blank papers. The statements of Yuvraj PW12 and Veer Singh PW13 do not reveal any such action at their hands. We have, therefore, no doubt in our minds, that they had duly affixed their signatures on the recovery memos, vide which the revolver of the deceased, as also, the mobile handset of Panasonic make bearing IEMI no.35136304044030 were recovered at the behest of accused-appellant Gajraj Singh. In view of the above, we find no merit even in the second contention advanced at the hands of the accused-appellant.

13. The third and the last contention advanced by the learned counsel for the accused-appellant was in respect of deposit of Rs.9,000/- by the accused-appellant in his account with the State Bank of India, Kundan Nagar Branch, Delhi. It was the contention of the learned counsel for the appellant-accused, that Minakshi PW23, the wife of deceased Harish Kumar had pointed out, that the deceased was having in his possession a sum of Rs.3 lakhs, when he departed Chandigarh for Delhi. The depiction of deposit of Rs.9,000/-, according to learned counsel, was a futile attempt at the hands of the prosecution to show, that the accused-appellant had deposited a part of money taken by him from deceased Harish Kumar, so as to establish his nexus with the crime. It was asserted that the prosecution could not show how the accused-appellant disposed of the balance amount.

14. It is not possible for us to accept even the third

contention advanced at the hands of learned counsel for the accused-appellant. We are satisfied that the amount of Rs.9,000/-, deposited by the accused in his bank account out of the total sum of Rs.3 lakhs may not be a justifiable basis to establish, that the alleged crime was committed by the accused-appellant. But then, keeping in mind overwhelming evidence produced by the prosecution in establishing the crime, namely, the recovery of revolver of the deceased from accused-appellant along with live and spent cartridges, the recovery of mobile handset of Panasonic make bearing IEMI No.35136304044030 from the custody of the accused-appellant, and the fact that the accused-appellant was using the same soon after the murder of the deceased Harish Kumar with mobile phone (sim) no.9818480558 which was registered in the name of the accused-appellant (and that he continued to use it till his arrest), leaves no room for any doubt, that the prosecution has brought home the charges as have been found to be established against the accused-appellant, by the Trial Court as also by the High Court.

15. For the reasons recorded hereinabove we find no merit in the instant appeal and the same is accordingly dismissed.

D.G. Appeal dismissed.

A.B. BHASKARA RAO
v.
INSPECTOR OF POLICE, CBI VISAKHAPATNAM
(Criminal Appeal No. 650 of 2008)

SEPTEMBER 23, 2011

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

Prevention of Corruption Act, 1988 – ss. 7, 13(1)(d)(ii) r/w s. 13(2) – Demand and acceptance of a meager amount as illegal gratification by a public servant – Conviction of accused-appellant u/s. 7 with rigorous imprisonment for six months and u/s. 13(1)(d)(ii) with rigorous imprisonment for one year – Upheld by the High Court – Appeal before Supreme Court – Issuance of notice limited to question of sentence only – Held: When notice is issued confining to particular aspect/sentence, arguments would be heard only to that extent unless some extraordinary circumstance/material is shown to the Court – When the statute prescribes minimum sentence, long delay in disposal of appeal is not a ground for reduction of sentence – That amount received by accused is meager as also that he lost his job after conviction, not a mitigating circumstance for reduction of sentence – Imposing lesser sentence than the minimum prescribed in the Statute is not permissible under Article 142 – Substantive provisions of a Statute cannot be ignored – Thus, the order passed by the trial judge as affirmed by the High Court is upheld – Constitution of India, 1950 – Article 142 – Sentence/Sentencing.

Constitution of India, 1950 – Article 142 – Exercise of power under – Held: Power under Article 142 is a constitutional power and not restricted by statutory enactments – However, no order would be passed which would amount to supplant the substantive law applicable or ignoring statutory provisions dealing with the subject – Powers under Article 142 are not

meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in statute dealing expressly with the subject – Exercise of power under Article 142 depends on the facts and circumstances of each case – Supreme Court under Article 142 would not ordinarily direct quashing of a case involving crime against the society particularly, when courts below found that the charge leveled against the accused under the Act was made out and proved by the prosecution by placing acceptable evidence.

Appellant, working as a Head Clerk in the Railway, demanded and accepted a sum of Rs.200/- as illegal gratification. Charge sheet was filed against the appellant-accused for an offence punishable under Sections 7, 13(1)(d)(ii) read with Section 13(2) of the Prevention of Corruption Act, 1988 by the Special Judge. The appellant was convicted under Section 7 of the Act and sentenced to undergo rigorous imprisonment for a period of six months and fine of Rs.500/- and, in default, simple imprisonment for one month. He was also convicted for the offence under Section 13(1)(d)(ii) read with Section 13(2) of the Act and sentenced to undergo rigorous imprisonment for one year and fine of Rs.500/-, in default, simple imprisonment for one month. Both the sentences of imprisonment were to run concurrently. The High Court upheld the order of conviction and sentence. Therefore, the appellant filed the instant appeal.

This Court issued notice in the instant matter confining to the quantum of sentence only.

Dismissing the appeal, the Court

HELD: 1. The provisions of the Prevention of Corruption Act, 1988 alone are applicable since the incident occurred on 14.11.1997 i.e. subsequent to the Act. Section 7 of the Act relates to public servant taking gratification other than legal remuneration in respect of

an official act. If the said offence/charge is proved, the court has no other option but *to impose sentence of imprisonment which shall be not less than six months* but which may extend to five years and also liable to fine. Section 13 deals with criminal misconduct by a public servant. As per sub-section (2) if any public servant commits criminal misconduct *shall be punishable with imprisonment for a term which shall be not less than one year* but which may extend to seven years and shall also be liable to fine. The relaxation in the form of a proviso to sub-section (2) of Section 5 of the Prevention of Corruption Act, 1947 which gives power to the court that for any special reasons to be recorded in writing, impose a sentence of imprisonment of less than one year, has been done away with in the 1988 Act. To put it clear, in the 1988 Act, if an offence under Section 7 is proved, the same is punishable with imprisonment which shall be not less than six months and in the case of Section 13, it shall not be less than one year. No other interpretation is permissible. [Paras 7, 8 and 9] [729-H; 730-A-F-G; 732-D-G]

Bechaarbhai S. Prajapati vs. State of Gujarat **(2008) 11 SCC 163 – distinguished.**

2.1 Inasmuch as both the courts have thoroughly discussed the oral and documentary evidence with reference to the charges leveled against the appellant and in view of the limited order dated 28.01.2008 by this Court issuing notice confining to quantum of sentence only and even applying the analogy enunciated in *Yomeshbhai's case it is not a case of such nature that the appellant should be heard on all points, consequently, the request of the counsel appearing for the appellant to be heard on all the points is rejected. [Para 5] [729-B-D]

2.2 It was submitted that inasmuch as the incident had occurred on 14.11.1997 and the trial court has

convicted him on 19.03.2001 which was affirmed by the High Court on 03.10.2007, at this juncture, i.e., after a gap of 14 years, there is no need to retain the same sentence and the Court is not justified in directing the appellant to serve the remaining period after such a long time. There is no dispute as regards the date of occurrence and the date of conviction passed by the trial court and affirmed by the High Court. Inasmuch as the conviction on both counts have been confirmed by this Court, as regards sentence, in view of the minimum sentence prescribed under Sections 7 and 13 of the Act, though long delay may be a ground for reduction of sentence in other cases, the same may not be applicable to the case on hand when the statute prescribes minimum sentence and the submission is rejected. It was also submitted that the amount alleged to have been received by the appellant accused is only Rs.200/- and he also lost his job after conviction by the trial court. Though, these grounds may be attractive in respect of other offences where minimum sentence is not prescribed, in view of the aforesaid reasonings, the same cannot be applied to the instant case. [Paras 11 and 12] [733-F-H; 734-A-C]

3. Though the jurisdiction of this Court, under Article 142 of the Constitution of India is not in dispute, it is made clear that exercise of such power would, however, depend on the facts and circumstances of each case. The High Court, in exercise of its jurisdiction, under Section 482 Cr.P.C. and this Court, under Article 142 of the Constitution, would not ordinarily direct quashing of a case involving crime against the society particularly, when both the trial court as also the High Court have found that the charge leveled against the appellant under the Act has been made out and proved by the prosecution by placing acceptable evidence. [Para 17] [741-F-G]

4. From the analysis of the said decision and the provision, the following principles emerge:

(a) When the Court issues notice confining to particular aspect/sentence, arguments will be heard only to that extent unless some extraordinary circumstance/material is shown to the Court for arguing the matter on all aspects.

(b) Long delay in disposal of appeal or any other factor may not be a ground for reduction of sentence, particularly, when the statute prescribes minimum sentence. In other cases where no such minimum sentence is prescribed, it is open to the Court to consider the delay and its effect and the ultimate decision.

(c) In a case of corruption by public servant, quantum of amount is immaterial. Ultimately it depends upon the conduct of the delinquent and the proof regarding demand and acceptance established by the prosecution.

(d) Merely because the delinquent lost his job due to conviction under the Act may not be a mitigating circumstance for reduction of sentence, particularly, when the Statute prescribes minimum sentence.

(e) Though Article 142 of the Constitution gives wider power to this Court, waiver of certain period as prescribed in the Statute imposing lesser sentence than the minimum prescribed is not permissible.

(f) An order, which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but also it cannot even be inconsistent with the substantive provisions of the relevant Statute. In other words, this Court

cannot altogether ignore the substantive provisions of a Statute.

(g) In exercise of the power under Article 142 of the Constitution, this Court generally does not pass an order in contravention of or ignoring the statutory provisions nor is the power exercised merely on sympathy.

(h) The power under Article 142 of the Constitution is a constitutional power and not restricted by statutory enactments. However, this Court would not pass any order under Article 142 which would amount to supplant the substantive law applicable or ignoring statutory provisions dealing with the subject. In other words, acting under Article 142, this Court cannot pass an order or grant relief which is totally inconsistent or goes against the substantive or statutory enactments pertaining to the case.

(i) The powers under Article 142 are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in statute dealing expressly with the subject.

The conclusion arrived at by the trial judge as affirmed by the High Court is concurred with. [Paras 19 and 20] [742-C-H; 743-A-H]

Bechaarbhai S. Prajapati vs. *State of Gujarat* **(2008) 11 SCC 163: 2008 (3) SCR 634 – distinguished.**

Yomeshbhai Pranshankar Bhatt* vs. *State of Gujarat* **(2011) 6 SCC 312; *State of M.P.* vs. *Shambhu Dayal Nagar* **(2006) 8 SCC 693: 2006 (8) Suppl. SCR 319;** *Manish Goel* vs. *Rohini Goel* **(2010) 4 SCC 393: 2010 (2) SCR 414;** *Anil Kumar Jain* vs. *Maya Jain* **(2009) 10 SCC 415: 2009 (14) SCR 90;** *Mota Ram* vs. *State of Haryana* **(2009) 12 SCC 727;**

Academy of Nutrition Improvement and Ors. vs. *Union of India* **JT 2011 (8) SC 16 – referred to.**

Case Law Reference:

(2011) 6 SCC 312	**Referred to**	**Para 4**
2008 (3) SCR 634	**Distinguished**	**Para 10**
2006 (8) Suppl. SCR 319	**Referred to**	**Para 13**
2010 (2) SCR 414	**Referred to**	**Para 14**
2009 (14) SCR 90	**Referred to**	**Para 14**
(2009) 12 SCC 727	**Referred to**	**Para 15**
JT 2011 (8) SC 16	**Referred to**	**Para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 650 of 2008.

From the Judgment and Order dated 03.10.2007 of the High Court of Judicature Andhra Pradesh at Hyderabad in Criminal Appeal No. 436 of 2001.

ATM Ranga Ramanujan, S. Ashok Kumar, Anu Gupta, Prakhar Sharma, Sanjeev Kumar Sharma and Rani Jethmalani for the Appellant.

Harish Chandra, P.K. Dey, A.K. Sharma and B. Krishna Prasad for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal is directed against the final judgment and order dated 03.10.2007 passed by the High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Appeal No. 436 of 2001 whereby the High Court dismissed the appeal filed by the appellant herein and confirmed the judgment dated 19.03.2001 passed by the Special Judge, C.B.I. Cases, Visakhapatnam in C.C. No.2 of 1998.

2. **Brief facts:**

(a) The appellant-accused was working as a Head Clerk in the Traffic Cadre Section in the Office of the Senior Divisional Personnel Officer, South Central Railway, Vijayawada during the period from April, 1992 to November, 1997. The nature of duties of the appellant-accused included dealing with and processing of the matters like promotions, transfers, seniority list, roster list, pay fixation on promotions, retirements, resignations etc. of the personnel.

(b) One K. Rama Rao-the Complainant, who was examined as PW-1, was posted as Yard Points Man, Grade 'A' under Station Superintendent, South Central Railway, Tanuku from December, 1995 to June, 1997. In June, 1997, due to excess staff at Tanuku, he was instructed to report at Head Quarters, Vijayawada and accordingly, when he reported there, he was asked to go back to Tanuku. Thereafter, he went back to Tanuku from where he was subsequently transferred to Rajahmundry. Thereafter, PW-1 made a representation to his senior officer requesting him for posting at Vijayawada, Cheerala, Vetapalam or Tenali. Later, PW-1 was transferred to Vijayawada.

(c) As the appellant-accused was dealing with the transfers, the complainant (PW-1) met him on 05.11.1997 at his office to pursue about the issuance of the said transfer order. The appellant-accused asked him to come on 10.11.1997. When he met him on 10.11.1997, the appellant asked him to come on the next day as he was busy in pay-fixation work. On 11.11.1997, again he went to the office of the appellant but he could not find him on his seat. Again a day after i.e. on 13.11.1997, when he met the appellant-accused, he informed him that his request for transfer has been processed and the order is ready and the same has been placed before the A.P.O. for signature and asked him to come on the next day, i.e., on 14.11.1997, and demanded Rs.200/- for releasing the said office order.

(d) On the same day, (PW-1) reported the matter in writing to the Inspector of Police, Central Bureau of Investigation (in short 'the CBI), Vijayawada. On 14.11.1997, a trap was laid by the CBI officials along with panchas and when the accused demanded and accepted a sum of Rs.200/- as illegal gratification, he was caught red handed along with the money which was recovered from the right hand side pocket of his pant.

(e) On 15.11.1997, at 7.30 a.m., an FIR was registered by the Inspector, CBI, Visakhapatnam Branch in Crime No. RC 20(A)/97-VSP. After recording the statements of the witnesses, Inspector of Police, CBI, Visakhapatnam filed charge sheet being No. 2/98-YTR dated 29.04.1998 against the appellant-accused for an offence punishable under Sections 7, 13(1)(d)(ii) read with Section 13(2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as "the Act") in the Court of Special Judge for CBI Cases at Visakhapatnam.

(f) The Special Judge, CBI, by order dated 19.03.2001, convicted the appellant and sentenced him to undergo rigorous imprisonment for a period of six months and to pay a fine of Rs.500/- and, in default, to suffer simple imprisonment for one month for the offence punishable under Section 7 of the Act and one year rigorous imprisonment with a fine of Rs.500/- and, in default, to suffer simple imprisonment for one month for the offence punishable under Sections 13(1)(d)(ii) read with Section 13(2) of the Act.

(g) Against the said order, the appellant-accused filed Criminal Appeal No. 436 of 2001 before the High Court of Andhra Pradesh. The High Court, by impugned judgment dated 03.10.2007 dismissed the appeal filed by the appellant-accused and confirmed the conviction passed by the trial Court. Hence, the appellant-accused has preferred this appeal by way of special leave petition before this Court.

3. Heard Mr. ATM Rangaramanujam, learned senior counsel for the appellant and Mr. Harish Chandra, learned

senior counsel for the respondent.

Notice only on quantum of sentence-hearing on all aspects-Permissibility:

4. On 28.01.2008, this Court consisting of three Hon'ble Judges issued notice in this matter confining to the quantum of sentence only. In pursuance of the same, we permitted Mr. Rangaramanujam, learned senior counsel for the appellant to address his arguments confining to quantum of sentence imposed on the appellant-accused. As stated in the narration of facts, the appellant was convicted under Section 7 of the Act for which he was sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs. 500/-, in default, simple imprisonment for one month. He was also convicted for the offence under Section 13(1)(d)(ii) read with Section 13(2) of the Act and sentenced to undergo rigorous imprisonment for one year and fine of Rs.500/-, in default, simple imprisonment for one month. The trial Court ordered that both the sentences of imprisonment shall run concurrently. The said conviction and sentence was affirmed by the High Court. If we confine ourselves to the limited extent of notice dated 28.01.2008, we have to hear both sides only on the quantum of sentence. However, Mr. Rangaramanujam, learned senior counsel for the appellant by drawing our attention to the recent judgment of this Court in *Yomeshbhai Pranshankar Bhatt vs. State of Gujarat,* (2011) 6 SCC 312, submitted that in spite of limited notice, this Court, while exercising jurisdiction under Article 142 of the Constitution, in order to do complete justice while hearing the matter finally can go into the merits of the orders passed by the trial Court and the High Court. In the reported case, the appeal was against the concurrent finding of both the courts convicting the appellant under Section 302 IPC and sentencing him to suffer imprisonment for life. At the SLP stage, this Court, by order dated 27.07.2009, issued notice confined only to the question as to whether the petitioner was guilty of commission of an offence under any of the parts of Section 304 Indian Penal Code, 1860 (in short 'IPC') and not under Section 302 IPC.

Similar request was made before the Bench that the appellant was entitled to urge all the questions including his right to urge that he should have been acquitted in the facts and circumstances of the case. This Court, referred to the Supreme Court Rules, 1966 which have been framed under Article 145 of the Constitution and also considered scope of its power under Article 142 as well as Order 47 Rule 6 of the Code of Civil Procedure, 1908 (in short 'the Code). While deciding the said question, the Bench has also considered the scope of Section 100 of the Code for entertaining the second appeal. It further shows that the Court considered the plea of the appellant therein for acquittal despite the fact that the notice was limited in terms of the order dated 27.07.2009. It is relevant to point out that the Bench in para 15, clarified the position and reopened the case in its entirety even though notice was issued confining to a particular aspect. After permitting the appellant therein to argue the case for acquittal on merits, it observed:

> "15. … …. We, however, make it clear that *this cannot be a universal practice in all cases*. The question whether the Court will enlarge the scope of its inquiry at the time of final hearing depends on the facts and circumstances of the case. Since in the facts of this case, we find that the appellant should be heard on all points, we have come to the aforesaid conclusion."
>
> (Emphasis supplied)

It is clear that the Bench itself has clarified that they are not laying down the law that in spite of issuing notice confining to a particular aspect (in the case on hand – "quantum of sentence") the parties are entitled to urge all points and re-open the case as if they are free to do the same without any restriction. As a matter of fact, the last sentence in para 15 makes it clear that in the facts and circumstances of that case, they permitted the appellants to urge all points on merits.

5. In the case on hand, it is to be noted that on

appreciation of oral and documentary evidence led in by the prosecution and the defence and on appreciation of entire materials, the court of first instance i.e. the trial Court convicted the appellant and sentenced him as mentioned above. The High Court, as an appellate Court, once again analysed all the material, discussed the oral and documentary evidence and finding that the prosecution had proved the guilt of the accused beyond reasonable doubt concurred with the conclusion arrived at by the trial Court and dismissed the appeal of the appellant. Inasmuch as both the courts have thoroughly discussed the oral and documentary evidence with reference to the charges leveled against the appellant and in view of the limited order dated 28.01.2008 by this Court issuing notice confining to quantum of sentence only and even applying the analogy enunciated in *Yomeshbhai (supra),* we feel that it is not a case of such nature that the appellant should be heard on all points, consequently, we reject the request of the learned senior counsel appearing for the appellant.

Quantum of sentence/Whether requires any reduction:

6. Mr. Rangaramanujam, learned senior counsel for the appellant submitted that inasmuch as the alleged incident took place on 14.11.1997 and 14 years have elapsed since then, the amount of Rs. 200/- said to have been received by the appellant is trivial in nature and also of the fact that due to the said conviction and sentence he lost his job, leniency may be shown and sentence be reduced to the period already undergone. He fairly admitted that out of the maximum period of one year, the appellant had served only 52 days in prison. With this factual position, let us consider whether the request of the learned senior counsel for the appellant is to be accepted and sentence be reduced to the period already undergone.

7. It is not in dispute that the provisions of the Prevention of Corruption Act, 1988 alone are applicable since the incident occurred on 14.11.1997 i.e. subsequent to the Act. Section 7 of the Act relates to public servant taking gratification other than

legal remuneration in respect of an official act. If the said offence/charge is proved, the court has no other option but *to impose sentence of imprisonment which shall be not less than six months* but which may extend to five years and also liable to fine. The said section reads as under:-

> "**7. Public servant taking gratification other than legal remuneration in respect of an official act.-** Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavor to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in Clause (c) of Section 2, or with any public servant, whether named or otherwise shall, be *punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine. … ….."*
>
> **(Emphasis supplied)**

8. Section 13 deals with criminal misconduct by a public servant. As per sub-section (2) if any public servant commits criminal misconduct *shall be punishable with imprisonment for a term which shall be not less than one year* but which may extend to seven years and shall also be liable to fine. For clarity, we reproduce the said section hereunder:

> "**13. Criminal misconduct by a public servant.-** (1) A public servant is said to commit the offence of criminal misconduct,

(a) If he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification other than legal remuneration as a motive or reward such as is mentioned in Section 7; or

(b) If he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate from any person whom he knows to have been, or to be, or to be likely to he concerned in any proceeding or business transacted or about to be transacted by him or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any, person whom he knows to be interests in or related to the person so concerned; or

(c) If he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do; or

(d) If he, -

(i) By corrupt or illegal means, obtains for himself or for any other person any valuable thing or Pecuniary advantage; or

(ii) By abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) While holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or

(e) If he or any person on his behalf, is in possession or has, at any time during the Period of his office, been in

possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.

Explanation. -For the purposes of this section "known sources of income" means income received from any lawful source and such receipt has been intimated in accordance, with the provisions of any law, rules or orders for the time being applicable to public servant.

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine."

(Emphasis supplied)

9. It is useful to refer that in the Prevention of Corruption Act, 1947 the same "criminal misconduct" which is available in Section 13 of the 1988 Act had been dealt with in Section 5 of the 1947 Act. Section 5(2) of the 1947 Act mandates that any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine. However, proviso to sub-section (2) of Section 5 gives power to the court that for any special reasons to be recorded in writing, impose a sentence of imprisonment of less than one year. Such relaxation in the form of a proviso has been done away with in the 1988 Act. To put it clear, in the 1988 Act, if an offence under Section 7 is proved, the same is punishable with imprisonment which shall be not less than six months and in the case of Section 13, it shall not be less than one year. No other interpretation is permissible.

Other circumstances pleaded for reduction of sentence:

10. In order to substantiate the claim with the regard to the above, learned senior counsel for the appellant has relied on the decision of this Court in *Bechaarbhai S. Prajapati vs. State*

of Gujarat, (2008) 11 SCC 163 and based on the same requested this Court to modify the sentence to the extent of period already undergone. We have gone through the facts in that case. It is true that even in the cited decision, the appellant accused demanded only Rs. 250/- and it was paid and accepted. Finally, the Special Judge framed charges for offence punishable under Sections 7, 12, 13(1)(d) read with Section 13(2) of the Act. The appellant therein was convicted for offence under Section 7(2) of the Act and appeal before the High Court was also dismissed. Thereafter, the same was challenged before this Court. This Court, after holding that the conclusion of the trial Court and High Court does not suffer from any infirmity considered the alternative submission which related to harshness of sentence. In that case, taking note of the fact that the occurrence took place nearly seven years back and also of the fact that the appellant had suffered custody for more than six months, considering all these aspects, while maintaining the conviction, this Court reduced the sentence to the period already undergone. Since the appellant therein was convicted only under Section 7 and Section 161 Cr.PC., the minimum sentence being six months and of the fact that he had suffered custody for more than six months, the course adopted by this Court is perfectly in order and the same cannot be applied to the case on hand, wherein the appellant had undergone only 52 days when the minimum sentence was six months under Section 7 and one year under Section 13.

11. Learned senior counsel for the appellant further submitted that inasmuch as the incident had occurred on 14.11.1997 and the trial Court has convicted him on 19.03.2001 which was affirmed by the High Court on 03.10.2007, at this juncture, i.e., after a gap of 14 years, there is no need to retain the same sentence and the Court is not justified in directing the appellant to serve the remaining period after such a long time. There is no dispute as regards the date of occurrence and the date of conviction passed by the trial court and affirmed by the High Court. Inasmuch as the conviction on both counts have

been confirmed by this Court and we are confined to sentence part alone and in view of the minimum sentence prescribed under Sections 7 and 13 of the Act, we are of the view that though long delay may be a ground for reduction of sentence in other cases, the same may not be applicable to the case on hand when the statute prescribes minimum sentence. Accordingly, we reject the said contention.

12. It was further contended that the amount alleged to have been received by the appellant accused is only Rs.200/- and he also lost his job after conviction by the trial court. Though, these grounds may be attractive in respect of other offences where minimum sentence is not prescribed, in view of our reasonings in the earlier paras, the same cannot be applied to the case on hand.

13. About the request based on delay that the appellant has lost his job, undergone the ordeal all along etc. a lenient view be taken in this case, it is useful to refer decision of this Court in *State of M.P. vs. Shambhu Dayal Nagar*, (2006) 8 SCC 693 wherein it was held that:

> **"32.** It is difficult to accept the prayer of the respondent that a lenient view be taken in this case. The corruption by public servants has become a gigantic problem. It has spread everywhere. No facet of public activity has been left unaffected by the stink of corruption. It has deep and pervasive impact on the functioning of the entire country. Large-scale corruption retards the nation-building activities and everyone has to suffer on that count. As has been aptly observed in *Swatantar Singh* v. *State of Haryana,* (1997) 4 SCC 14, corruption is corroding, like cancerous lymph nodes, the vital veins of the body politics, social fabric of efficiency in the public service and demoralising the honest officers. The efficiency in public service would improve only when the public servant devotes his sincere attention and does the duty diligently, truthfully, honestly and devotes himself assiduously to the performance of the duties of his

post. The reputation of corrupt would gather thick and unchaseable clouds around the conduct of the officer and gain notoriety much faster than the smoke.

Article 142 and its applicability

14 By drawing our attention to Article 142 of the Constitution of India, learned senior counsel for the appellant vehemently submitted that in order to do complete justice, this Court has ample power to reduce the sentence even to the extent of period already undergone or any other order which would be beneficial to the parties approaching this Court. Similar claim based on Article 142 has been negatived in several decisions by this Court, we need to refer only the latest decision of this Court in *Manish Goel vs. Rohini Goel,* (2010) 4 SCC 393. The facts in that case are that the parties by persuasion of the family members and friends, entered into a compromise and prepared a memorandum of understanding dated 13.11.2009, in the proceedings pending before the Mediation Centre, Delhi, by which they agreed on terms and conditions incorporated therein, to settle all their disputes and also for dissolution of their marriage. The parties filed an application under Section 13-B(1) of the Hindu Marriage Act, 1955 before the Family Court, Delhi seeking divorce by mutual consent. The said HMA No. 456 of 2009 came before the court and it recorded the statement of parties on 16.11.2009. The parties moved another HMA No. 457 of 2009 to waive the statutory period of six months in filing the second petition. However, the court rejected the said application vide order dated 01.12.2009 observing that the court was not competent to waive the required statutory period of six months under the Act and such a waiver was permissible only under the directions of the Supreme Court as held by this Court in *Anil Kumar Jain vs. Maya Jain,* (2009) 10 SCC 415. Hence the parties have approached this Court for appropriate relief. Speaking for the Bench one of us - (Dr. Justice B.S. Chauhan) referred to more than fifty decisions including the Constitution

Bench judgments. The relevant paras, which are useful, may be quoted:

> **"11.** We are fully alive of the fact that this Court has been exercising the power under Article 142 of the Constitution for dissolution of marriage where the Court finds that marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably, even if the facts of the case do not provide a ground in law on which the divorce could be granted. Decree of divorce has been granted to put quietus to all litigations between the parties and to save them from further agony, as it is evident from the judgments in *Romesh Chander v. Savitri (1995) 2 SCC 7*, *Kanchan Devi v. Promod Kumar Mittal (1996) 8 SCC 90*, *Anita Sabharwal v. Anil Sabharwal (1997) 11 SCC 490*, *Ashok Hurra v. Rupa Bipin Zaveri (1997) 4 SCC 226*, *Kiran v. Sharad Dutt (2000) 10 SCC 243*, *Swati Verma v. Rajan Verma (2004) 1 SCC 123*, *Harpit Singh Anand v. State of W.B. (2004) 10 SCC 505*, *Jimmy Sudarshan Purohit v. Sudarshan Sharad Purohit (2005) 13 SCC 410*, *Durga Prasanna Tripathy v. Arundhati Tripathy (2005) 7 SCC 353*, *Naveen Kohli v. Neelu Kohli (2006) 4 SCC 558*, *Sanghamitra Ghosh v. Kajal Kumar Ghosh (2007) 2 SCC 220*, *Rishikesh Sharma v. Saroj Sharma (2007) 2 SCC 263*, *Samar Ghosh v. Jaya Ghosh (2007) 4 SCC 511* and *Satish Sitole v. Ganga (2008) 7 SCC 734*. However, these are the cases, where this Court came to rescue the parties on the ground for divorce not provided for by the legislature in the statute.
>
> **12.** In *Anjana Kishore v. Puneet Kishore (2002) 10 SCC 194*, this Court while allowing a transfer petition directed the court concerned to decide the case of divorce by mutual consent, ignoring the statutory requirement of moving the motion after expiry of the period of six months under Section 13-B(2) of the Act. In *Anil Kumar Jain*, this Court held that an order of waiving the statutory requirements can be passed only by this Court in exercise

of its powers under Article 142 of the Constitution. The said power is not vested with any other court.

13. However, we have also noticed various judgments of this Court taking a contrary view to the effect that in case the legal ground for grant of divorce is missing, exercising such power tantamounts to legislation and thus transgression of the powers of the legislature, which is not permissible in law (vide *Chetan Dass v. Kamla Devi* (2001) 4 SCC 250 and *Vishnu Dutt Sharma v. Manju Sharma* (2009) 6 SCC 379).

14. Generally, no court has competence to issue a direction contrary to law nor can the court direct an authority to act in contravention of the statutory provisions. The courts are meant to enforce the rule of law and not to pass the orders or directions which are contrary to what has been injected by law. (Vide *State of Punjab v. Renuka Singla* (1996) 8 SCC 90, *State of U.P. v. Harish Chandra* (1996) 9 SCC 309, *Union of India v. Kirloskar Pneumatic Co. Ltd* (1996) 4 SCC 453., *University of Allahabad v. Dr. Anand Prakash Mishra* (1997) 10 SCC 264 and *Karnataka SRTC v. Ashrafulla Khan* (2002) 2 SCC 560.)

15. A Constitution Bench of this Court in *Prem Chand Garg v. Excise Commr*. AIR 1963 SC 996 held as under: (AIR p. 1002, para 12)

"*12*. … An order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but *it cannot even be inconsistent with the substantive provisions of the relevant statutory laws*."

(emphasis supplied)

The Constitution Benches of this Court in *Supreme Court Bar Assn. v. Union of India* (1998) 4 SCC 409 and *E.S.P. Rajaram v. Union of India* (2001) 2 SCC 186 held that

under Article 142 of the Constitution, this Court cannot altogether ignore the substantive provisions of a statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute. It is not to be exercised in a case where there is no basis in law which can form an edifice for building up a superstructure.

16. Similar view has been reiterated in *A.R. Antulay v. R.S. Nayak* (1988) 2 SCC 602, *Bonkya v. State of Maharashtra* (1995) 6 SCC 447, *Common Cause v. Union of India* (1999) 6 SCC 667, *M.S. Ahlawat v. State of Haryana (2000) 1 SCC 278, M.C. Mehta v. Kamal Nath* (2000) 6 SCC 213, *State of Punjab v. Rajesh Syal* (2002) 8 SCC 158, *Govt. of W.B. v. Tarun K. Roy* (2004) 1 SCC 347, *Textile Labour Assn. v. Official Liquidator* (2004) 9 SCC 741, *State of Karnataka v. Ameerbi* (2007) 11 SCC 681, *Union of India* v. *Shardindu* (2007) 6 SCC 276 and *Bharat Sewa Sansthan v. U.P. Electronics Corpn. Ltd.* (2007) 7 SCC 737.

17. In *Teri Oat Estates (P) Ltd. v. UT, Chandigarh* (2004) 2 SCC 130 this Court held as under: (SCC p. 144, para 36)

"*36*. … sympathy or sentiment by itself cannot be a ground for passing an order in relation whereto the appellants miserably fail to establish a legal right. … despite an extraordinary constitutional jurisdiction contained in Article 142 of the Constitution of India, this Court ordinarily would not pass an order which would be in contravention of a statutory provision."

18. In *Laxmidas Morarji v. Behrose Darab Madan* (2009) 10 SCC 425, while dealing with the provisions of Article 142 of the Constitution, this Court has held as under: (SCC p. 433, para 25)

"*25*. … The power under Article 142 of the Constitution is a constitutional power and hence, not restricted by statutory enactments. Though the Supreme Court would not pass any order under Article 142 of the Constitution which would amount to supplanting substantive law applicable or ignoring express statutory provisions dealing with the subject, at the same time these constitutional powers cannot in any way, be controlled by any statutory provisions. However, it is to be made clear that this power cannot be used to supplant the law applicable to the case. This means that *acting under Article 142, the Supreme Court cannot pass an order or grant relief which is totally inconsistent or goes against the substantive or statutory enactments pertaining to the case*. The power is to be used sparingly in cases which cannot be effectively and appropriately tackled by the existing provisions of law or when the existing provisions of law cannot bring about complete justice between the parties."

(**Emphasis added**)

After elaborately discussing almost all the case laws on this subject about jurisdiction of this Court under Article 142, in para 19, summarised the same in the following words:

19. Therefore, the law in this regard can be summarised to the effect that in exercise of the power under Article 142 of the Constitution, this Court generally does not pass an order in contravention of or ignoring the statutory provisions nor is the power exercised merely on sympathy.

After saying so, the Court rejected the request of the parties to waive the statutory period of six months under the Act.

15. In *Mota Ram vs. State of Haryana,* (2009) 12 SCC 727, this Court, while reiterating the above principles has concluded that Article 142 cannot be exercised to negate the statutory provisions.

16. In *Academy of Nutrition Improvement and Others vs. Union of India,* JT 2011 (8) SC 16, the following conclusion about the applicability of Article 142 is relevant:

28. The question is having held that Rule 44I to be invalid, whether we can permit the continuation of the ban on sale of non-iodised salt for human consumption for any period. Article 142 of the Constitution vests unfettered independent jurisdiction to pass any order in public interest to do complete justice, if exercise of such jurisdiction is not be contrary to any express provision of law. In *Supreme Court Bar Association v. Union of India*: 1998 (4) SCC 409, this Court observed:

The Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such order as is *necessary for doing complete justice* "between the parties in any cause or matter pending before it". The very nature of the power must lead the court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the conflicting claims of the litigating parties by "ironing out the creases" in a cause or matter before it. Indeed this Court is not a court of restricted jurisdiction of only dispute settling. It is well recognised and established that this Court has always been a law maker and its role travels beyond merely dispute settling. It is a "problem solver in the nebulous areas". (See. *K. Veeraswami v. Union of India* : 1991 (3) SCC 655, but the substantive statutory provisions dealing with the subject matter of a given case, cannot be altogether ignored by this Court, while making an order under Article 142. Indeed, these constitutional powers can not, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise *may come directly in conflict* with what has been expressly provided

for in statute dealing expressly with the subject.

In *Kalyan Chandra Sarkar v. Rajesh Ranjan* : 2005 (3) SCC 284, this Court after reiterating that this Court in exercise of its jurisdiction under Article 142 of the Constitution would not pass any order which would amount to supplanting substantive law applicable to the case or ignoring express statutory provisions dealing with the subject, observed as follows:

It may therefore be understood that the plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are *complementary to those powers which are specifically conferred on the Court by various statutes though are not limited by those statutes*. These powers also exist independent of the statutes with a view to do complete justice between the parties...and are in the nature of supplementary powers...[and] may be put on a different and perhaps even wider footing than ordinary inherent powers of a court to prevent injustice. The advantage that is derived from a constitutional provision couched in such a wide compass is that it prevents 'clogging or obstruction of the stream of justice. *See: Supreme Court Bar Association* (supra)

17. Though the jurisdiction of this Court, under Article 142 of the Constitution of India is not in dispute, we make it clear that exercise of such power would, however, depend on the facts and circumstances of each case. The High Court, in exercise of its jurisdiction, under Section 482 of the Criminal Procedure Code and this Court, under Article 142 of the Constitution, would not ordinarily direct quashing of a case involving crime against the society particularly, when both the trial Court as also the High Court have found that the charge leveled against the appellant under the Act has been made out and proved by the prosecution by placing acceptable evidence.

18. Finally, learned senior counsel for the appellant has

cited certain orders of this Court wherein this Court has reduced the period of sentence already undergone while upholding the conviction. We have perused those orders. The orders do not disclose any factual details and the relevant provisions under which the accused was charged/convicted and minimum sentence, if any, as available in the Act as well as the period already undergone. In the absence of such details, we are unable to rely on those orders.

19. From the analysis of the above decisions and the concerned provisions with which we are concerned, the following principles emerge:

(a) When the Court issues notice confining to particular aspect/sentence, arguments will be heard only to that extent unless some extraordinary circumstance/material is shown to the Court for arguing the matter on all aspects.

(b) Long delay in disposal of appeal or any other factor may not be a ground for reduction of sentence, particularly, when the statute prescribes minimum sentence. In other cases where no such minimum sentence is prescribed, it is open to the Court to consider the delay and its effect and the ultimate decision.

(c) In a case of corruption by public servant, quantum of amount is immaterial. Ultimately it depends upon the conduct of the delinquent and the proof regarding demand and acceptance established by the prosecution.

(d) Merely because the delinquent lost his job due to conviction under the Act may not be a mitigating circumstance for reduction of sentence, particularly, when the Statute prescribes minimum sentence.

(e) Though Article 142 of the Constitution gives wider power to this Court, waiver of certain period as prescribed in the Statute imposing lesser sentence than the minimum prescribed is not permissible.

(f) An order, which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but also it cannot even be inconsistent with the substantive provisions of the relevant Statute. In other words, this Court cannot altogether ignore the substantive provisions of a Statute.

(g) In exercise of the power under Article 142 of the Constitution, this Court generally does not pass an order in contravention of or ignoring the statutory provisions nor is the power exercised merely on sympathy.

(h) The power under Article 142 of the Constitution is a constitutional power and not restricted by statutory enactments. However, this Court would not pass any order under Article 142 which would amount to supplant the substantive law applicable or ignoring statutory provisions dealing with the subject. In other words, acting under Article 142, this Court cannot pass an order or grant relief which is totally inconsistent or goes against the substantive or statutory enactments pertaining to the case.

(i) The powers under Article 142 are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in statute dealing expressly with the subject.

20. In the light of the above discussion, we are unable to accept any of the contentions raised by the learned senior counsel for the appellant, on the other hand, we are in entire agreement with the conclusion arrived at by the trial Judge as affirmed by the High Court. Consequently, the appeal fails and the same is dismissed. Since the appellant is on bail, the bail bonds executed by him stand cancelled. The trial Judge is directed to secure his presence for serving the remaining period of sentence.

N.J. Appeal dismissed.

SANJEEV KUMAR JAIN

v.

RAGHUBIR SARAN CHARITABLE TRUST & ORS.

(Civil Appeal No. 8610 of 2011)

OCTOBER 12, 2011

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

CODE OF CIVIL PROCEDURE, 1908:

s. 35(1), CPC read with Chapters 11, 5 and 23 of Delhi High Court Rules – Costs – Appeal against vacating of an interim order – Dismissed by High Court with costs of Rs. 45,28,000/- – Appeal to Supreme Court confined only to legality and validity of order of High Court as regards costs – The Court also referred to the larger question of costs in civil litigation – The Law Commission of India also intervened – Notices were also issued to High Courts to ascertain the Rules and procedures in force in regard to costs – HELD: High Court could not have awarded costs exceeding the scale that was prescribed in the Schedule to the Rules – Doing so would be contrary to the Rules and, as such, also contrary to s.35, CPC which makes it subject to the conditions and limitations as may be prescribed and the provisions of law for the time being in force – Therefore, merely by seeking a consent of the parties to award litigation expenses as costs, the High Court could not have adopted the procedure of awarding what it assumed to be the 'actual costs' nor could it proceed to award a sum of Rs.45,28,000/- as costs in an appeal relating to an interim order in a civil suit – Awarding of realistic costs should be in accordance with law – If the law does not permit award of actual costs, courts cannot award actual costs – The 'actual realistic cost' should have a correlation to costs which are realistic and practical – It cannot refer to fanciful and whimsical expenditure by parties engaging high-charging lawyers, as is the case on hand – It is

suggested that the Rules be amended to provide for 'actual realistic costs' – The object is to streamline the award of costs and simplify the process of assessment, while making the cost 'actual and realistic' – Salem Advocates Bar Association case, explained.

ss. 35(1) and (2) – Costs – Discretion of court – HELD: The discretion of the court is subject to such conditions and limitations as may be prescribed and to the provisions of law for the time being in force – Where the court does not direct that costs shall follow the event, it shall state the reasons in writing – The mandate of sub- s.(2) should be strictly followed.

s.35-A – Exemplary costs in respect of false or vexatious litigation – HELD: In order to discourage false and vexatious claims, the compensatory costs has to be brought to a realistic level– A small sum of Rs. 3,000/- would not make much difference – The Court is of the view that the ceiling in regard to compensatory costs should be at least Rs. 1,00,000 – The description of the costs awardable u/s. 35 A "as compensatory costs" gives an indication that is restitutive rather than punitive – The costs awarded for false or vexatious claims should be punitive and not merely compensatory – In fact, compensatory costs is something that is contemplated in s. 35B and s.35 itself – Therefore, the Legislature may consider award of punitive costs' u/s. 35 A.

Arbitration and Conciliation Act, 1996:

s.31(8), Explanation, r/w s.11 – Costs – HELD: The Explanation to sub-s. (8) of s. 31 makes it clear that 'costs' means reasonable costs – What is awardable is not 'actual' expenditure but 'reasonable' costs – Whenever the Chief Justice or his Designate appoints arbitrator/s, it will be open to him to stipulate the fees payable to the arbitrator/s..

Court Fees:

Litigation – Court fees – HELD: Except in the case of few

categories of suits where court fee is ad valorem, in majority of the suits/petitions and appeals arising therefrom, the court fee is a fixed nominal amount – The fixed fees that are payable, prescribed decades ago, have not undergone a change and in many cases, the fixed fee is not worth the cost of collection thereof – There is, therefore, a need for a periodical revision of fixed court fees that is payable in regard to suits/petitions/appeals filed in courts/tribunals at different levels.

Legislation:

Litigation – Costs and court fees – HELD: The Law Commission of India, Parliament and the respective High Courts are suggested to make appropriate changes in the provisions relating to costs.

Words and Phrases:

Expression, to 'appoint' an arbitrator – Connotation of.

In an appeal arising out of an order vacating the interim injunction in a suit for permanent injunction, the High Court of Delhi suggested to the parties that since the dispute was purely a commercial one, the party succeeding in the appeal should be entitled to the litigation expenses from the other party, and asked the parties to give their respective statements of the total litigation expenses incurred in the appeal only. The appellant filed a memo stating that a sum of Rs. 25,50,000/- was incurred as advocates' fees; whereas the respondents filed an affidavit stating that an amount of Rs. 45,28,000/- was spent as advocates' fees in the appeal. The High Court dismissed the appeal and awarded to the respondents Rs. 45,28,000/- as costs in respect of the appeal to be paid by the appellant.

In the instant appeal, the only issue for decision of

the Court was the legality and validity of the order of the High Court directing the appellant to pay costs of Rs. 45,28,000/- to the respondents.

Disposing of the appeal, the Court

HELD: 1.1. Though, s.35 of the Code of Civil Procedure, 1908 does not impose a ceiling on the costs that could be levied, and gives discretion to the court in the matter, it should be noted that s.35 starts with the words "subject to such conditions and limitations as may be prescribed, and to the provisions of law for the time being in force". Therefore, if there are any conditions or limitations prescribed in the Code or in any rules, the court, obviously, cannot ignore them in awarding costs. [para 8] [765-G-H]

1.2. In the instant case, the High Court could not have awarded costs exceeding the scale that was prescribed in the Schedule to the Rules. Doing so would be contrary to the Delhi Court Rules and, as such, also contrary to s.35 of the Code which makes it subject to the conditions and limitations as may be prescribed and the provisions of law for the time being in force. Therefore, merely by seeking a consent of the parties to award litigation expenses as costs, the High Court could not have adopted the procedure of awarding what it assumed to be the 'actual costs' nor could it proceed to award a sum of Rs.45,28,000/- as costs in an appeal relating to an interim order in a civil suit. Awarding of realistic costs should be in accordance with law. If the law does not permit award of actual costs, obviously courts cannot award actual costs. As the law presently stands, there is no provision for award of 'actual costs' and the award of costs will have to be within the limitation prescribed by s.35. [para 9] [766-A-F]

1.3. The respondents and the High Court have

misread the observations of this Court in *Salem Advocates Bar Association. All that this Court stated was that the *actual reasonable cost* has to be provided for in the rules by appropriate amendment. In fact, the very next sentence in para 37 of the decision of this Court is that the High Courts should examine these aspects and wherever necessary, make requisite rules, regulations or practice directions. What has been observed by this Court about *actual realistic costs* is an observation requiring the High Courts to amend their rules and regulations to provide for actual realistic costs, where they are not so provided. Section 35 does not impose a restriction on actual realistic costs. Such restriction is generally imposed by the rules made by the High Courts. The observation in *Salem Advocates Bar Association* is a direction to amend the rules so as to provide for actual realistic costs and not to ignore the existing rules. The decision in *Salem Advocates Bar Association* is, therefore, of no assistance to justify the award of such costs. The Rules permit costs to be awarded only as per the Schedule. Therefore, as the Rules presently stand, whatever may be the 'actual' expenditure incurred by a party, what could be awarded as costs is what is provided in the Rules. [para 10] [767-E-H; 768-A-B]**

Salem Advocates Bar Association v. Union of India* **2005 (1) Suppl. SCR 929 = 2005 (6) SCC 344; *Ashok Kumar Mittal* Vs. *Ram Kumar Gupta & Anr.* **2009 (1) SCR 125 = 2009 (2) SCC 656; and** *Vinod Seth* Vs. *Devender Bajaj & Anr.* **2010 (7) SCR 424 = 2010 (8) SCC 1;** *Manindra Chandra Nandi vs. Aswini Kumar Acharjya* **ILR (1921) 48 Ca. 427 –referred to.**

1.4. The *'actual realistic cost'* should have a correlation to costs which are realistic and practical. It cannot obviously refer to fanciful and whimsical expenditure by parties who have the luxury of engaging

a battery of high-charging lawyers, as is the case on hand. In a matter relating to temporary injunction, merely because the court adjourns the matter several times and one side engages a counsel by paying exorbitant fees per hearing, the other side cannot be made to bear such costs. In the instant case, the costs memo filed by the respondents show that a sum of Rs. 45,28,000/- was paid to four counsel. Even if actual costs have to be awarded, it should be *realistic* which means what a "normal" advocate in a "normal" case of such nature would charge. Mechanically ordering the losing party to pay costs of Rs. 45,28,000/- in an appeal against grant of a temporary injunction in a pending suit for permanent injunction was unwarranted and contrary to law. It cannot be sustained. [para 11] [768-C-H; 769-B-D]

1.5. The order dated 20.1.2010 of the High Court, to the extent it levies costs of Rs.45,28,000/- on the appellant is set aside and in its place it is directed that the appellant shall pay the costs of the appeal before the High Court as per Rules plus Rs. 3000/- as exemplary costs to the respondents. [para 29] [779-H; 780-A-B]

Strict enforcement of Section 35(2) of the Code

2.1. The discretion vested in the courts in the matter of award of costs, as is evident from s. 35 of the Code, is subject to two conditions: (i)the discretion of the court is subject to such conditions and limitations as may be prescribed and to the provisions of law for the time being in force [sub-s.(1)]; and (ii) where the court does not direct that costs shall follow the event, it shall state the reasons in writing [sub-s. (2)]. The mandate of sub-s. (2) of s. 35 that "where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing" is seldom followed in practice by courts. Many courts either direct the parties to bear their respective costs or do not make any order as to costs without

assigning or recording the reasons for giving such exemption from costs. Unless the courts develop the practice of awarding costs in accordance with s.35 (that is, costs following the event) and also give reasons where costs are not awarded, the object of the provision for costs would be defeated. [para 13] [770-C-H]

Section 35A of the Code – Exemplary costs.

2.2. Section 35A refers to compensatory costs in respect of false or vexatious claims or defenses. As on date, the maximum that can be awarded as compensatory costs in regard to false and vexatious claims is Rs. 3,000/-. In order to discourage false and vexatious claims, the compensatory costs has to be brought to a realistic level. At present courts have virtually given up awarding any compensatory costs, as award of such a small sum of Rs. 3,000/- would not make much difference. The Court is of the view that the ceiling in regard to compensatory costs should be at least Rs. 1,00,000/-. [para 14] [771-C-F]

2.3. The description of the costs awardable u/s. 35A "as compensatory costs" gives an indication that is restitutive rather than punitive. The costs awarded for false or vexatious claims should be punitive and not merely compensatory. In fact, compensatory costs is something that is contemplated in s.35B and s.35 itself. Therefore, the Legislature may consider award of 'punitive costs' u/s. 35A. [para 15] [771-G]

Award of Realistic Costs

2.4. In *Salem Advocates Bar Association,* this Court suggested to the High Courts that they should examine the Model Case Flow Management Rules and consider making rules in terms of it, with or without modification

so that a step forward is taken to provide to the litigating public a fair, speedy and inexpensive justice. [para 18] [772-G]

2.5. The costs in regard to a litigation include (a) the court fee and process fee; (b) the advocate's fee; (c) expenses of witnesses; and (d) other expenses allowable under the Rules. The need to revise and streamline the court fee has already been emphasized. Equally urgent is the need to revise the advocate's fee provided in the Schedules to the Rules, most of which are outdated and have no correlation with the prevailing rates of fees. In regard to money suits, specific performance suits and other suits where *ad valorem* court fee is payable, the Advocate's fee is also usually *ad valorem.* However, majority of the litigation constitutes where fixed Advocates' fees are prescribed. There is need to provide for awarding realistic advocates' fee by amending the relevant rules periodically. This Court, of course, in several cases has directed payment of realistic costs. But this Court could do so, either because of the discretion vested under the Supreme Court Rules, 1966 or having regard to Article 142 of the Constitution under which this Court has the power to make such orders as are necessary to do complete justice between the parties. [para 19 and 20] [773-G-H; 774-A-B-E-F]

2.6. It is suggested that the Rules be amended to provide for 'actual realistic costs'. The object is to streamline the award of costs and simplify the process of assessment, while making the cost 'actual and realistic'. While ascertainment of actuals in necessary in regard to expenditure incurred (as for example travel expenses of witnesses, cost of obtaining certified copies etc.) in so far as advocates' fee is concerned, the emphasis should be on 'realistic' rather than 'actual'. The Advocate fee should be a realistic normal single fee. [para 22] [775-C-D]

Costs in Arbitration matters

2.7. In arbitration proceedings where usually huge costs are awarded (with reference to actual unregulated fees of Arbitrators and Advocates), awarding of actual but unrealistic costs and delay in disposal is affecting the credibility of an alternative dispute resolution process. The provisions of s. 31(8) of Arbitration and Conciliation Act, 1996 which deal with costs, show that what is awardable is not 'actual' expenditure, but 'reasonable' costs. [para 23] [775-E-F]

2.8. Section 11 speaks of Chief Justice or his Designate 'appointing' an arbitrator. The word 'appoint' means not only nominating or designating the person who will act as an arbitrator, but is wide enough to include stipulating the terms on which he is appointed. The word 'appoint' in section 11 of the Act, therefore, refers not only to the actual designation or nomination as an arbitrator, but includes specifying the terms and conditions, which the Chief Justice or Designate may lay down on the facts and circumstances of the case. Whenever the Chief Justice or his Designate appoints arbitrator/s, it will be open to him to stipulate the fees payable to the arbitrator/s, after hearing the parties and if necessary after ascertaining the fee structure from the prospective Arbitrator/s. [para 25] [776-C-H]

Union of India v. Singh Builders Syndicate **2009 (3) SCR 563 = 2009 (4) SCC 523 – relied on**

Court fees

2.9. Though there is a general impression that the court fee regarding litigation is high, in fact, it is not so. Except in the case of few categories of suits (that is money suits, specific performance suits etc., and the

appeals therefrom), where court fee is *ad valorem*, in majority of the suits/petitions and the appeals arising therefrom, the court fee is a fixed nominal fee. The fixed fees that are payable, prescribed decades ago, have not undergone a change and in many cases the fixed fee is not worth the cost of collection thereof. There is, therefore, a need for a periodical revision of fixed court fees, that is payable in regard to suits/petitions/appeals filed in civil courts, High Courts, Tribunals and the Supreme Court. [para 16] [772-A-D]

2.10. The Law Commission of India, Parliament and the respective High Courts are suggested to make appropriate changes in the provisions relating to costs. [para 30] [780-B]

Case Law Reference:

2005 (1) Suppl. SCR 929	**referred to**	**para 7**
2009 (1) SCR 125	**referred to**	**para 7**
2010 (7) SCR 424	**referred to**	**para 7**
ILR (1921) 48 Ca. 427	**referred to**	**para 7**
2009 (3) SCR 563	**relied on**	**para 26**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8610 of 2011.

From the Judgment & Order dated 8610 of 2011 of the High Court of Delhi at New Delhi in FAO (O.S.) No. 244 of 2004.

Dr. Arun Mohan, (A.C.), A. Mariarputham, Jawahar Lal Gupta, Arvind Bhatt, Megha Gaur, Yusuf Khan, P.N. Puri, Indra Sawhney, Simran Mehta, Sibo Sankar Mishra for the appering parties.

The Order of the Court was delivered by

O R D E R

R.V. RAVEENDRAN, J. 1. Notice had been issued limited to the question whether a sum of Rs. 45,28,000/- could be awarded as costs in an appeal against a vacating temporary injunction in an injunction suit. Leave is granted in regard to that aspect only.

2. The appellant is a tenant under the respondents in regard to a first floor unit bearing No.E-67, Connaught Place, New Delhi. He was also a tenant under the respondents in respect of a mezzanine floor unit bearing No.E-11 of the said building situated below the first floor tenement. When he was a tenant of both these portions, the respondents granted permission on 4.7.1986 to the appellant to put up an internal staircase connecting the mezzanine floor with the first floor. The respondents initiated proceedings for eviction of the appellant in regard to mezzanine floor unit and obtained vacant possession thereof. Even after vacating the mezzanine floor unit, the appellant claimed a right to use the staircase which had been constructed in the mezzanine floor unit to reach the first floor unit. In that behalf, he filed a suit for permanent injunction to restrain the respondents from obstructing him from using the said staircase to reach the first floor unit. Interim protection was given in favour of appellant on 30.12.2003. The said interim order was vacated on 8.11.2004. Feeling aggrieved, the appellant filed an appeal. The appeal was pending for nearly six years. During the final hearing of the appeal, the Division Bench appears to have suggested to the parties that as the dispute was purely a commercial dispute, the party succeeding in the appeal should be entitled to the litigation expenses from the party who did not succeed. Both counsel, agreed to the said proposal in principle and the court made the following order on 21.12.2009:

"Arguments heard. Order reserved.

Learned counsel for the parties should give to the Court Master, statement of the total litigation expenses incurred in this appeal only, within two days."

In pursuance of it, the parties filed memos indicating the respective expenses incurred in the appeal. The appellant filed a memo dated 22.12.2009 stating that Rs. 25,50,000/- was incurred as advocates' fees in the appeal. The respondents filed an affidavit dated 23.12.2009 stating that Rs. 45,28,000/- was spent as advocates' fees in regard to the appeal. By the impugned judgment dated 20.1.2010, the Division Bench of the High Court, dismissed the appeal by the appellant. Taking note of the said memos regarding fees, the High Court awarded to the respondents Rs. 45,28,000/- as costs in respect of the appeal to be paid by the appellant within six months. The appellant has challenged the said order both on merits and costs. But leave is restricted only to the question of costs.

3. The only question for consideration is the legality and validity of the order of the High Court directing the appellant to pay costs of '45,28,000/- to the respondents.

4. The appellant contended that award of such costs by the High Court was erroneous and contrary to law. The respondents drew our attention to para 20 of the order of the High Court in which it has been observed that the learned counsel for the parties had agreed for the suggestion of the Court for litigation costs being payable to the succeeding party by the losing party. The respondents contended that the award of actual costs incurred in the appeal was by consent of parties; and the same being a consent order, there was no question of the matter being challenged by the appellant.

5. On a careful consideration, we find that the impugned order, including the portion regarding costs, was not a consent order. During hearing on merits, the division bench indicated that the losing party should pay the 'litigation expenses' relating to the appeal. This is nothing but a reiteration of what is stated

in law, namely section 35 of the Code of Civil Procedure. The counsel naturally agreed for the suggestion. But there was no consent for Rs. 45,28,000/- being determined or being awarded as costs. There was no assessment of the costs by the Taxing Officer of the High Court. We may therefore examine whether the award of such costs is contrary to law.

Relevant provisions of the Code

6. Section 35 of the Code of Civil Procedure, 1908, (for short 'the Code') relates to costs and is extracted below:

"35. *Costs.* (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing."

6.1) Section 35A relates to compensatory costs in respect of false or vexatious claims and is extracted below:

"35A. Compensatory costs in respect of false or vexatious claims or defenses (1) If any suit or other proceedings including an execution proceedings but excluding an appeal or a revision any party objects to the claim of defence on the ground that the claim or defence or any part of it is, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward, and if thereafter, as against the objector, such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the Court if it so thinks fit, may, after recording

its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the object or by the party by whom such claim or defence has been put forward, of cost by way of compensation.

(2) No Court shall make any such order for the payment of an amount exceeding three thousand rupees or exceeding the limits of it pecuniary jurisdiction, whichever amount is less:

Provided that where the pecuniary limits of the jurisdiction of any Court exercising the jurisdiction of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887 (9 of 1887) or under a corresponding law in force in any part of India to which the said Act does not extend and not being a Court constituted under such Act or law, are less than two hundred and fifty rupees, the High Court may empower such Court to award as costs under this section any amount not exceeding two hundred and fifty rupees and not exceeding those limits by more than one hundred rupees :

Provided, further, that the High Court may limit the amount or class of Courts is empowered to award as costs under this Section.

(3) No person against whom an order has been made under this section shall, by reason thereof, be exempted from any criminal liability in respect of any claim or defence made by him.

(4) The amount of any compensation awarded under this section in respect of a false or vexatious claim or defence shall be taken into account in any subsequent suit for damages or compensation in respect of such claim or defence."

6.2) Section 35B relates to costs for causing delay and is extracted below :

"35B. Costs for causing delay. - (1) If, on any date fixed for the hearing of a suit or for taking any step therein, a party to the suit—

(a) fails to take the step which he was required by or under this Code to take on that date, or

(b) obtains an adjournment for taking such step or for producing evidence or on any other ground, the Court may, for reasons to be recorded, make an order requiring such party to pay to the other party such costs as would, in the opinion of the Court, be reasonably sufficient to reimburse the other party in respect of the expenses incurred by him in attending the Court on that date, and payment of such costs, on the date next following the date of such order, shall be a condition precedent to the further prosecution of—

(a) the suit by the plaintiff, where the plaintiff was ordered to pay such costs,

(b) the defence by the defendant, where the defendant was ordered to pay such costs.

Explanation.—Where separate defences have been raised by the defendants or groups of defendants, payment of such costs shall be a condition precedent to the further prosecution of the defence by such defendants or groups of defendants as have been ordered by the Court to pay such costs.

(2) The costs, ordered to be paid under sub-section (1), shall not, if paid, be included in the costs awarded in the decree passed in the suit; but, if such costs are not paid, a separate order shall be drawn up indicating the amount of such costs and the names and addresses of the persons by whom such costs are payable and the order so drawn up shall be executable against such persons."

6.3) Order XXA of the Code provides for costs being awarded in regard to the following six items enumerated in Rule 1:

> "1. Provisions relating to certain items.- Without prejudice to the generality of the provisions of this Code relating to cots, the Court may award costs in respect of, -
>
> (a) expenditure incurred for the giving of any notice required to be given by law before the institution of the suit;
>
> (b) expenditure incurred on any notice which, though not required to be given by law, has been given by any party to the suit to any other party before the institution of the suit;
>
> (c) expenditure incurred on the typing, writing or printing of pleadings filed by any party;
>
> (d) charges paid by a party for inspection of the records of the court for the purposes of the suit;
>
> (e) expenditure incurred by a party for producing witnesses, even though not summoned through courts; and
>
> (f) in the case of appeals, charges incurred by a party for obtaining any copies of judgments and decrees which are required to be filed along with the memorandum of appeal."

Rule 2 of Order XXA provides that award of costs under this Rule shall be in accordance with such rules as the High Court may make in this behalf.

Decisions dealing with costs

7. Sections 35 and 35A have been considered recently by this Court in *Salem Advocates Bar Association v. Union of*

India [2005 (6) SCC 344], *Ashok Kumar Mittal Vs. Ram Kumar Gupta & Anr.* [2009 (2) SCC 656] and *Vinod Seth Vs. Devender Bajaj & Anr.* [2010 (8) SCC 1]. Before referring to them, we may refer to the principle underlying award of costs stated in *Manindra Chandra Nandi vs. Aswini Kumar Acharjya* [ILR (1921) 48 Ca. 427] :

> "….We must remember that whatever the origin of costs might have been, they are now awarded, not as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected, or, as Lord Coke puts it, for whatever appears to the Court to be the legal expenses incurred by the party in prosecuting his suit or his defence. * * * The theory on which costs are now awarded to a plaintiff is that default of the defendant made it necessary to sue him, and to a defendant is that the plaintiff sued him without cause; costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in court and consequently the party to blame pays costs to the party without fault. These principles apply, not merely in the award of costs, but also in the award of extra allowance or special costs. Courts are authorized to allow such special allowances, not to inflict a penalty on the un-successful party, but to indemnify the successful litigant for actual expenses necessarily or reasonably incurred in what are designated as important cases or difficult and extraordinary cases."

7.1) In *Salem Advocates Bar Association,* this Court held:

> "Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded on the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In large number of cases, such an order is passed despite Section 35(2) of the Code. Such a practice also encourages filing

of frivolous suits. It also leads to taking up of frivolous defences. Further wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for cost to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the Court in its discretion may direct otherwise by recording reasons thereof. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental cost besides the payment of the court fee, lawyer's fee, typing and other cost in relation to the litigation. It is for the High Courts to examine these aspects and wherever necessary make requisite rules, regulations or practice direction so as to provide appropriate guidelines for the subordinate courts to follow."

7.2) In *Ashok Kumar Mittal,* this Court pointed out that present system of levying meagre costs in civil matters (or no costs in some matters), is wholly unsatisfactory and does not act as a deterrent to vexatious or luxury litigation borne out of ego or greed, or resorted to as a 'buying-time' tactic and that a more realistic approach relating to costs may be the need of the hour. This Court had also observed that the question whether we should adopt suitably, the western models of awarding actual and more realistic costs is a matter that requires to be debated and that should engage the attention of Law Commission of India. This Court also observed:

"One view has been that the provisions of Sections 35 and 35A CPC do not in any way affect the wide discretion vested in by High Court in exercise of its inherent power to award costs in the interests of justice in appropriate civil cases. The more sound view however is that though award of costs is within the discretion of the court, it is subject to such conditions and limitations as may be prescribed and subject to the provisions of any law for

the time being in force; and where the issue is governed and regulated by Sections 35 and 35A of the Code, there is no question of exercising inherent power contrary to the specific provisions of the Code. Further, the provisions of Section 35A seems to suggest that even where a suit or litigation is vexatious, the outer limit of exemplary costs that can be awarded in addition to regular costs, shall not exceed Rs. 3000/-. It is also to be noted that huge costs of the order of Rs. Fifty thousand or Rs. One lakh, are normally awarded only in writ proceedings and public interest litigations, and not in civil litigation to which Sections 35 and 35A are applicable. The principles and practices relating to levy of costs in administrative law matters cannot be imported mechanically in relation to civil litigation governed by the Code."

7.3) In *Vinod Seth,* this Court observed as under:

"48. The provision for costs is intended to achieve the following goals:

(a) It should act as a deterrent to vexatious, frivolous and speculative litigations or defences. The spectre of being made liable to pay actual costs should be such, as to make every litigant think twice before putting forth a vexatious, frivolous or speculative claim or defence.

(b) Costs should ensure that the provisions of the Code, Evidence Act and other laws governing procedure are scrupulously and strictly complied with and that parties do not adopt delaying tactics or mislead the court.

(c) Costs should provide adequate indemnity to the successful litigant for the expenditure incurred by him for the litigation. This necessitates the award of actual costs of litigation as contrasted from nominal or fixed or unrealistic costs.

(d) The provision for costs should be an incentive for each litigant to adopt alternative dispute resolution (ADR) processes and arrive at a settlement before the trial commences in most of the cases. In many other jurisdictions, in view of the existence of appropriate and adequate provisions for costs, the litigants are persuaded to settle nearly 90% of the civil suits before they come up to trial.

(e) The provisions relating to costs should not however obstruct access to courts and justice. Under no circumstances the costs should be a deterrent, to a citizen with a genuine or bonafide claim, or to any person belonging to the weaker sections whose rights have been affected, from approaching the courts.

At present these goals are sought to be achieved mainly by sections 35,35A and 35B read with the relevant civil rules of practice relating to taxing of costs.

49. Section 35 of the Code vests the discretion to award costs in the courts. It provides that normally the costs should follow the event and court shall have full power to determine by whom or out of what property, and to what extent such costs are to be paid. Most of the costs taxing rules, including the rules in force in Delhi provide each party should file a bill of cost immediately after the judgment is delivered setting out: (a) the court fee paid; (b) process fee spent; (c) expenses of witnesses; (d) advocate's fee; and (e) such other amount as may be allowable under the rules or as may be directed by the court as costs. We are informed that in Delhi, the advocate's fee in regard to suits the value of which exceeds Rs.5 lakhs is : Rs.14,500/- plus 1% of the amount in excess of Rs.5 lakhs subject to a ceiling of Rs.50,000/-. The prevalent view among litigants and members of the bar is that the costs provided for in the Code and awarded by courts neither compensate nor indemnify the litigant fully

in regard to the expenses incurred by him.

50. The English Civil Procedure Rules provide that a court in deciding what order, if any, to make in exercising its discretion about costs should have regard to the following circumstances:

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) any payment made into court or admissible offer to settle made by a party which is drawn to the courts attention.

'Conduct of the parties' that should be taken note by the court includes:

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

Similar provisions, with appropriate modifications may enable proper and more realistic costs being awarded.

51. As Section 35 of the Code does not impose any ceiling the desired object can be achieved by the following:

(i) courts levying costs, following the result, in all

cases (non-levy of costs should be supported by reasons); and

(ii) appropriate amendment to Civil Rules of Practice relating to taxation of costs, to make it more realistic in commercial litigation.

52. The provision relating to compensatory costs (Section 35A of the Code) in respect of false or vexatious claims or defences has become virtually infructuous and ineffective, on account of inflation. Under the said section, award of compensatory costs in false and vexatious litigation, is subject to a ceiling of Rs.3,000/-. This requires a realistic revision keeping in view, the observations in Salem Advocates Bar Association (supra). Section 35B providing for costs for causing delay is seldom invoked. It should be regularly employed, to reduce delay.

53. The lack of appropriate provisions relating to costs has resulted in a steady increase in malicious, vexatious, false, frivolous and speculative suits, apart from rendering Section 89 of the Code ineffective. Any attempt to reduce the pendency or encourage alternative dispute resolution processes or to streamline the civil justice system will fail in the absence of appropriate provisions relating to costs. There is therefore an urgent need for the legislature and the Law Commission of India to re-visit the provisions relating to costs and compensatory costs contained in Section 35 and 35A of the Code."

8. Though, Section 35 does not impose a ceiling on the costs that could be levied and gives discretion to the Court in the matter, it should be noted that Section 35 starts with the words "subject to such conditions and limitations as may be prescribed, and to the provisions of law for the time being in force". Therefore, if there are any conditions or limitations prescribed in the Code or in any rules, the Court, obviously, cannot ignore them in awarding costs.

9. Chapter 11 Part C of the Delhi High Court Rules ('Rules' for short) deals with award of costs in civil suits. Chapter XXIII of the said Rules deals with taxation of costs. Rule 1 relates to appointment of Taxing Officer. Rule 6 provides that advocate's fee should be taxed on the basis of a certificate filed under Rule 2 Chapter 5 but *not exceeding the scale prescribed in the schedule* to Chapter XXIII. Therefore, the Court could not have awarded costs exceeding the scale that was prescribed in the schedule to the Rules. Doing so would be contrary to the Rules. If it was contrary to the Rules, it was also contrary to Section 35 also which makes it subject to the conditions and limitations as may be prescribed and the provisions of law for the time being in force. Therefore, we are of the view that merely by seeking a consent of the parties to award litigation expenses as costs, the High Court could not have adopted the procedure of awarding what it assumed to be the 'actual costs' nor could it proceed to award a sum of Rs.45,28,000/- as costs in an appeal relating to an interim order in a civil suit. While we would like to encourage award of realistic costs, that should be in accordance with law. If the law does not permit award of actual costs, obviously courts cannot award actual costs. When this Court observed that it is in favour of award of actual realistic costs, it means that the relevant Rules should be amended to provide for actual realistic costs. As the law presently stands, there is no provision for award of 'actual costs' and the award of costs will have to be within the limitation prescribed by section 35.

10. Learned counsel for the respondents submitted that in awarding actual costs, the High Court was merely following the decision of a three-Judge Bench of this court in *Salem Advocates Bar Association*. He drew our attention to para 37 of the said decision (which is extracted in the judgment of the High Court), in particular, the observation that "costs have to be actual reasonable costs including the cost of time spent by the successful party, the transportation and lodging, if any, and any other incidental costs besides the payment of the court fee,

lawyer's fee, typing and other costs in relation to the litigation." The High Court has also assumed that the above observations of this Court in *Salem Advocates Bar Association* enabled it to award "actual" costs. The High Court has opened its order with the following words:

> "The importance of this decision lies not in any substantial question of law having been decided – indeed, no question of law was urged before us, only issues touching upon facts. The importance lies in the nature of the dispute between the parties, which is a purely commercial dispute in which litigation expenses have touched the sky. In our opinion, the only way in which a successful litigant can be compensated financially is by awarding actual costs incurred by him in the litigation. The Supreme Court has recommended this course of action and we think the time has come to give more than serious weight and respect to the views of the Supreme Court. We have endeavoured to do just that in this appeal by awarding to the respondents the actual litigation expenses incurred by them, which is a staggering Rs.45,00,000/."

We are afraid that the respondents and the High Court have misread the observations of this Court in *Salem Advocates Bar Association*. All that this Court stated was that the *actual reasonable cost* has to be provided for in the rules by appropriate amendment. In fact, the very next sentence in para 37 of the decision of this Court is that the High Courts should examine these aspects and wherever necessary, make requisite rules, regulations or practice directions. What has been observed by this court about *actual realistic costs* is an observation requiring the High Courts to amend their rules and regulations to provide for actual realistic costs, where they are not so provided. We have noticed that section 35 does not impose a restriction on actual realistic costs. Such restriction is generally imposed by the rules made by the High Court. The observation in *Salem Advocates Bar Association* is a direction

to amend the rules so as to provide for actual realistic costs and not to ignore the existing rules. The decision in *Salem Advocates Bar Association* is therefore of no assistance to justify the award of such costs. The Rules permit costs to the awarded only as per the schedule. Therefore, as the Rules presently stand. Whatever may be the 'actual' expenditure incurred by a party, what could be awarded as costs is what is provided in the Rules.

11. There is one more aspect which requires serious consideration. What is the meaning of the words '*actual realistic costs'* assuming that costs could be awarded on such basis? Whether it can be said that Rs. 45,28,000/- said to have been incurred (made up of Rs. 29,73,000/- paid to Mr. S, Senior Advocate, Rs. 14,41,000/- paid to Mr. G, Senior Advocate, Rs. 85,500/- paid to Mr. M, Advocate, Rs. 16,750/- paid to Mr. V, Advocate and Rs. 11,750/- incurred as miscellaneous expenses) was the 'actual realistic cost' of an appeal against an interim order in a suit for injunction? The actual *realistic* cost should have a correlation to costs which are realistic and practical. It cannot obviously refer to fanciful and whimsical expenditure by parties who have the luxury of engaging a battery of high-charging lawyers. If the logic adopted by the High Court is to be accepted, then the losing party should pay the costs, not with reference to the subject matter of the suit, but with reference to the fee paying capacity of the other side. Let us take the example of a suit for recovery of ` One lakh. If a rich plaintiff wants to put forth his case most effectively, engages a counsel who charges ` One lakh per hearing and the matter involves 30 hearings, should the defendant be made to pay costs of Rs. 30 lakhs, in a suit for recovery of ` One lakh merely because it is a commercial dispute? In a matter relating to temporary injunction, merely because the court adjourns the matter several times and one side engages a counsel by paying more than a lakh per hearing, should the other side be made to bear such costs? The costs memo filed by the respondents show that Rs. 45,28,000/- was paid to four counsel? If a rich

litigant engages four counsel instead of one, should the defendant pay the fee of four counsel? If a party engages five senior Advocates and five ordinary counsel because he is capable, should the losing party pay the fees of all these counsel? The appeal came up on several occasions, but the final hearing of the appeal was only on a few days and other days were mere appearances. Should the losing party pay for such appearances? If respondents had engaged two senior counsel who charged Rs. Two lakhs per appearance, should the other side be made liable to pay Rs. 1.5 crore as costs? Even if actual costs have to be awarded, it should be *realistic* which means what a "normal" advocate in a "normal" case of such nature would charge normally in such a case. Mechanically ordering the losing party to pay costs of Rs. 45,28,000/- in an appeal against grant of a temporary injunction in a pending suit for permanent injunction was unwarranted and contrary to law. It cannot be sustained.

12. Though this takes care of the actual dispute between the parties, it is also necessary to refer to the larger question of costs in civil suits. For this purpose, during the hearing, this Court requested Dr. Arun Mohan, learned senior counsel to assist as an Amicus Curiae in the matter. In pursuance of it, Dr. Arun Mohan collected and made available considerable material with reference to practices relating to levy of costs in several other jurisdictions. We find that the schemes/processes for assessment of costs in some of the western countries may not be appropriate with reference to Indian conditions. The process of taxation of costs has developed into a detailed and complex procedure in developed countries and instances are not wanting where the costs awarded has been more than the amount involved in the litigation itself. Having regard to Indian conditions, it is not possible or practical to spend the amount of time that is required for determination of 'actual costs' as done in those countries, when we do not have time even to dispose of cases on merits. If the Courts have to set apart the time required for the elaborate procedure of assessment of

costs, it may even lead to an increase in the pendency of cases. Therefore, we requested Dr. Arun Mohan to suggest ways and means of simplifying costs procedures to suit Indian conditions so that appropriate suggestions could be made to the Government. He has put forth several suggestions. Law Commission of India has also intervened and made several valuable suggestions. Notices were issued to the High Courts to ascertain the Rules and procedures in force in regard to costs. For convenience, we will refer to Delhi High Court Rules as the present matter arises from Delhi.

Strict enforcement of Section 35(2) of the Code

13. The discretion vested in the courts in the matter of award of costs is subject to two conditions, as is evident from section 35 of the Code:

(i) The discretion of the court is subject to such conditions and limitations as may be prescribed and to the provisions of law for he time being in force (vide sub-section (1)]

(ii) Where the court does not direct that costs shall follow the event, it shall state the reasons in writing [vide sub-section (2)].

The mandate of sub-section (2) of Section 35 of the Code that "where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing" is seldom followed in practice by courts. Many courts either do not make any order as to costs or direct the parties to bear their respective costs without assigning or recording the reasons for giving such exemption from costs. Unless the Courts develop the practice of awarding costs in accordance with Section 35 (that is, costs following the event) and also give reasons where costs are not awarded, the object of the provision for costs would be defeated. Prosecution and defence of cases is a time consuming and costly process. A plaintiff/petition/ appellant who

is driven to the court, by the illegal acts of the defendant/respondent, or denial of a right to which he is entitled, if he succeeds, to be reimbursed of his expenses in accordance with law. Similarly a defendant/respondent who is dragged to court unnecessarily or vexatiously, if he succeeds, should be reimbursed of his expenses in accordance with law. Further, it is also well recognised that levy of costs and compensatory costs is one of the effective ways of curbing false or vexatious litigations.

Section 35A of the Code – Exemplary costs.

14. Section 35A refers to compensatory costs in respect of false or vexatious claims or defenses. The maximum amount that could be levied as compensatory costs for false and vexatious claims used to be Rs. 1,000/-. In the year 1977, this was amended and increased to Rs. 3,000/-. At present, the maximum that can be awarded as compensatory costs in regard to false and vexatious claims is Rs. 3,000/-. Unless the compensatory costs is brought to a realistic level, the present provision authorizing levy of an absurdly small sum by present day standards may, instead of discouraging such litigation, encourage false and vexatious claims. At present Courts have virtually given up awarding any compensatory costs as award of such a small sum of Rs. 3,000/- would not make much difference. We are of the view that the ceiling in regard to compensatory costs should be at least Rs. 1,00,000/-.

15. We may also note that the description of the costs awardable under Section 35A "as compensatory costs" gives an indication that is restitutive rather than punitive. The costs awarded for false or vexatious claims should be punitive and not merely compensatory. In fact, compensatory costs is something that is contemplated in Section 35B and Section 35 itself. Therefore, the Legislature may consider award of 'punitive costs' under section 35A.

Court fees

16. Though there is a general impression that the court fee regarding litigation is high, in fact, it is not so. Except in the case of few categories of suits (that is money suits, specific performance suits etc., and appeals therefrom), where court fee is *ad volerem*, in majority of the suits/petitions and appeals arising therefrom, the court fee is a fixed nominal fee. The fixed fees that are payable, prescribed decades ago have not undergone a change and in many cases, the fixed fee is not worth the cost of collection thereof. There is therefore a need for a periodical revision of fixed court fees, that is payable in regard to suits/petitions/appeals filed in civil courts, High Court, Tribunals and Supreme Court. For example, in Supreme Court, the maximum court fee payable is only Rs. 250/-, whether it is a suit or special leave petition or appeal.

17. A time has come when at least in certain type of litigations, like commercial litigations, the costs should be commensurate with the time spent by the courts. Arbitration matters, company matters, tax matters, for example, may involve huge amounts. There is no reason why a nominal fixed fee should be collected in regard to such cases. While we are not advocating an ad valorem fee with reference to value in such matters, at least the fixed fee should be sufficiently high to have some kind of quid-pro-quo to the cost involved. Be that as it may.

Award of Realistic Costs

18. In *Salem Advocates Bar Association,* this Court suggested to the High Courts that they should examine the Model Case Flow Management Rules and consider making rules in terms of it, with or without modification so that a step forward is taken to provide to the litigating public a fair, speedy and inexpensive justice. The relevant rules therein relating to costs are extracted below:

"Re: Trial Courts

So far as awarding of costs at the time of judgment is concerned, awarding of costs must be treated generally as mandatory in as much as the liberal attitude of the Courts in directing the parties to bear their own costs had led parties to file a number of frivolous cases in the Courts or to raise frivolous and unnecessary issues. Costs should invariably follow the event. Where a party succeeds ultimately on one issue or point but loses on number of other issues or points which were unnecessarily raised, costs must be appropriately apportioned. Special reasons must be assigned if costs are not being awarded. Costs should be assessed according to rules in force. If any of the parties has unreasonably protracted the proceedings, the Judge should consider exercising discretion to impose exemplary costs after taking into account the expense incurred for the purpose of attendance on the adjourned dates.

Re: Appellate Courts

Awarding of costs must be treated generally as mandatory in as much as it is the liberal attitude if the Courts in not awarding costs that has led to frivolous points being raised in appeals or frivolous appeals being filed in the courts. Costs should invariably follow the event and reasons must be assigned by the appellate Court for not awarding costs. If any of the parties have unreasonably protracted the proceedings, the Judge shall have the discretion to impose exemplary costs after taking into account the costs that may have been imposed at the time of adjournments."

19. The costs in regard to a litigation include (a) the court fee and process fee; (b) the advocate's fee; (c) expenses of witnesses; and (d) other expenses allowable under the Rules. We have already referred to the need to revise and streamline the court fee. Equally urgent is the need to revise the advocate's

fee provided in the Schedule to the Rules, most of which are outdated and have no correlation with the prevailing rates of fees. In regard to money suits, specific performance suits and other suits where *ad valorem* court fee is payable, the Advocate's fee is also usually *ad valorem.* We are more concerned with the other matters, which constitute the majority of the litigation, where fixed Advocates' fees are prescribed. In Delhi in regard to any proceedings (other than suits where the *ad valorem* court fee is payable), the maximum fee that could be awarded is stated to be Rs. 2000 and for appeals of the scale if that is payable to original suits.

20. The Supreme Court Rules (Second Schedule) prescribes a fee of Rs. 2400/- for leading counsel and Rs. 1200/- for Associate Advocate in regard to defended appeals and suits or writ petitions. For special leave petitions, it is Rs. 800/- for leading counsel and Rs. 400/- for Advocate-on-Record. It is of some interest to note that the fee paid to amicus curiae in criminal appeals in Supreme Court and to the Legal Aid counsel appointed by Supreme Court Legal Services Committee is much higher than the above scale of fees. There is need to provide for awarding realistic advocates' fee by amending the relevant rules periodically. This Court, of course, in several cases has directed payment of realistic costs. But this Court could do so, either because of the discretion vested under the Supreme Court Rules, 1966 or having regard to Article 142 of the Constitution under which this Court has the power to make such orders as are necessary to do complete justice between the parties.

21. A serious fallout of not levying actual realistic costs should be noted. A litigant, who starts the litigation, after sometime, being unable to bear the delay and mounting costs, gives up and surrenders to the other side or agrees to settlement which is something akin to creditor who is not able to recover the debt, writing off the debt. This happens when the costs keep mounting and he realizes that even if he succeeds

he will not get the actual costs. If this happens frequently, the citizens will lose confidence in the civil justice system. When a civil litigant is denied effective relief in Courts, he tries to take his grievances to 'extra judicial' enforcers (that is goons, musclemen, underworld) for enforcing his claims/right thereby criminalising the civil society. This has serious repercussions on the institution of democracy.

22. We therefore, suggest that the Rules be amended to provide for 'actual realistic costs'. The object is to streamline the award of costs and simplify the process of assessment, while making the cost 'actual and realistic'. While ascertainment of actuals in necessary in regard to expenditure incurred (as for example travel expenses of witnesses, cost of obtaining certified copies etc.) in so far as advocates' fee is concerned, the emphasis should be on 'realistic' rather than 'actual'. The courts are not concerned with the number of lawyers engaged or the high rate of day fee paid to them. For the present, the Advocate fee should be a realistic normal single fee.

Costs in Arbitration matters

23. We have referred to the effect of absence of provisions for award of actual costs, on civil litigation. At the other end of the spectrum is an area where award of actual but unrealistic costs and delay in disposal is affecting the credibility of an alternative dispute resolution process. We are referring to arbitration proceedings where usually huge costs are awarded (with reference to actual unregulated fees of Arbitrators and Advocates).

24. Clause (a) of section 31(8) of Arbitration and Conciliation At, 1996 ('Act' for short) deals with costs. It provides that unless otherwise agreed by the parties, the *costs of an arbitration* shall be fixed by the arbitral tribunal. The explanation to sub-section (8) of section 31 makes it clear that 'costs' means *reasonable* costs relating to (i) the fees and expenses of the arbitrators and witnesses, (ii) legal fees and

expenses, (iii) any administration fees of the institution supervising the arbitration, and (iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award. Clause (b) of section 31(8) of the Act provides that unless otherwise agreed by parties, the arbitral tribunal shall specify (i) the party entitled to costs, (ii) the party who shall pay the costs, (iii) the amount of costs or method of determining the amount, and (iv) the manner in which the costs shall be paid. This shows that what is awardable is not 'actual' expenditure but 'reasonable' costs.

25. Arbitrators can be appointed by the parties directly without the intervention of the court, or by an Institution specified in the arbitration agreement. Where there is no consensus in regard to appointment of arbitrator/s, or if the specified institution fails to perform its functions, the party who seeks arbitration can file an application under section 11 of the Act for appointment of arbitrators. Section 11 speaks of Chief Justice or his Designate 'appointing' an arbitrator. The word 'appoint' means not only nominating or designating the person who will act as an arbitrator, but is wide enough to include the stipulating the terms on which he is appointed. For example when we refer to an employer issuing a letter of appointment, it not only refers to the actual act of appointment, but includes the stipulation of the terms subject to which such appointment is made. The word 'appoint' in section 11 of the Act, therefore refers not only to the actual designation or nomination as an arbitrator, but includes specifying the terms and conditions, which the Chief Justice or Designate may lay down on the facts and circumstances of the case. Whenever the Chief Justice or his Designate appoint arbitrator/s, it will be open to him to stipulate the fees payable to the arbitrator/s, after hearing the parties and if necessary after ascertaining the fee structure from the prospective Arbitrator/s. This will avoid the embarrassment of parties having to negotiate with the Arbitrators, the fee payable to them, after their appointment.

26. This Court in *Union of India v. Singh Builders Syndicate* – 2009 (4) SCC 523, dealt with the complaints about the arbitration cost in India:

> "20. Another aspect referred to by the appellant, however requires serious consideration. When the arbitration is by a Tribunal consisting of serving officers, the cost of arbitration is very low. On the other hand, the cost of arbitration can be high if the Arbitral Tribunal consists of retired Judge/s.
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> 21. When a retired Judge is appointed as Arbitrator in place of serving officers, the government is forced to bear the high cost of Arbitration by way of private arbitrator's fee even though it had not consented for the appointment of such non-technical non-serving persons as Arbitrator/s. There is no doubt a prevalent opinion that the cost of arbitration becomes very high in many cases where retired Judge/s are Arbitrators. The large number of sittings and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award.
>
> 22. When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a disadvantage. Firstly, the parties feel constrained to agree to whatever fees is suggested by the Arbitrator, even if it is high or beyond their capacity. Secondly, if a high fee is claimed by the Arbitrator and one party agrees to pay such fee, the other party, who is unable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party who readily agreed to pay the high fee.

> 23. It is necessary to find an urgent solution for this problem to save arbitration from the arbitration cost. Institutional arbitration has provided a solution as the Arbitrators' fees is not fixed by the Arbitrators themselves on case to case basis, but is governed by a uniform rate prescribed by the institution under whose aegis the Arbitration is held. *Another solution is for the court to fix the fees at the time of appointing the arbitrator, with the consent of parties, if necessary in consultation with the arbitrator concerned.* Third is for the retired Judges offering to serve as Arbitrators, to indicate their fee structure to the Registry of the respective High Court so that the parties will have the choice of selecting an Arbitrator whose fees are in their 'range' having regard to the stakes involved.
>
> 24. What is found to be objectionable is parties being forced to go to an arbitrator appointed by the court and then being forced to agree for a fee fixed by such Arbitrator. It is unfortunate that delays, high cost, frequent and sometimes unwarranted judicial interruptions at different stages are seriously hampering the growth of arbitration as an effective dispute resolution process. Delay and high cost are two areas where the Arbitrators by self regulation can bring about marked improvement."

(emphasis supplied)

27. There is a general feeling among consumers of arbitration (parties settling disputes by arbitration) that ad-hoc arbitrations in India - either international or domestic, are time consuming and disproportionately expensive. Frequent complaints are made about two sessions in a day being treated as two hearings for purpose of charging fee; or about a sessions for two hours being treated as full sessions for purposes of fee; or about non-productive sittings being treated as fully chargeable hearings. It is pointed out that if there is an arbitral tribunal with three arbitrators and if the arbitrators are

from different cities and the arbitrations are to be held and the Arbitrators are accommodated in five star hotels, the cost per hearing, (Arbitrator's fee, lawyer's fee, cost of travel, cost of accommodation etc.) may easily run into Rupees One Million to One and half Million per sitting. Where the stakes are very high, that kind of expenditure is not commented upon. But if the number of hearings become too many, the cost factor and efficiency/effectiveness factor is commented. That is why this Court in *Singh Builders Syndicate* observed that the arbitration will have to be saved from the arbitration cost.

28. Though what is stated above about arbitrations in India, may appear rather harsh, or as an universalisation of stray aberrations, we have ventured to refer to these aspects in the interest of ensuring that arbitration survives in India as an effective alternative forum for disputes resolution in India. Examples are not wanting where arbitrations are being shifted to neighbouring Singapore, Kuala Lumpur etc., on the ground that more professionalized or institutionalized arbitrations, which get concluded expeditiously at a lesser cost, are available there. The remedy for healthy development of arbitration in India is to disclose the fees structure *before* the appointment of Arbitrators so that any party who is unwilling to bear such expenses can express his unwillingness. Another remedy is Institutional Arbitration where the Arbitrator's fee is pre-fixed. The third is for each High Court to have a scale of Arbitrator's fee suitably calibrated with reference to the amount involved in the dispute. This will also avoid different designates prescribing different fee structures. By these methods, there may be a reasonable check on the fees and the cost of arbitration, thereby making arbitration, both national and international, attractive to the litigant public. *Reasonableness and certainty* about total costs are the key to the development of arbitration. Be that as it may.

Conclusion

29. In view of the above, the order dated 20.1.2010 of the

High Court, to the extent it levies costs of ' 45,28,000/- on the appellant is set aside and in its place it is directed that the appellant shall pay the costs of the appeal before the High Court as per Rules plus ' 3000/- as exemplary costs to the respondents.

30. We suggest appropriate changes in the provisions relating to costs contained as per paras 14 to 29 above to the Law Commission of India, the Parliament and the respective High Courts for making appropriate changes.

31. As the respondents have succeeded before the High Court and award of such costs was not at the instance of the respondents, we do not award any costs in this appeal.

32. We place on record our appreciation for the assistance rendered by Dr. Arun Mohan, Amicus Curiae and Mr. A. Mariarputham, learned senior counsel appearing for Law Commission of India.

R.P. Appeal disposed of.

SHRI GIRISH VYAS & ANR.
v.
THE STATE OF MAHARASHTRA & ORS.
(Civil Appeal No. 198-199 of 2000)

OCTOBER 12, 2011

[R. V. RAVEENDRAN AND H.L. GOKHALE, JJ.]

MAHARASHTRA REGIONAL AND TOWN PLANNING ACT, 1966:

s. 23 (1) read with s. 38 – Revised Development Plan, and Development Control Rules, sanctioned – Subsequently, shifting of reservation of a primary school to a far off place, under D. C. Rule 13.5 – Held: If the statute provides for doing a particular act in a specified manner, it has to be done in that manner alone and not in any other manner – In the instant case, the shifting of reservation to a far off place, though effected under DC Rule 13.5, was in violation of the said rule and , as such, could not be justified – Once the State Government published the draft Development Plan reserving the plot for a primary school, any construction contrary thereto could not be permitted – Development Control Rules – r. 13.5

s. 39 r/w ss. 59, 46 and 165 – Primacy of Development Plan over Town Planning Scheme – In Development Plan, plot reserved for a primary school – Land owner's claim that as per Town Planning Scheme, the plot could be used for residential purposes – Held: Subsequent to the commencement of MRTP Act, as per s. 39 r/w s. 59 thereof, a TP Scheme will have to be in consonance with the DP Plan – s. 39, r/w s. 59 do indicate the superiority of DP Plan over TP Scheme – s. 46 indicates that the moment a draft Development Plan is proposed, permission for contrary development can no more be granted – Besides, when the land-owner issued the purchase notice u/s 49 and led the

State Government and the Municipal Corporation to acquire the plot, such a plea was never raised – Nor had the land owner taken any step in pursuance of the erstwhile TP Scheme – Therefore, the right claimed under the erstwhile TP Scheme cannot be sustained.

ss. 50 and 154 – Deletion of reservation – Held: s. 50 provides for deletion of a reservation at the instance of the authority for whose benefit the reservation is made – In the instant case, the acquiring body is the Municipal Corporation, i.e., its general body, which has to be satisfied that the land is no longer required for the public purpose for which it is reserved – The officers of the Planning Authority as well as of the Government department concerned were not in favour of deleting the reservation – The application of the landowner was received directly at the level of the Minister of State and it was on latter's direction that the Municipal Commissioner gave a report which was used by the State Government and the Chief Minister approved the shifting of the reservation – The Commissioner's opinion could not have been treated as the opinion of the Municipal Corporation, and the State Government could not have made any order sanctioning the deletion of reservation on the basis thereof – s. 154, cannot save the directions issued by the State Government or the actions of the Municipal Commissioner in pursuance thereof.

ss. 37 and 22A – Development Plan – Modification of – Held: The model of democratic planning involves the participation of the citizens, planners, administrators, Municipal bodies and the Government – The provisions of the Act indicate that once the plan is formulated, one has to implement it as it is, and it is only in the rarest of the rare cases that one can depart therefrom – There is no exclusive power given to the State Government, or to the planning authority, or to the Chief Minister to bring about any modification, deletion or de-reservation, and certainly not by resort to any of the D.C. Rules – All these constituents of the planning process have to follow the mandate u/s. 37 or 22A,

as the case may be, if any modification becomes necessary.

s. 126 – Acquisition of land – Change of purpose during acquisition – Applicability of Land Acquisition Act – Held: MRTP Act is a self-contained code and in the scheme of said Act substantive provisions of L.A. Act are not applicable – In the instant case, the letter of the landowner had led to the subsequent steps for acquisition – s. 126 (1) (c) specifically states that when an application is made to the State Government for acquiring the land under the L.A. Act, the land vests absolutely with the Planning Authority – Though the civil court has held the acquisition for the changed purpose under the D.P Plan as bad in law, in the scheme of the MRTP Act, it is not necessary that the original public purpose should continue to exist till the award was made and possession taken – In the instant case, the acquisition cannot be said to be invalid on account of change of purpose during acquisition – Besides, the civil suit itself was not maintainable – The appeal of the Municipal Corporation has been directed by the High Court to be revived.

CONSTITUTION OF INDIA, 1950:

Article 226 – Writ petitions in public interest alleging illegal shifting of reservation of a primary school from a plot and granting permission to develop the plot for private residences – Held: The development permission is granted by-passing the objections of the department of the Government and the Municipal Corporation, and flouting all relevant provisions of law – The Municipal Corporation was asked to withdraw the appeal against the judgment holding that acquisition has lapsed – This is not a case where permission was sought for the construction under erstwhile T.P. scheme, or u/s. 50 of the MRTP Act – This is a case where the personal relationship of the developer with the then Chief Minister was apparently used to obtain permission for construction without following any due process of law – This is a case of rules and procedures being circumvented to

benefit a close relative of the Chief Minister – It is a clear case of mala fide exercise of powers and, therefore, High Court was perfectly justified in canceling the development permission which was granted by the State Government – Consequently, the construction put up on the basis of such permission had to be held to be illegal – Maharashtra Regional and Town Planning Act, 1966.

Article 226 –Writ petitions – Strictures passed by High Court – Held: The then Minister of State acted clearly against the provisions of law though he was fully informed about the same – He was aware about the land owner's connection with the developer and latter's relationship with the then Chief Minister, and acted for the benefit of the developer at the instance of the Chief Minister, as has rightly been inferred by the High Court – The Chief Minister's relationship with the developer is established – The basic order granting no objection to an illegal action is signed by the Chief Minister himself – The strictures passed by the High Court against the then Chief Minister and the then Minister of State are maintained – However, though the acts of the Municipal Commissioner clearly amounted to failure on his part to discharge his duty correctly, but as he had no personal interest in the matter and was acting under the directions of his superior, the remarks against him are deleted.

Article 226 – Direction by High Court to initiate criminal proceedings against the persons responsible – Held: High Court itself did not attribute any personal motive to the Municipal Commissioner and the Minister of State – Therefore, direction for criminal investigation against them cannot be sustained – Though the conduct on the part of the then Chief Minister prima facie amounts to misfeasance, but as there is no prima facie finding in the judgment rendered way back in 1999, the direction of the High Court to make criminal investigations through an impartial agency cannot be sustained and is set aside.

Articles 226 and 136 – High Court directing removal of illegal construction of residential apartments raised on a plot reserved for a primary school – Held: The ten storied building meant for private sale must be either demolished or put to a permissible use – The illegal development carried out by the developer has resulted into a legitimate primary school not coming up on the disputed plot of land – Thousands of children would have attended the school on this plot during last 15 years – The loss suffered by the children and the cause of education is difficult to assess in terms of money, and in a way could be considered to be far more than the cost of construction of the building – It will, therefore, be open to the developer to redeem himself by offering the entire building to the Municipal Corporation for being used as a primary school or for the earmarked purpose, free of cost – Directions for taking the necessary steps in this behalf within the stipulated frame, given – As regards the tenants, who belong to economically weaker section of the society and were occupiers of the erstwhile plot, Municipal Corporation has no objection in their continuance in the premises meant for them, but they shall now continue in the building as tenants of the Municipal Corporation for residential purpose – Public Interest Litigation.

PUBLIC INTEREST LITIGATION:

Locus standi – Writ petition in public interest alleging illegal shifting of reservation for a primary school – Held: Public interest litigation is not in the nature of adversarial litigation, but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful – By its very nature the PIL is inquisitorial in character – Access to justice being a Fundamental Right and citizen's participatory role in the democratic process itself being a constitutional value, accessing the court will not be readily discouraged – Consequently, when the cause or issue relates to matters of good governance in the Constitutional sense, and there are no particular individuals or class of

persons who can be said to be injured persons, groups of persons who may be drawn from different walks of life, may be granted standing for canvassing the PIL and if the Government action is found to be contrary to law or affecting the rights of citizens, the court is required to intervene – In the instant case, there was sufficient foundation in the petition for further steps to be taken by High Court – Constitution of India, 1950 – Article 226.

URBAN DEVELOPMENT:

*Town Planning – Role of Municipalities, responsibilities of Municipal Commissioners, other Government Officers and Political Executives – Explained – Public amenities earmarked in Development Plan – Deletion or modification of – **Safeguards** laid down – Maharashtra Regional and Town Planning Act, 1966 – Constitution of India, 1950 – Chapter IX A – Article 243W.*

A plot of land (FP No. 110) admeasuring 3450 sq. meters, situate in the prime area of the city and reserved under the Development Plan, 1966 for public purpose, namely, garden/play ground, was, pursuant to the purchase notice u/s 49 of the MRTP Act, 1966, given by its owner, notified on 27.8.1981 for acquisition u/s 126 of the Act read with s. 6 of the Land Acquisition Act, 1894. In the final Development Plan, 1987, the said plot was reserved for a primary school. However, on 21.8.1996 the then Chief Minister approved the shifting of reservation on F.P. 110 to another plot. This was given effect to by the Government in its letter/order dated 3.9.1996 to the Commissioner of Municipal Corporation. Accordingly, Commencement (of construction) Certificates dated 28.8.1996 and 3.5.1997 and the Occupation Certificate dated 20.12.1997 were issued in respect of FP No. 110. Two writ petitions were filed in public interest stating that F.P. No. 110 was de-reserved and permitted to be developed for private residences by flouting all norms

and mandatory provisions. The High Court allowed the writ petitions and directed to cancel the Commencement Certificates and the Occupation Certificate and to remove the construction raised on the plot. The State Government was also directed to initiate criminal investigation against the then Chief Minister, the then Minister of State for Urban Development Department and the then Municipal Commissioner.

Disposing of the appeals, the Court

HELD:

Shifting of reservation under DC Rule 13.5:

1.1. Chapter-III of the Maharashtra Regional and Town Planning Act, 1966 on Development Plans requires the sanctioned plan to be implemented as it is. There are only two methods by which modifications of the final Development Plan can be brought about. One is where the proposal is such that it will not change the character of the Development Plan, which is known as minor modification [s. 37]. The other is where the modification is of a substantial nature [ss.22-A and 29]. There is also one more analogous provision, though it is slightly different: the one, for deletion of the reservation where the appropriate authority (other than the planning authority) no longer requires the designated land for the particular public purpose, and seeks deletion of the reservation thereon [s.50]. [Para 47] [839-D-F]

1.2. In the instant case, the Government's action to shift the reservation from F.P. No. 110 is under r.13.5 of Development Control Rules [DC Rule 13.5] and not u/s. 37 of the MRTP Act. Under D.C. Rule 13.5, shifting of the reservation has to be without altering the size of the area under reservation. Besides, it is permissible only on three conditions, namely, that (1) it cannot be beyond 200 metres of the original location in the Development Plan,

(2) it has to be within the holding of the owner in which the reservation is located, and (3) the alternative location ought to have a similar access and land level as the original location. Obviously the shifting of the reservation from F.P. No. 110 to a far off place could not be justified under D.C. Rule 13.5. If the statute provides for doing a particular act in a specified manner, it has got to be done in that manner alone, and not in any other manner. [para 49 and 58] [839-G; 840-A-D-F; 848-H; 849-A]

Primacy of Development Plan over Town Planning Scheme:

2.1. Inasmuch as the action of the State Government could not be defended under D.C. Rules,135, the appellants claimed for the first time before the High Court that under the erstwhile Town Planning Scheme, FP 110 could be developed for residential purposes irrespective of subsequent reservation for a public purpose on the plot under the Development Plan. It is significant to note that right from 8.5.1979, when the landowner issued purchase notice, and led the State Government and PMC to acquire the plot of land, this plea was never raised. [Para 59 and 61] [849-C-D; 850-F]

2.2. Section 39 lays down that the T.P. Scheme is to be varied suitably in accordance with the D.P. Plan u/s. 92 of the Act. Thus, s. 39 read with s. 59 do indicate the approach of legislature, namely, superiority of the D.P. plan over the T.P. scheme. Subsequent to the commencement of the MRTP Act, a T.P. Scheme will have to be in consonance with the D.P. Plan. The Planning Authority cannot act contrary to D.P. plan and grant Development permission to defeat the provision of the D.P. plan. Once the State Government published the draft Development Plan on 18.9.1982, providing for the reservation for a primary school on F.P. 110, any construction contrary thereto could not be permitted.

This can only be the interpretation of the provisions contained in s. 39 read with ss. 43 and 165 of the MRTP Act. [Para 63,64, 66 and 71] [852-H; 853-A; 854-C; 856-A; 855-F; 858-H; 859-A]

Gordhanbhai Vs. The Anand Municipality & Ors. **XVI (1975) Gujarat Law Report 558 – held inapplicable**

2.3. It is significant to note that the landowner had not taken any step in pursuance to the erstwhile T.P. scheme nor had he objected to the changes brought in by the authorities by following the due process of law. Thus, in view of the provisions of ss. 39, 42 and 46, the scheme of the Act and the judicial pronouncements, it is clear that the right claimed under the erstwhile T.P. scheme could not be sustained in the teeth of the reservation for a Primary school under the 1987 D.P. plan. Merely because under the erstwhile Town Planning scheme residential use was permissible, it cannot be supposed to be saved u/s. 165 (2) of the MRTP Act. Besides, independent of one's right either under the D.P. Plan or the T.P. Scheme, one ought to have a permission for development granted by the planning authority traceable to an appropriate provision of law. In the instant case there is none. [Para 78 and 84] [865-F; 871-B-E]

Reserve Bank of India Vs. Peerless Corpn. **1987 (2) SCR 1 =AIR 1987 SC 1023=1987 (1) SCC 424;** *Raju S. Jethmalani Vs. State of Maharashtra* **2005 Suppl. (1) SCR 1 = 2005 (11) SCC 222 – held inapplicable .**

Rusy Kapadia v. State of Maharashtra **1998 (2) ALL MR 181; and** *Indirabai Bhalchandra Bhajekar Vs. The Pune Municipal Corporation and Ors.,* **2009 (111) Bom LR 4251 – referred to**

2.4. It is also material to note that though subsequent to the Government orders, Commencement Certificates

were issued, there was no order specifically setting aside the earlier order of the City Engineer of PMC passed u/s. 45 of the MRTP Act rejecting the building permission by his letter/order dated 6.11.1995. There is no such specific mention of reversal of the order dated 6.11.1995 even in the order of the State Government dated 3.9.1996. [Para 80] [866-H; 867-A-B]

2.5. Section 50 provides for deletion of a reservation at the instance of an appropriate authority (other than the planning authority) for whose benefit the reservation is made. In the instant case, the acquiring body is PMC, and it will mean the general body of PMC. Assuming that the section applies in the instance case, the general body has to be satisfied that the land is no longer required for the public purpose for which it is designed or reserved. It is on the direction of the Minister of State that the Municipal Commissioner has given a report which has been used by the State Government to pass an order of shifting the reservation from F.P. No.110. The officers of the Planning Authority as well as of the Government department concerned were not in favour of deleting the reservation. The Commissioner's opinion could not have been treated as the opinion of PMC. The State Government could not have made any such order sanctioning the deletion of reservation on the basis of the report of the Municipal Commissioner. [Para 81] [868-E-H; 869-A-B]

2.6. The provisions of law cannot be disregarded and ignored merely because what was done, was being done at the instance of the State Government. Section 154, which provides for directions or instructions to be given by the State Government for efficient administration of the Act, cannot save the directions issued by the State Government or the actions of the Municipal Commissioner in pursuance thereof. [Para 82] [870-B-D]

2.7. The direction given by the State Government for the deletion of reservation on F.P. No.110, and the commencement and occupation certificates issued by Pune Municipal Corporation in favour of the developer were in complete subversion of the statutory requirements of the MRTP Act. The development permission was wholly illegal and unjustified. The order of the Government dated 3.9.1996 cannot be traced to any legitimate source of power, and, therefore, the situation cannot be remedied by reference to other sources of power. The Division Bench has, therefore, rightly held that the action taken by the Planning authority was not legal and justified. [Paras 83 & 157] [870-F-H; 935-H; 936-A-B]

3.1. In *Girnar Traders* case this Court has held that in the scheme of the MRTP Act, the provisions of Land Acquisition Act would apply only until the making of the award u/s. 11 of the Act; and that MRTP Act is a self-contained code and ss. 126 to 129 thereof clearly enunciate the intention of the framers that substantive provisions of L.A. Act are not applicable to MRTP Act. In the instant case, the letter of the landowner had led to the subsequent steps for acquisition. Section 126 (1) (c) specifically states that when an application is made to the State Government for acquiring the land under the L.A. Act, the land vests absolutely with the Planning Authority. Therefore, in *IDI Co.*'s case it was held that in the scheme of MRTP Act, it is not necessary that the original public purpose should continue to exist till the award was made and possession taken. [Para 85, 89 and 95] [872-B; 874-H; 875-A; 880-H; 881-A-E]

Municipal Corporation of Greater Bombay vs. Industrial Development Investment Co. Pvt. Ltd. And Ors. **(1996) 11 SCC 501; and** *Girnar Traders (3) Vs. State of Maharashtra & Ors.* **2011 (3) SCR 1 = 2011 (3) SCC 1 – relied on.**

Industrial Development & Investment Company Pvt. Ltd. Vs. State of Maharashtra **1988 Mh.LJ 1027 – stood overruled.**

Santu Kisan Khandwe Vs. Special Land Acquisition Officer No. 2 Nasik & Ors **1995 (1) Mh.LJ 363 – disapproved**

Special Land Acquisition Bombay Vs. M/s Godrej & Boyce **1988 (1) SCR 590 = AIR 1987 SC 2421 – distinguished**

Ghulam Mustafa Vs. State of Maharashtra **1977 (1) SCR 875 =1976 (1) SCC 800;** *Mangal Oram Vs. State of Orissa* **1977 (2) SCR 666 =1977 (2) SCC 46;** *State of Maharashtra Vs. Mahadeo Deoman Rai* **1990 (2) SCR 533 =1990 (3) SCC 579;** *Collector of 24 Parganas Vs. Lalit Mohan Mullick* **1986 (1) SCR 271 =1986 (2) SCC 138 and** *Ram Lal Sethi Vs. State of Haryana* **1990 Supp. SCC 11 – referred to**

3.2. The acquisition of the land, in the instant case, cannot said to be invalid on account of change of purpose during acquisition. Though, the civil court has held the acquisition for the changed purpose under the D.P Plan as bad in law on the ground that the initially designated public purpose for acquisition was changed, in view of the decision of this Court in *Dhirendra Kumar's* **case, the civil suit itself was not maintainable in the instant case. It is stated that an application has already been filed for restoration of the appeal against the decision of the civil court. [Para 97, 99 and 107] [883-C; 883-H; 884-A-B; 892-F-H; 893-A-D; 895-G-H; 896-A-B]**

<u>Conduct of land owner/Developer:</u>

4.1. The landowner never raised any objection when the F.P. No. 110 was sought to be reserved for a public purpose, viz. either for a garden/playground or subsequently for a primary school, nor did he challenge

the acquisition. He merely demanded compensation at a higher rate. When the notice to take possession was given, it is the tenants alone who filed suits challenging the acquisition. It was in Civil Suit No. 397 of 1988 filed by the tenants that on 2.4.1988 the prayer of the land owner for transposing himself as a plaintiff was allowed. The civil court having held that the acquisition had lapsed due to the change in purpose of acquisition (from what it originally was in 1966), the PMC filed an appeal. In 1995 the land-owner appointed the son-in-law of the then Chief Minister as a developer and another power of attorney 'SKK' to approach the Ministers directly. He pointed out that two schools had come up on the adjoining plots (which was in fact as per the D.P. Plan itself), and the Minister used this information to get a report from the Municipal Commissioner who suppressed the fact that applications for this very plot from two educational institutions were pending with PMC. Then also the order of deletion was not passed either u/s. 37 (leave aside s. 22A), or s. 50 of the Act which was invoked for the first time in this Court (and which otherwise also could not be applied). The order of deletion was passed under D.C. Rule 13.5 which had no application. [Para 99 and 103] [883-H; 884-A-D; 885-B-D; 893-A-D]

Conduct of the Minister of State for UDD, the then Chief Minister, and the Municipal Commissioner :

4.2. The application of the landowner was received directly at the level of the Minister of State and immediately a meeting of High ranking officers was called. In view of the direction of the Minister of State, the Municipal Commissioner, who was the Chief Executive of PMC and an officer of a high rank, was asked to make a report after personally making a site inspection. Such a direction is quite unusual and disturbing and is not expected. The Municipal Commissioner, in his letter dated 17.4.1996, though reiterated the earlier stand of PMC, but

volunteered to add that private institutions may not come to F.P. 110 to set up a primary school and PMC may as well spend its funds elsewhere. This was not correct, since applications of two reputed educational institutions for this very plot were pending with PMC, and this fact was not stated by the Commissioner in his report. The UDD did not accept the proposal of shifting the school from F.P. 110 to a place far away, but the Minister of State did not approve the note. The events in the matter disclose that although the officers of UDD and the PMC initially took the clear stand opposing the proposal on behalf of the landowner to put up a residential building in place of a Primary School, the Minister for Urban Development asked the Municipal Commissioner to personally carry out a survey of the property, on the ground that two schools had come up in the near vicinity, ignoring the fact that they had so come up as per the provision in the D.P. Plan itself. Thereafter when it was pointed out that the permission of the general body of the Municipal Corporation will be required for the modification, that submission was by-passed. The provision of DC Rule 13.5 requiring alternate land to be provided for the same purpose within 200 meters was also given a go-bye, and this rule was utilized to accept the proposal to shift the school to a very far off place. The mandatory provision for modification u/s. 37 of the MRTP Act was totally ignored. Ultimately, only an amount for constructing a school building elsewhere and the land therefor was offered to the Municipal Corporation, for getting a reserved plot of land in a prime area of the city released from a public amenity. The Municipal Corporation was instructed to withdraw the First Appeal which it had filed to challenge the decision of the civil court in favour of the landowner in the matter of acquisition. It is material to note that after the Municipal Commissioner sent his report dated 17.4.1996, the Private Secretary to the then Chief Minister called for the file.

After all necessary directions were complied with, the Chief Minister placed his approval on 21.8.1996. Thus, it has got to be inferred that not only the then Chief Minister was fully aware about this matter right from April 1996, until the last direction of UDD dated 29.7.1998, but he was also associated with the decision making process and the directions issued all throughout. [Para 100, 101 and 102] [887-C-F-H; 888-A-B-E-F; 891-C-H; 892-A-D]

5.1. This is not a case where permission was sought for the construction under erstwhile T.P. scheme, or u/s. 50 of the MRTP Act. This is a case where the personal relationship of the developer with the Chief Minister was apparently used to obtain permission for construction without following any due process of law. This is a case of rules and procedures being circumvented to benefit a close relative of the Chief Minister. The development permission is granted by-passing the objections of the concerned department of the Government and the Municipal Corporation, and flouting all relevant provisions of law. The Municipal Corporation is asked to withdraw the appeal against the judgment holding that acquisition has lapsed. It is a clear case of *mala fide* exercise of the powers and, therefore, the High Court was perfectly justified in canceling the development permission which was granted by the State Government. The development permission could not be defended either under Rule 6.6.2.2 or u/s. 50. The MRTP Act requires a valid development permission under chapter IV of the Act, and in the instant case there is none. Consequently, the construction put up on the basis of such permission had to be held to be illegal. In the circumstances, the judgment of the Division Bench of the High Court holding that the disputed construction by the developer was totally illegal and that there was nothing wrong with the acquisition of F.P. No.110, is upheld as fully justified in law and in the facts of the case. [Para 104-106] [893-E-H; 894-A-G; 895-A]

5.2. In view of the gross illegality in the order of the State Government and PMC in granting the development permission, the direction for cancellation of Commencement Certificates and Occupation Certificate had to be issued and the same can not be faulted. It was noted by the High Court that the PMC had been forced by the State Government to apply for withdrawal of its appeal so that the judgment of the civil *court* remains undisturbed. Since the High Court came to the conclusion that there was nothing illegal about the acquisition, the appeal had to be restored. The direction is, therefore, fully justified. PMC has already filed an application for restoration of the appeal. [Para 107] [895-G-H; 896-A-B]

<u>Order passed by the Division Bench of the High Court:</u>

5.3. The direction (b) in the impugned order to demolish the disputed building was issued basically on two grounds. Firstly, the development permission had no legal validity whatsoever, and secondly it was clearly a case of showing favouritism by going out of the way and circumventing the law. Besides, since the challenge to acquisition was being rejected, it would not have been proper to postpone the demolition of the disputed construction on the ground of pendency of the appeal, since the construction was absolutely illegal. There is no redeeming feature whatsoever in the instant case. It is clearly a case of misuse of one's position for the benefit of a relative leading to an action which is nothing short of fraud on one's power and also on the statute. The High Court was right in its conclusion. [Para 108, 109 and 112] [896-C-D; 897-A-B; 899-B-C]

Pratibha Cooperative Housing Society Vs. State of Maharashtra **1991 (2) SCR 745 = 1991 (3) SCC 341;** *M.I Builders Pvt. Ltd. Vs. Radhey Shyam Sahu & Ors.* **1999 (3) SCR 1066 = 1999 (6) SCC 464 – relied on**

5.4. The ten storied building meant for private sale must be either demolished or put to a permissible use. The illegal development carried out by the developer has resulted into a legitimate primary school not coming up on the disputed plot of land. Thousands of children would have attended the school on this plot during last 15 years. The loss suffered by the children and the cause of education is difficult to assess in terms of money, and in a way could be considered to be far more than the cost of construction of the building. It will, therefore, be open to the developer to redeem himself by offering the entire building to PMC for being used as a primary school or for the earmarked purpose, free of cost. Directions for taking the necessary steps in this behalf within the stipulated frame, given. [Para 158] [936-H; 937-A-C]

5.5. The building constructed for the tenants is meant for accommodating them, the developer and PMC have no objection to the retention of the building constructed for the erstwhile occupants of the plot. However these occupants, who belong to economically weaker section of the society, will now have to continue in that building as tenants of PMC, for residential purpose, and they may not be entitled to receive any monetary compensation. However, since the amount of compensation awarded to them was too meagre, if they have collected it, they need not return the same to PMC. [Para 113] [899-D-H; 900-A-C]

5.6. As far as the ownership of the plot is concerned, the same will abide by the decision of the High Court in First Appeal Stamp No. 18615 of 1994 which will be decided in accordance with law. [Para 159] [937-D]

Adverse remarks by High Court and its direction for criminal investigation:

6.1. As regards the defence of the Municipal

Commissioner, firstly, when he made his report dated 17.4.1996 to the Minister of State, he overlooked the fact that the reservation on the plot in question was for a primary school, and not merely for a municipal primary school. Two private schools had already come up on the adjoining plots as per the D.P. provision itself. Besides, two renowned educational institutions had applied for this plot of land for running of schools thereon. The Commissioner did not place this very vital information before the Minister for Urban Development in his report. Secondly, he bypassed the general body of the Municipal Corporation in the matter of deleting the reservation on F.P. No. 110 inspite of being aware of the correct legal position, and his attention having been specifically drawn thereto by the senior law officer of PMC. Both these acts on the part of the Municipal Commissioner clearly amounted to failure on his part to discharge his duty correctly. But noticing that he had no personal interest in the matter, and he was acting under the directions of his superior, the Division Bench could have avoided making the particular remarks against him. The remarks against the Municipal Commissioner are, therefore, deleted. [Para 117, 118 and 162] [902-G-H; 903-A-E-H; 904-A; 939-H]

6.2. As regards the direction to initiate appropriate investigation, it has to be seen that as far as the Municipal Commissioner is concerned, though the Division Bench did not approve his conduct and squarely criticized him, yet it observed that it did not attribute any motive to him for his actions. That apart, s. 147 of the MRTP Act provides that no suit, prosecution or other legal proceedings shall lie against any person for anything which is in good faith done or entitled to be done under this Act or any rules or regulations made therein. Section 486 of the B.P.M.C. Act 1949 is also to the similar effect. The Division Bench of the High Court has

also clearly stated that it did not accept the suggestion in the writ petitions that the Commissioner was willingly a party to the process of abuse of executive powers. Therefore, it would not be correct to direct any criminal investigation against the then Municipal Commissioner. [Para 137] [920-C-G-H; 921-A-B]

6.3. The Division Bench observed that initially the Minister of State was also of the view that s. 37 of the MRTP Act should be followed and the departmental note was in fact as per the initial stand taken by the Minister of State, yet he declined to approve the note. The stand of the Minister of State that until the last he had no knowledge of land owner's connection with the son-in-law of the Chief Minister can not be accepted. He acted clearly against the provisions of law though he was fully informed about the same. The natural inference which flows from all this conduct is that right from the beginning, the Minister of State was aware about land owner's connection with the son-in-law of Chief Minister, and, therefore, he acted for the benefit of the developer, obviously at the instance of the then Chief Minister as inferred by the Division Bench. There is no reason to disagree. The remarks against the Minister of State are, therefore, sustained. [Para 119- 121] [904-D-F; 906-F]

6.4. Though the Division Bench commented adversely on the conduct of the Minister of State, yet it also observed that there was nothing on record that he had any personal motive in the matter. The Division Bench has, thus, specifically inferred that whatever he has done, was done to oblige his senior Minister i.e. the then Chief Minister. In the circumstances, he is entitled to a benefit of doubt and, therefore, the direction for criminal investigation against him can not be sustained. [Para 138] [921-F]

6.5. The two writ petitions contain serious allegations

against the then Chief Minister. It is alleged that the Chief Minister misused his executive powers and authority for the purpose of securing benefits for his near relatives, and it is specifically stated that this was for ensuring a substantial monetary benefit for them. It is evident, on 24.4.1996 the initial report made by the Municipal Commissioner dated 17.4.1996 was called for the perusal of the then Chief Minister. The basic order dated 21.8.1996 granting no objection, thereby approval to the release of the reservation on F.P. No. 110 was that of the Chief Minister himself. The disputed permission dated 3.9.1996 was issued in pursuance thereto. There is a note dated 22.7.1998 on record which was meant for the perusal of the Chief Minister to enable him to answer the probable questions concerning this matter in the assembly. Thus, it is quite clear that he was aware about the developments in the matter, and the orders therein were issued with his approval and knowledge. The record shows the keen interest of the then Chief Minister in the matter and it can certainly be inferred that he was so acting for the benefit of his son-in-law. The relationship is established. He cannot, therefore, escape the responsibility for all the illegal actions in this matter. This Court, therefore, refuses to expunge any of the remarks made against him by the High Court. [para 122,124,130 and 135] [906-G-H; 907-A-G; 910-F; 916-D; 919-E-G]

State of U.P. Vs. Mohammad Naim **1964 SCR 363 = AIR 1964 SC 703; and** *P.K. Dave Vs. Peoples' Union of Civil Liberties (Delhi) & Ors*. **1996 (2) Suppl. SCR 770 = 996 (4) SCC 262 – relied on.**

6.6. The conduct on the part of the then Chief Minister prima-facie amounts to a misfeasance. However, in order to indicate that misfeasance on the part of the Chief Minister and the Minister of State amounts to a criminal misconduct u/s 13(1)(d) of the Prevention of Corruption Act, 1988, there is neither any such reference to this

section nor any prima facie finding in the impugned judgment rendered way back in 1999. In the circumstances in view of the proposition of law enunciated in the case of *Common Cause, a Registered Society*, the direction of the High Court to make criminal investigations through an impartial agency, cannot be sustained and is set aside. [Para 142] [923-F-H; 924-A]

Common Cause, A Registered Society Vs. Union of India & Ors. **1999 (3) SCR 1279 = 1999 (6) SCC 667 – relied on**

7.1. Public interest litigation is not in the nature of adversarial litigation, but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful. By its very nature the PIL is inquisitorial in character. Access to justice being a Fundamental Right and citizen's participatory role in the democratic process itself being a constitutional value, accessing the court will not be readily discouraged. Consequently, when the cause or issue, relates to matters of good governance in the Constitutional sense, and there are no particular individuals or class of persons who can be said to be injured persons, groups of persons who may be drawn from different walks of life, may be granted standing for canvassing the PIL. [Para 132] [917-D-G]

7.2. The petitions before the High Court were in the nature of public interest litigation. The purpose in such matters is to draw the attention of the High Court to a particular state of facts, and if the Government action is found to be contrary to law or affecting the rights of the citizen, the court is required to intervene. There was sufficient foundation in the petition for the further steps to be taken by the High Court. A prima facie case had been made up in the petitions which got supported when the High Court in exercise of its writ jurisdiction rightly

called for the relevant files from the State Government and the PMC to explain and defend their decisions. [Para 131 and 134] [916-G-H; 917-A-D]

Jasbir Singh Chhabra Vs. State of Punjab **2010 (4) SCC 192 – Distinguished**

Approach towards the planning process:

8.1. The significance of planning cannot be understated. The model of democratic planning involves the participation of the citizens, planners, administrators, Municipal bodies and the Government as is also seen throughout in the MRTP Act the provisions whereof indicate that once the plan is formulated, one has to implement it as it is, and it is only in the rarest of the rare cases that one can depart therefrom. There is no exclusive power given to the State Government, or to the planning authority, or to the Chief Minister to bring about any modification, deletion or de-reservation, and certainly not by a resort to any of the D.C. Rules. All these constituents of the planning process have to follow the mandate u/s. 37 or 22A as the case may be if any modification becomes necessary. [Paras 145 & 146] [925-E-G; 926-D-E]

Chairman, Indore Vikas Prodhikaran Vs. Pure Industrial Coke & Chemicals Ltd. & Ors. **2007 (6) SCR 799 = 2007 (8) SCC 705 – relied on.**

"Jawaharlal Nehru and the Planning Commission" published by Indian Institute of Public Administration in September, **1964 – referred to.**

8.2. The municipalities which are the planning authorities for the purpose of bringing about the orderly development in the municipal areas, are given a status under Part IX A of the Constitution. Article 243W lays

down the powers of the Municipalities to perform the functions which are listed in the Twelfth Schedule. For performing these functions, planning becomes very important. These are the statutory powers, and they cannot be bypassed. The Ministers, the Corporators and the administrators including the Municipal Commissioner must act with responsibility to protect the interest of the Corporation. [Para 147, 148 and 150] [927-A-C; 928-F-H]

8.3. The MRTP Act gives a place of prominence to the spaces meant for public amenities, which are essential for a good civic life and cannot be sacrificed. Similar are the provisions in different State Acts. Yet, cases are being noticed, as is seen in the instant case, that the spaces for the public amenities are under a systematic attack. Time has, therefore, come to take a serious stock of the situation. When the land is reserved for a public purpose after following the due process of law, the interest of the individual must yield to the public interest. [Para 151] [931-A-F]

8.4. As far as the MRTP Act is concerned, there is a complete mechanism for the protection of the spaces meant for public amenities. Their deletion or modification should be resorted to only in the rarest of rare case, and after fully examining as to why the plot concerned was originally reserved for a public amenity, and as to how its deletion is necessary. Safeguards have been laid down in the judgment so that such kind of gross deletions do not occur in future, and the provisions of the Act are strictly implemented in tune with the spirit behind. It is also made clear that any unauthorised construction particularly on the lands meant for public amenities must be removed forthwith. It is expected that the guidelines laid down in this behalf would be followed scrupulously. [para 153 and 161] [931-G-H; 932-A-D, E; 938-C]

Raju S. Jethmalani Vs. State of Maharashtra **2005**

Suppl. (1) SCR 1 = 2005 (11) SCC 222 – relied on

Case Law Reference:

XVI (1975) Gujarat Law Report 558	held inapplicable	Para 72
1987 (2) SCR 1	referred to	Para 74
1998 (2) ALL MR 181	referred to	Para 75
2005 Suppl. (1) SCR 1	held inapplicable	Para 76
2009 (111) Bom LR 4251	referred to	Para 76
1988 Mh.LJ 1027	stood overruled	Para 87
1995 (1) Mh.LJ 363	disapproved	Para 87
1988 (1) SCR 590	distinguished	Para 89
2011 (3) SCR 1	relied on	Para 95
1977 (1) SCR 875	referred to	Para 96
1977 (2) SCR 666	referred to	Para 96
1990 (2) SCR 533	referred to	Para 96
1986 (1) SCR 271	referred to	Para 96
1990 Supp. SCC 11	referred to	Para 96
1991 (2) SCR 745	relied on	Para 110
1999 (3) SCR 1066	relied on	Para 111
2010 (4) SCC 192	Distinguished	Para 134
1964 SCR 363	relied on	para 135
1996 (2) Suppl. SCR 770	relied on	para 135
2005 Suppl. (1) SCR 1	relied on	Para 138

1999 (3) SCR 1279	**relied on**	**Para 141**
2007 (6) SCR 799	**relied on**	**Para 146**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 198-199 of 2000.

From the Judgment and Order dated 6, 8, 9, 10, 11, 12 and 15 March 1999 of High Court of Bombay in writ Petition Nos. 4433 and 4434 of 1998.

WITH

Civil Appeal Nos. 196-197, 2450, 2102-2103, 2105-2106 and 2120 of 2000.

V. Tulzapurkar, Shekhar Naphade, P.S. Narsimha, Shyam Divan and S.B. Sanyal, Purnima Bhat, E.C. Agrawala, Javaid Muzaffar, Pankaj Sutter, Umesh Kumar Khaitan, D.M. Nargolkar, Shakil Ahmed Syed, Makarand D. Adkar, Braj K. Misra, Vijay Kumar and Vishwajit Singh for the Appellants.

Ramesh P. Bhatt, Kailash Vasdev S.K. Dholakia, P.V. Yogeswaran, Jayashree Wad, Ashish Wad, Tamali Wad, Chiraf S. Dave, Sameer Abhayankar, J.S. Wad & Co. Ravindra Keshavrao Adsure, A.P. Mayee, Charudatta Mahendrakar, Sanjay Kharde, Arun R. Pedneker, Chinmoy A. Kaladkar and Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. What is the nature and significance of the planning process for a large Municipal town area? In that process, what is the role of the Municipal Corporation, which is the statutory planning authority? Can the State Government interfere in its decisions in that behalf and if so, to what extent? Does the State Government have the power to issue instructions to the Municipal Corporation to act in a particular manner contrary to the Development Plan sanctioned by the

State Government, and that too a number of years after the Municipal Corporation having taken the necessary steps in consonance with the plan? Can the State Government instruct a Municipal Corporation to shift the reservation for a public amenity such as a primary school on a plot of land, and also instruct it to grant a development permission for residential purposes thereon without modifying the Development Plan? Could it still be considered as an action following the due process of law merely because a provision of Development Control Rules is relied upon, whether it is applicable or not? Or where the Municipal Corporation is required to take such contrary steps, supposedly on the instructions of the concerned Minister / Chief Minister, for the development of a property for the benefit of his relative, would such instructions amount to interference/*mala fide* exercise of power? Is it permissible for the landowner and developer to defend the decision of the Government in their favour on the basis of a provision in the erstwhile Town Planning Scheme as against the purpose for which the land is reserved under the presently prevalent Development Plan? Is it permissible for the landowner and developer to explain and justify such a favourable Government decision by relying upon the authority of the Government under another section of the statute which is not even invoked by the Government? What inference is expected to be drawn in such a situation with respect to the role played by the ministers or the municipal officers? What orders are expected to be passed when such facts are brought to the notice of the High Court in a Public Interest Litigation? These are some of the issues which arise in this group of Civil Appeals in the context of the provisions of the Maharashtra Regional and Town Planning Act, 1966 (for short MRTP Act) concerning a property situated in Pune Municipal area.

2. These appeals arise out of two writ petitions in public interest leading to concurrent judgments and a common order dated 6th – 15th March 1999 passed by a Division Bench of the Bombay High Court. These writ petitions bearing nos.4433

and 4434 of 1998 were filed respectively by one Vijay Krishna Kumbhar, a journalist and one Nitin Duttatraya Jagtap, a Municipal Corporator of Pune. The petitions pointed out that a particular plot of land bearing Final Plot No.110 (F.P. No. 110 for short), and admeasuring about 3450 sq. meters, situated on Prabhat Road in the Erandwana area of the city, was initially reserved for a public purpose namely, a garden/playground, and subsequently for a primary school. They further pointed out that a number of years after the Pune Municipal Corporation (hereinafter referred to as PMC) took all the necessary steps to acquire this particular plot of land, the landowner one Dr. Laxmikant Madhav Murudkar appointed M/s Vyas Constructions, a proprietary concern of one Shri Girish Vyas (the appellant in Civil Appeal No.198-199 of 2000) as the developer of the property. Shri Girish Vyas is the son-in-law of Shri Manohar Joshi who was the Chief Minister of Maharashtra from 14.03.1995 till January 1999. The petitioners contended that only because of the instructions from the Urban Development Department (UDD for short) which was under Shri Manohar Joshi, that in spite of the reservation for a primary school, the plot was permitted to be developed for private residences flouting all norms and mandatory legal provisions. They sought to challenge the building permission which was issued by the PMC under the instructions of the State Government, by submitting that these instructions amounted to interference into the lawful exercise of the powers of the Municipal Corporation, and the same was *mala fide*. After hearing all concerned, the petitions were allowed, and an order has been passed to cancel the Commencement (of construction) certificates, and Occupation Certificate, and to pull down the concerned building which has been constructed in the meanwhile. The State Government has been directed to initiate criminal investigation against Shri Manohar Joshi, Shri Ravindra Murlidhar Mane, the then Minister of State for UDD, and the then Pune Municipal Commissioner Shri Ram Nath Jha.

3. Being aggrieved by this order, the present group of appeals have been filed:

(i) Civil Appeal Nos. 198- 199/ 2000 are filed by the developer Shri Girish Vyas and his proprietary concern M/s Vyas Constructions. Civil Appeal No. 2450 of 2000 is filed by the landowner Dr. Laxmikant Madhav Murudkar (since deceased) to challenge the judgments and the order in their entirety. Their submissions by and large are similar.

(ii) Civil Appeal Nos. 2102-2103 of 2000 are filed by Shri Manohar Joshi, the then Chief Minister, Civil Appeal Nos. 2105-2106 of 2000 are filed by Shri Ram Nath Jha who was the then Pune Municipal Commissioner, and Civil Appeal No. 2120 of 2000 is filed by Shri Ravindra Murlidhar Mane, the then Minister of State, UDD. These appeals seek to expunge the adverse remarks against the appellants, and the order directing criminal investigation against them.

(iii) Civil Appeal Nos. 196-197 of 2000 are filed by Maruti Raghu Sawant and others who were the tenants in this property. They contend that in the scheme prepared by the developer, they were to become owners of their tenements whereas under the original reservation, they were to be evicted.

We may note at this stage that though the PMC accepts the judgment, it has no objection to the tenants continuing as tenants of PMC in the building which is constructed for accommodating them on a portion of the very plot of land. The tenants, however, contend that if the plot of land is taken over by PMC, they will remain mere tenants as against the ownership rights which were assured to them by the developer and the landlord, and are, therefore, continuing to maintain their appeals.

4. All these appeals are opposed and the impugned judgment and order are defended by the original petitioners as well as by the PMC and the State Government. It is relevant to

note that the State of Maharashtra as well as PMC had opposed the writ petitions in the High Court, but they have not filed any appeals and have now accepted the judgment and order as it is. Since, all these appeals are arising out of the same judgment and order, they have been heard and are being decided together, by treating the appeals filed by Shri Girish Vyas as the lead appeals.

Facts leading to these appeals

Reservation on F.P. No. 110 for a garden

5. Dr. Laxmikant Madhav Murudkar (since deceased), appellant in Civil Appeal No. 2450 of 2000 (hereinafter referred to as landowner) owned the property bearing F.P. No. 110. The Government of Maharashtra sanctioned a Development Plan for Pune City by publishing a notification dated 7.7.1966 in the official gazette dated 8.7.1966, which fixed 15.8.1966 as the date on which the said plan shall come into force. (The said plan is hereinafter referred to as 1966 D.P. Plan). Under the said 1966 D.P. Plan, F.P. No. 110-112 were reserved for a garden. The Plan was sanctioned in exercise of the power of the State Government under Section 10 of the then prevalent Bombay Town Planning Act 1954 (1954 Act for short). This notification stated that the PMC had passed the necessary resolution of its intention to prepare a Development Plan, carried out the necessary survey, considered the suggestions received from the members of the pubic under Section 9 of the Act, and after modifying the Plan wherever found necessary, submitted it to the Government, and thereafter the Government having consulted the Director of Town Planning, had in exercise of its power under Section 10 (1) and (2) of the Act, sanctioned the Development Plan.

6. Subsequently, the 1954 Act was repealed and replaced by the MRTP Act with effect from 11.01.1967. However, by virtue of Section 165 (2) of MRTP Act, the 1966 D.P. Plan was saved. Consequently, when the landowner applied for the

sanction of a layout in F.P. No.110, the same was rejected by PMC. Therefore, the landowner served on the State Government a notice dated 8th May 1979 under Section 49 (1) of the MRTP Act, calling upon it to purchase the land and to "commence the proceedings for acquisition". The notice stated that the F.P. No.110 was not acquired within the period of 10 years granted to the Planning Authority to implement the D.P. (for the Pune Municipal area, PMC is the Planning Authority). It further stated that as per his understanding, the D.P. was under revision but the reservation on petitioner's F.P. No.110 had not been changed, and 'the reservation will never be cancelled and the final plot will never be handed back' to him. The State Government confirmed the purchase notice under Section 49 (4) of the Act by its letter dated 5.12.1979. The Government's letter informed the landowner that necessary instructions have been issued to the PMC, and he may approach their office.

Steps for acquisition of F.P. No. 110

7. The standing committee of the PMC thereafter passed a resolution on 5.1.1980 to initiate the proposal for acquisition. The PMC then forwarded the proposal to the Collector of Pune on 9.5.1980 to take the steps for acquisition. On 27.8.1981, the State Government notified the land for acquisition under Section 126 of the MRTP Act read with Section 6 of the Land Acquisition Act 1894 (for short L.A. Act). A Special Land Acquisition Officer (S.L.A.O. for short) was appointed to perform the functions of the Collector. A notice informing the initiation of the proceedings under the L.A. Act as required under Section 9 thereof was issued on 8.9.1981 seeking claims for compensation. The landowner replied to the notice, but did not challenge the acquisition. He filed his claim statement during the acquisition proceeding, and demanded the compensation at the rate of Rs. 480 per sq.m, and also that the material removed after demolition of the temporary structures (of the tenants) on the property should be given to him. Twenty four

tenants filed a common claim statement and objected to the acquisition, but did not seek any compensation. They specifically stated that 'there will not be any objection if they are provided with alternative accommodation on the land to be acquired'. The S.L.A.O. passed his award under Section 11 of the L.A. Act on 12.5.1983. He rejected the objections of the tenants, and awarded the compensation of Rs. 100 to each of the 25 tenants. He determined the compensation payable to the landowner at Rs. 6,10,823/-. On 15.3.1985 the landowner withdrew the amount of compensation by furnishing necessary security, though under protest.

8. After the Award was made by the S.L.A.O. on 12.5.1983 as stated earlier, a notice under Section 12 (2) of the L.A. Act was given, to take possession of the land on 20.5.1983. Once again, only the tenants objected thereto. They filed a suit on 19.5.1983 in the Court of Civil Judge, Senior Division, Pune, bearing Suit No. 966 of 1983, to challenge the acquisition and the Award. The landowner was joined therein as defendant No. 3. The Court granted an interim injunction on 19.6.1983, restraining the authorities from taking possession. However, after hearing the parties, an order was passed on 9.2.1984 vacating the injunction, and returning the plaint for failure to give the mandatory notice required under Section 80 of the Code of Civil Procedure. The tenants filed an appeal to the District Court against that order, but the same was also dismissed. Thereafter, the tenants made a representation to the then Minister of State for UDD, pointing out their difficulties, which persuaded him to pass an administrative order restraining the authorities concerned from taking possession of F.P. No. 110.

9. It is pertinent to note that all along, the landowner did not challenge the acquisition of his land in any manner whatsoever. On the other hand, he sought a Reference under Section 18 of the L.A. Act for enhancement of the compensation. The District Court dismissed that Reference bearing No. 273 of 1983 by order dated 15.4.1988, but

enhanced the solatium and additional amount payable under Section 23(2) and 23(1A) of the L.A. Act. The amount payable under the order of the District Court was collected by the landowner, though under protest, but he did not prefer the appeal permissible under Section 54 of the L.A. Act.

Revision of the D.P. Plan for Pune under the MRTP Act and change of utilisation of F.P. No. 110 to a Primary school

10. In the meanwhile, the process of revising the Development Plan of Pune city under the provisions of MRTP Act was going on. The PMC as the planning authority had passed a resolution on 15.3.1976 declaring its intention to prepare a Revised Development Plan under Section 23 (1) read with Section 38 of the MRTP Act. The State Government appointed the Director of Town Planning to be the Special Officer for that purpose under Section 162 (1) of that Act. After observing all the legal formalities, the said Director published in the official gazette on 18.9.1982 the Revised Draft Development Plan under Section 26 (1) of the Act. In that plan F.P. No. 110-112 were initially reserved for children's play-ground, but subsequently the reservation was changed to primary school. After inviting the objections and suggestions, and after considering them, the State Government sanctioned the Revised D.P. Plan on 5.1.1987 (though with a few modifications), to be effective from 1.1.1987 (hereafter referred as 1987 D.P. Plan for short) as also the Development Control Rules (D.C. Rules for short). In the sanctioned D.P. Plan of 1987, the purpose of utilization of these three plots was, as stated above changed to primary school.

The *modification* with respect to these three plots was as follows:–

> "*Reservation continued. Development allowed as per note 4*".

Note 4 reads as follows:-

> "*Sites designated for Primary Schools from Sector I to VI as may be decided by the Pune Municipal Corporation may be allowed to be developed by recognized public institutions registered under Public Charitable Trust Act, working in that field or the owners of the land.*"

Thus by virtue of this note, the purpose could also be effectuated either by the owner of the land, or by a recognized charitable institution.

11. It is relevant to note at this stage that a school for the handicapped children has come up in the adjoining F.P. No. 111. Besides, a primary school was set up by Symbiosis International Cultural and Educational Centre ('Symbiosis' for short) on F.P. No. 112. It is stated that Symbiosis and another educational institution viz. Maharashtra Education Society (MES) had sought these plots since they were in need of land for extension of their educational activities. The then Chief Minister of Maharashtra had recommended the proposal of MES by his letter dated 9.4.1986, and the society had applied to the then Commissioner of Pune by its letter dated 29.4.1986. That was, however, without any effect.

12. The S.L.A.O. gave one more notice to take possession of F.P. No.110 on 1.3.1988. It led to the filing of Regular *Civil Suit bearing No. 397 of 1988* by some of the tenants in the Court of Civil Judge, Senior Division, Pune against the State Government and PMC, once again challenging the award of the S.L.A.O., and seeking an injunction to protect their possession. The Court granted the interim injunction as sought. Thereafter the landowner, who was one of the defendants in the suit, applied for transposing himself as a plaintiff, which prayer was allowed on 2.4.1988. The Court accepted the contention of the tenants that the acquisition had lapsed due to the change of purpose of reservation from what it was in 1966 viz. a garden

by the time the award was made, and, therefore, decreed the suit by its order dated 23.4.1990.

13. The PMC preferred a first appeal against that decree to the Bombay High Court on 7.1.1991, but the Additional Registrar of the High Court returned the appeal by his order dated 21.4.1992 for presentation to the District Court on the basis of the valuation of the suit, and the provision for jurisdiction as it then existed. Accordingly, the PMC filed the appeal before the District Court immediately on 29.4.1992, but the District Court in turn, by its order passed two years later on 7.4.1994 returned the appeal for re-presenting it to the High Court, on the ground that the suit was valued above Rs. 50,000/- and as per the rules then existing the appeal would lie to the High Court. PMC once again filed the appeal in the High Court being F.A (Stamp) No. 18615 of 1994 on 18.7.1994, alongwith an Application for condonation of delay for the reasons as stated above. This Appeal remained pending till it was withdrawn on the direction of the State Government on 18.8.1998, in the circumstances which will be presently pointed out. It is, however, relevant to note that this appeal was withdrawn at a point of time when the two public interest petitions were filed on 12.8.1998, and were pending in the High Court. The impugned order of the Division Bench on these petitions has directed the PMC to move an Application before the High Court for reviving the First Appeal (Stamp No.18615 of 1994), and pursuant thereto the PMC has already moved the necessary Application on 13.1.2000. Be that as it may.

Steps taken by the landowner after Shri Manohar Joshi took over as the Chief Minister of Maharashtra

14. It is material to note that after the decision of the Reference Court, the landowner entered into an agreement of sale of the concerned land with one Shri Mukesh Jain on 17.8.1989, though no steps were taken thereafter by either of the parties on the basis of that agreement. It so happened that consequent upon the elections to the State Assembly, a new

Government came in power in the State of Maharashtra in March 1995, and Shri Manohar Joshi took over as the Chief Minister (hereinafter referred as the then Chief Minister). He retained with himself the UDD portfolio. The earlier referred Shri Ravindra Mane became the Minister of State for UDD (hereinafter referred to as the then Minister of State). On 20.10.1995 the landowner entered into a Development agreement with M/s Vyas Constructions by virtue of which the landowner handed over all rights of development in the property to them for a consideration of Rs. 1.25 crores, a flat of 1500 sq. feet area and an office space of 500 sq. feet in the building to be developed on F.P. No. 110. The agreement stated that it was being entered into to solve the practical difficulties. Para 7 thereof stated that the developer shall follow the procedure or process of de-reservation of the said property. Para 20 and 21 stated that 'after de-reservation of the property, the developer agrees to get the clearance under the Urban Land (Ceiling and Regulation) Act 1976 which may be necessary,' and for that purpose he was authorised to get any scheme sanctioned. M/s Vyas Constructions is stated to have settled the claim of above referred Shri Mukesh Jain. On the same day, the landowner executed an irrevocable Power of Attorney in favour of Shri Girish Vyas for the development of F.P No. 110. (He is referred hereinafter as the developer). The landowner simultaneously executed another Power of Attorney in favour of one Shri Shriram Karandikar on 26.10.1995, authorising him to take necessary steps concerning the development of that land.

15. Thereafter, on 1.11.1995 the architect of the landowner submitted to PMC a building layout for permission for residential use of F.P. No. 110. The City Engineer of PMC rejected the proposal by his reply dated 6.11.1995 under Section 45 of the MRTP Act read with Section 255 of the Bombay Provincial Municipal Corporations Act 1949 (BPMC Act for short) and D.C. Rule No. 6.7.1, since the plot had been reserved for a primary school, and hence such a permission

could not be granted. It was however pointed out in this reply of the City Engineer that the development of the land was permissible in the manner indicated in the note No.4 published in the gazette which has been referred to hereinabove (i.e. putting up a primary school either by the landowner or by a charitable trust).

16. At this stage, landowner's Attorney holder, Shri Shriram Karandikar wrote to the Minister of State for UDD on 20.11.1995 seeking a direction to the Municipal Commissioner to sanction landowner's aforesaid application dated 1.11.1995 for development of the property for residential houses. He relied on the decree of Civil Judge Senior Division in Civil Suit No.399 of 1998 and prayed for correcting the Development Plan also. From here onwards starts the role of the then Minister of State, the Municipal Commissioner, and the then Chief Minister.

Processing of the application dated 20.11.1995 on behalf of the landowner at the level of the State Government

17. In their petitions to the High Court, the writ petitioners made the allegation of *mala fides* on the part of the then Chief Minister and the Minister of State for UDD in entertaining the application made on behalf of the landowner. It, therefore, became necessary for the Division Bench of the High Court to call for the original record from the State Government as well as from the PMC. The application dated 20.11.1995 made by Shri Karandikar on behalf of the landlord narrated the developments until the date of that application including the judgment and decree of the Civil Court setting aside the acquisition of the property. It was, thereafter, submitted that the Municipal Commissioner be directed to sanction the development permission as per the application of the architect of the landowner. It is relevant to note that as far as this application of Shri Karandikar is concerned, it was not addressed to the State Government or to the Secretary of the concerned Department, but directly to the Minister of State for

UDD, which fact is noted by the Division Bench in its judgment. The application did not bear any inward stamp of UDD. In the margin of the application, there was a noting by the Private Secretary of the Minister of State for UDD, recording that the Minister had directed the Deputy Secretary, UDD, to call a meeting on 19.1.1996. The record further shows that although the Under Secretary of UDD Shri P.V. Ghadge accordingly called the initial meeting, by addressing a letter to the Director, Town Planning and the Municipal Commissioner, the same was adjourned to 22.1.1996. On that date, the meeting was attended by the Director of Town Planning, the Deputy City Engineer of PMC, Deputy Director of Town Planning, Pune, as well as by Shri Karandikar and his advocate, but what happened in that meeting is not reflected in this file.

Initial Stand of Urban Development Department and PMC

18. The Under Secretary (Shri P.V. Ghadge) prepared a preliminary note dated 2.2.1996 for the subsequent meeting. At the outset, the note mentions in a nutshell the background for the meeting which was sought on behalf of the landlord. Thereafter it gives the initial opinion of the U.D. Department at the end of the note, which is as follows:-

> "In this regard it is the advice of the department that, acquisition has been done after taking action on the purchase notice. The compensation amount has been accepted. Even if the reservation of the plot is changed, it does not make any difference. Directions be given to the Pune Municipal Corporation to immediately present this matter in the Bombay High Court. The question of returning the plot to the land owner does not arise."

19. On the background of this departmental note containing its advice, a meeting was held on 3.2.1996 presided over by the Minister of State for UDD, and the minutes of the meeting are part of the record placed before the High Court. Apart from

Shri Karandikar and his advocate, high ranking officers such as (i) Secretary, UDD, (ii) Director, Town Planning, (iii) Commissioner, PMC, (iv) City Engineer, PMC and (v) Under Secretary, UDD were present in the meeting. The minutes of the meeting are recorded by the Under Secretary.

20. These minutes record that in this meeting the advocate of the applicant explained the facts leading to his client's application, justifying as to why the reservation on the land may be deleted. He referred to the Court proceedings, the fact that 25-30 tenants were residing on the property for many years, and that on the adjoining property a school was running. He therefore submitted that the reservation on the land be deleted.

21. The note records a preliminary query raised by the Secretary, UDD as to whether the advocate was pleading on behalf of the tenants or the landowner, to which the Advocate replied that he was pleading for the landowner. The Secretary, UDD raised two more queries viz. (i) if the land was not useful for reservation because of the tenants, then how will it be available to the landowner, and (ii) whether the landowner had ever objected to this reservation, to which the advocate replied in the negative.

22. The City Engineer, PMC pointed out during the meeting that consequent upon the property owner issuing the purchase notice, the PMC had acquired the land, the award was made, the property owner had accepted the compensation, and that he never objected to the change in reservation due to the revision of the D.P. Plan during the entire period of revision i.e. 1982-87. With respect to the proceedings initiated by the tenants, he pointed that PMC had filed an Appeal in the Bombay High Court against the judgment of the Civil Court, and the matter was sub-judice. He specifically asked whether the hearing given to the applicant was on an appeal under Section 47 of the MRTP Act, or was it on his application. He pointed out that the property was under reservation, and it could not be de-reserved in an appeal under Section 47. It required an

action in the nature of modification under Section 37 of the MRTP Act. If it was an appeal, then it may be rejected, and if it was an application for modification then a decision cannot be taken as the matter was sub-judice. On these queries it was stated on behalf of the landowner that his application was a request and not an appeal.

Directions by Minister of State and report made by the Municipal Commissioner in pursuance thereof

23. It was thereafter pointed out on behalf of landowner that on the adjoining two plots, schools had been developed, and the Corporation may not need this land. The note records that in view of this submission, the Minister of State, UDD asked the Municipal Commissioner to examine whether the PMC really needed the concerned property. He also suggested that it be examined, if PMC can keep some portion of the land under reservation, and release the remaining to the landowner. If such a compromise is to be arrived at, then the property owner will have to accommodate the tenants on a portion of property released to him. If PMC did not have any objection to reduce the area under reservation, Government will issue the necessary direction to take action under Section 37. The note records at that stage, that the Municipal Commissioner pointed out that the permission of the Municipal Corporation (meaning the general body) was necessary to either delete the reservation, or to reduce the area under reservation.

24. The file shows that accordingly the Under Secretary wrote to the Municipal Commissioner on 14.2.1996 requesting him to examine the possibility regarding any settlement after a site inspection, and to forward his opinion. He was also asked to inform as to when had the PMC filed its appeal in the Bombay High Court, and about its status.

25. The file shows that at this stage, the landowner changed his stand. Shri Karandikar wrote another letter dated 23.3.1996 to the Minister of State that his application be treated as an

appeal under Section 47 of the MRTP Act.

26. The Municipal Commissioner replied Government's letter dated 14.2.1996 by his letter dated 17.4.1996. He pointed out that the development permission for this particular plot had been rejected because the property was under reservation. Then he reiterated the position of PMC as stated in the meeting of 3.2.1996. Then he added –

> "On 3.2.1996 we took the same stand which was taken by us in various counts and administrative levels regarding dispute for the development of property, and that if any change is proposed in the use of the said property, permission has to be taken from the Pune Municipal Corporation. The Hon'ble Minister of State for urban development ordered us to survey the subject property and also ordered to explore the options of changing or reducing the area of the reservation."

27. The Municipal Commissioner then stated that before considering the various options as directed by the State Government, it was necessary to note the background of the subject property; viz. that as per the 1966 D.P. Plan, it was reserved for a garden, and subsequently the reservation was changed to a Primary School in the draft D.P. Plan of 1982 confirmed in 1987. He referred to the litigation initiated by the tenants, the fact that the PMC had filed an appeal to the High Court against the decision in the Civil Suit No. 397/1988, and that the High Court sent back the matter to the District Court and it was pending there. He placed on record the fact that though full price of the land was paid to the owner, procedure of taking actual possession by the PMC was still pending for last 13 years, because of which it was not possible to make appropriate use of the land. The Minister had asked him to survey the subject property, and to explore the possibility of changing or reducing the area of reservation. The commissioner pointed out that a survey was carried

accordingly. He recorded that on inspection following facts were mainly noted:-

"1. There are about 36 temporary Houses on the land.

2. Out of the total area nearly half is encumbered.

3. Two Educational Institutions in the vicinity of the School.

4. There are 11 Educational Institutions in the vicinity of the School.

5. Except the temporary Houses on this property the development of the area is planned and corporation has control over it."

The Commissioner however, did not specify as to which area of the city was considered by him when he spoke about 'vicinity' in item No. 4 above.

28. The land was to be developed either by PMC or the owner or by a Charitable Trust as per the D.P. Note 4 referred to above. The Municipal Commissioner then gave his opinion that development of a primary school on that plot by a charitable institution appeared impossible due to various factors such as the order of the Civil Court, litigation concerning this plot, the requirement of rehabilitation of the tenants on that plot, and existence of near-by schools. Besides, the area being a higher middle class area, the response to a municipal school was doubtful. He then added as follows - 'considering the funds available, the PMC is inclined to develop school on some other plot reserved for school'. As we have noted earlier two well-known educational institutions, viz. MES and Symbiosis had already sought this plot also. The PMC had however replied to them that it was not possible for it to give them this plot, since it was not in the possession of PMC. The Municipal Commissioner failed to bring these very relevant facts to the

notice of the Government. Having noticed these facts, the Division Bench has observed in para 143 of its judgment that the Commissioner's statement in this behalf in his report was "far from truth".

29. The Commissioner then recorded that in view of the direction of the State Government to suggest alternatives for settlement, he had in the meanwhile, held discussions with Shri Karandikar, and that Shri Karandikar had expressed readiness to give alternate unencumbered land within suburbs of Pune admeasuring 5000 to 10000 sq. feet free of cost. Thereafter, in view of the direction of the State Government and proposals from Shri Karandikar, the Commissioner recorded two suggestions:-

"1. Presently reserved area is about 3541 sq.mtrs out of which nearly 50% area is occupied by occupants and remaining area is open. The land owner after excluding the area occupied by the existing houses, to transfer the remaining area to the Pune Municipal Corporation for school. However, since the land owner has accepted compensation for the entire area, for the area to be transferred, he should refund the amount to the Pune Municipal Corporation at the rate suggested by the Director of Town Planning.

2. To get transferred land admeasuring 3000 sq.mtrs elsewhere at a convenient place in Pune City with school admeasuring 500 sq.mtrs constructed thereon free of cost as per specifications of the Pune Municipal Corporation, and for that purpose it is necessary to get executed a proper agreement. But land to be given elsewhere should not be reserved in development plan for school or some other purpose."

Thereafter his letter stated as follow:-

"If first proposal is to be accepted for developing

school on remaining area question regarding decision of Civil Judge, Senior Division would arise. In this situation it is necessary to have the support of the land owner and tenants for this proposal. For implementing both the aforesaid proposals suggested by us it would be appropriate if the following things are complied with:-

1. The Pune Municipal Corporation administration to take permission from the Pune Municipal Corporation before releasing rights in respect of the subject property.

2. For deleting reservation on the property taking action under Section 37 of M.R.T.P.

3. For acquiring new site as per Proposal No.2 permission of concerned Departments of the Pune Municipal Corporation will have to be taken.

Then the Commissioner added:-

Prior to this since no such settlement matters have taken place regarding the development plan of Pune Municipal Corporation, the experience of Pune Municipal Corporation in this regard is limited. Till the next order is received from the State Government the Pune Municipal Corporation is continuing the judicial procedure in respect of this land."

30. After the receipt of the letter dated 17.4.1996 from the Municipal Commissioner, the file shows the following noting dated 24.4.1996:-

"Mantralaya, Bombay 400 032

Date 24/4/1996

According to the instructions of Shri Chavan, Private Secretary of the Hon'ble Chief Minister, please forward a copy of the report of the Pune Municipal Corporation in the

matter of Shri Karandikar for the perusal of the Hon'ble Chief Minister.

Shri Ghadesaheb
Under Secretary
N.V.

Sd/-
Private Secretary
Minister of State for Finance, Planning and Urban Development *Government of Maharashtra"*

31. On receiving the above reply dated 17.4.1996 from Municipal Commissioner, Shri Ghadge, the Under Secretary once again put up a detailed note thereon. In first 8 paragraphs of that note he recorded the previous developments, including and upto the letter sent by the Municipal Commissioner. Thereafter in paragraph 9, 10 and 11 he put up the proposal of the department:-

"9. Considering the entire aforesaid circumstances, it is firstly pointed out that applicant Shri Karandikar has approached the Government on behalf of the land owner but the land owner has already taken the price of the said property in the year 1983. Though the physical possession of the said property is not received to the Municipal Corporation still however, legally Municipal Corporation has become owner of the said property. Therefore, the Land Owner does not have any right to demand return of the said property by deleting reservation. Now considering the tenants, they have approached the Court and therefore, it is not necessary to consider that aspect till the matter is decided by the Court. If the said matter is decided against the Municipal Corporation still the said persons shall be tenants and the land owner shall be Municipal Corporation and further that the tenants have requested for allotment of the land for developing it.

10. Still however considering the fact that no way out will be available if the matter is kept pending as it is, and further considering that there are numerous schools in the

vicinity of the said property, there should be no objection to consider and approve on government level the alternative No.1 suggested by the Municipal Commissioner. However, for the said purpose the tenants will have to withdraw their proceedings from the Court and they will have to pay to the Municipal Corporation the cost price of the 50% portion to be released for the said tenants as may be determined by the Director, Town Planning. If the said alternative is acceptable to the land owner, the Pune Municipal Corporation be informed about the orders of the Government to initiate proceedings u/s 37 for the purposes of deletion of 50% property from reservation and to forward the said proposal to the Government.

11. Second alternative does not deserve any consideration since for shifting the reservation the alternative property should have the same area like that of the original one and that it is necessary that such property should be in the vicinity of approximately 200 mtrs. from the property under reservation. So also the matters like approach road and level of the land are also required to be similar. (MARGINAL REMARK – Rule No.13.5 of Pune Development Control Rules).

12. Proposal in paragraph 10 submitted for approval."

The note was countersigned by Shri Deshpande, Deputy Secretary, Town Planning on 4.6.1996, and by the Senior Chief Secretary (NV i.e. Nagar Vikas or Urban Development). Thus the Urban Development Department did not accept the second proposal of the Municipal Commissioner to remove the reservation on the plot in its entirety, but recommended the acceptance of the first proposal to reduce the reservation on the plot to 50% of its area. The Minister for State however did not sign the note and he ordered a further discussion on the subject on 12.6.1996.

32. Thus there was once again a discussion with the Minister of State, UDD on 12.6.1996 when Shri Karandikar, Shri Harihar, City Engineer, PMC, Shri Deshpande, Deputy Secretary, Town Planning and Shri Ghadge, Under Secretary were present. Shri Ghadge made a note of the meeting and signed it on 13.6.1996, and which note is also signed by Shri Deshpande and the Additional Chief Secretary. The note records that on behalf of the applicants it was stated that it was not possible for them to accept the alternative no.1, and Municipal Corporation should consider the second alternative. The note further records that thereupon the City Engineer suggested that if the applicant shows some other alternative properties, the Municipal Corporation will inspect all of them and then consider as to which of them is possible to be accepted. The note thereafter records as follows:-

> "In the event such alternative property is selected by Municipal Corporation, then action to be taken for shifting the reservation from the subject property as per Rule No. 13.5 of Pune Development Control Rules can be considered. However, it was clarified by the Department that for that purpose the condition of 200 mtr. Distance will have to be relaxed and for which the permission of Hon. Chief Minister will have to be obtained".

The PMC was thereafter asked to submit its response in the light of above discussion. Shri Ghadge recorded this suggestion in his letter dated 20.6.1996 addressed to the Municipal Commissioner.

33. The Municipal Commissioner then wrote back to the Under Secretary, UDD by his letter dated 15.7.1996, pointing out that the applicant had shown four sites from which one at Lohegaon Survey No.261 H.No.1/2 admeasuring 3000 sq.meter was suitable for a primary school, but it was in the Agricultural zone as per the approved D.P., and if it was to be converted to Residential zone, the approval of the State Government will have to be obtained for such a modification.

34. On receiving this letter from the Municipal Commissioner, Shri Ghadge once again put up a detailed note and at the end of para 8 thereof stated as follows:-

"Considering the above circumstances and especially 'A" on 12 T.V. and B on 14 T.V., there could be no objection in granting permission for shifting reservation under Rule 13.5 of the D.C. Rules by relaxing the 200 meter condition and accordingly directions can be given to the PMC for taking the following necessary action:-

1. The Pune Municipal Corporation should recover the amount of compensation paid earlier, for acquisition of final plot No.110 at Earndwane together with the structures, with simple interest.

2. The State Government should issue directions to the Pune Municipal Corporation for getting the plot at Lohegaon, Pune Survey No.261 Hissa No.1/2 from Agricultural zone into residential zone by following the procedure under Section 37(1) of the Maharastra Regional and Town Planning Act, 1966 and thereafter submitting the proposal to the State Government for sanction.

3. The Commissioner Pune Municipal Corporation should take action for shifting the reservation for Primary School on Final Plot No.110 in the Development Plan of Pune City under Rule 13.5 of the Development Control Rules, Pune to Lohegaon, Survey No.261, Hissa No.1/2 and for that purpose the permission of the Corporation is not necessary as intimated earlier by the State Government in another case [Survey No.39/1, Kothrud, Pune].

4. After complying with (1) and (3) above, the Pune Municipal Corporation should enter into an Agreement for transfer of the land at Lohegaon Pune and thereafter give development permission for the plot at Erandwane.

However the Completion Certificate for that place should not be issued unless the construction of School at Lohegaon is completed."

Below that note there are signatures as follows:-

"*Sd/-*
26/7/96
(P.V. Ghadge)
Under Secretary

Sd/-
26/7/96
(Shri Deshpande)
Deputy Secretary Town Planning

Sd/-
26/7/96
Additional Chief Secretary, (U.D.)

Sd/-
30/7/96
Hon'ble Minister of State (U.D.)

Received
31/7/96

All action be taken in accordance with law. No objection.

Sd/-
21/8/96
Hon. Chief Minister"

35. In view of the above decision signed by the Chief Minister on 21.8.1996, the Deputy Secretary, UDD sent a letter/ order dated 3.9.1996 to the Commissioner containing exactly the above four conditions. The letter stated that he had been ordered by the State Government to inform those four directives, and after quoting those four directives the letter further directed the Corporation to act as per the above State Government directives and report compliance. The letter reads as follows:-

"ENGLISH TRANSLATION OF STATE GOVERNMENT LETTER DATED 03/09/1996

(MAHARASHTRA STATE)

No.TPS-1896/102/
MatterNo.7/96/U.D.-93

Urban Development
Department Mantralaya,

Mumbai 400 032

Date : 3rd September, 1996

To,
The Commissioner
Pune Municipal Corporation
Pune

Sub: Development Permission of T.P. Scheme No.1, Final Ploat No.110.

Ref: Request Application dated 20/11/95 by Shri Shriram Karandikar to Minister of State for Urban Development for Development in the subject matter.

Sir,

I have been ordered by the State Government to communicate to you the following directives.

1. The Pune Municipal Corporation should recover from the landowner according to the land acquisition law the principal amount paid for acquisition of Final Ploat No.110, Erandwane along with construction, with interest thereon at 12%.

2. S.No.261 Hissa No.1/2 Lohegaon, Pune which is in agricultural zone should be included within residential zone in the Development Plan. For doing this you are directed that Pune Municipal Corporation should complete the entire legal action under Section 37 (1) of the Maharashtra Regional and Town Planning Act, 1966 and send the proposals to the State Government for sanction.

3. The Commissioner, Pune Municipal Corporation should take steps to shift the reservation of primary school in accordance with Rule 13.5 of the Development Control Rules from Final Plot No.110, Erandwane to Lohegaon S. No.260 Hissa No.1/2. For this purpose no sanction is required from the Pune Municipal Corporation as has been earlier communicated to you in another matter (S.No.39/1 Kothrud).

4. After action as stated in (1) and (3) above is completed, appropriate agreement be entered into by Pune Municipal Corporation with land owner about transferring the Lohegaon plot and thereafter Development permission be granted in respect of the Plot at Erandwane, however no completion certificate for that place be granted unless the construction of school at Lohegaon is complete.

Corporation to act as per the above State Government directive and submit report regarding compliance to the Government.

Yours faithfully,

Sd/-
Vidyadhar Deshpande
Deputy Secretary"

Notings from the Municipal Files:-

36. Thereafter we have the notings from the Municipal files

which show that consequently the City Engineer has written to landowner on 27.9.1996 to return the amount paid to him for acquisition of final Plot No.110 T.P. Scheme, No.1 with interest at the rate of 12%, and secondly to transfer concerned land bearing survey No.261 Hissa No.1/2 at Lohegaon free of cost and without any encumbrances. The letter further stated that only after compliance of the above two conditions he will be given permission for development of F.P. No.110. It then stated that building completion certificate will be given only after the procedure under Section 37 (1) of the MRTP Act for deleting Survey No.261 Hissa 2/1 at Lohegaon, Hadapsar from the agricultural zone, and reserving it for primary school is completed, and sanctioned by the State Government.

37. Thereafter there is one more note of the Municipal Commissioner dated 21.9.1996 which records the opinion of the Senior Law Officer that the permission of the general body of PMC will be required for entering into an agreement for deleting the reservation of plot at Erandawana. With respect to the same the commissioner has recorded as follows:-

"However, since the State Government has given clear orders to take action under Rule 13.5 of the Development Control Rules of Pune for complying with the subject matters and since directives have been given for making such change, no permission of the Pune Municipal Corporation is necessary".

Subsequent Developments

38. Consequently, the subsequent steps have been taken. The landowner has returned the amount as sought, a deed of settlement has been entered into between the landowner and the PMC, and Commencement Certificates have been issued on 28.11.1996 and 3.5.1997 for the two buildings proposed to be constructed. An Occupation Certificate dated 20.12.1997 was also given for a part of the building completed thereafter namely, B Wing containing 24 flats for the tenants. It is however interesting to note that PMC instructed its counsel on

19.11.1996 to withdraw its first appeal in the High Court as directed by the Government even before the landowner returning the amount of compensation with interest on 22.11.1996.

39. It has so transpired that though the land at Lohegaon was handed over to PMC as proposed, subsequently the Municipal Corporation found that there was not so much need of a school at Lohegaon, but a school was needed at Sinhagad Road, Dattawadi. The procedure for changing the zone of the land at Lohegaon as required under Section 37 of the MRTP Act was also taking its own time at the municipal level. Once again there was a correspondence between the PMC and the Government in this behalf. The Commissioner wrote to the Dy. Secretary, UDD on 28.5.1998 for a modification in the conditions in the Government letter dated 3.9.1996 to get the school constructed at Dattawadi (instead of Lohegaon) in lieu of the school reservation on plot no. 110 at Prabhat road. At this stage for the first time we have the letter from the developer dated 15.7.1998 addressed to the City Engineer of PMC signed by Shri Girish Vyas for the Vyas Constructions, stating that he was prepared to offer an alternative site admeasuring 3000 sq. meters at Mundhwa within PMC area which is in residential zone. This was to avoid the difficulty concerning the change of zone. Additionally he was prepared to deposit an amount with PMC equivalent to the cost of construction of 500 sq. meters as per PMC's standard specifications, and PMC may construct the school whenever and wherever it required. He further sought that on his doing so, the final completion certificate be issued so that the flat purchasers can occupy their flats in the building on F.P. No.110 which was almost ready.

40. The Government file contains one more note made by the Under Secretary Shri Rajan Kop and signed by Shri Deshpande on 22.7.1998. It is clearly recorded below the note that it was marked for the Additional Chief Secretary to the Chief Minister, and also for the Chief Minister. The note

mentions that there has been substantial criticism in local newspaper about this matter. It is stated that the issue was raised in the general body of PMC, and it was represented that an amenity in the area is being destroyed by deleting the reservation for a primary school. The Commissioner had defended the decision by contending that although 3450 sq. meter area of reservation of F.P. No.110 was being deleted, reservation on 8219 sq. meters on adjoining two plots was being maintained. It was also pointed out by the Commissioner that an additional amenity was being created in another area. The note further records that in the meanwhile the proposal to shift the reservation on the plot at Lohegaon had been filed (i.e. disapproved) by the Standing Committee of PMC. Last para of this note states as follows:-

> "Senior Chief Secretary of Hon. Chief Minister has issued instructions to put up a self explanatory note in this entire matter for perusal of Hon. Chief Minister. It is further instructed to include the matters wherein the Government has taken a decision in this matter as also in another matter prior thereto, the information provided and points suggested by Municipal Corporation with respect to the matters of deletion of reservation from Pune City Development Plan, etc., Such note containing the full background, factual and other aspects of the matter would be useful for Hon. Chief Minister if certain questions are raised with respect to the said matter in the current session of Legislative Assembly."

41. On receiving the developer's letter dated 15.7.1998, the Commissioner once again wrote to Under Secretary UDD on 23.7.1998 suggesting acceptance of the two proposals of the developer, but seeking orders of the government therefor. It is material to note at this stage that in the Government file there is a clear noting of the Principal Secretary UDD dated 24.7.1998 that the application of Rule 13.5 in the matter under question was not legal. As the note states:-

> "…….*With due respect to the persons then, doing interpretation of the said decision of the Government and Rule No. 13.5, I feel that application of Rule No. 13.5 in the matter under question is not legal. Upon plain reading of the said rule it is clear that this rule can be applied when the reservation is to be shifted within a distance of 200 mtrs. Government or the Commissioner do not appear to be empowered for such shifting beyond the distance of 200 mtrs. It would have been much appropriate that the action for change as contemplated in Sec. 37 of the Maharashtra Regional and Town Planning Act, 1966 would have been taken……"*

42. In view of Commissioner's letter dated 23.7.1998 however, once again a departmental note was prepared containing following opinion, still seeking to resort to Rule 13.5.

> *"…… After considering this issue the following opinion is being expressed on the proposal of Pune Municipal Corporation*.
>
> (1) *Commissioner, Pune Municipal Corporation to take action to cancel the action earlier taken of shifting reservation at Lohegaon as per Rule No. 13.5 and the action of shifting the said part reservation to Mundhawa be initiated afresh under Rule 13.5.*
>
> (2) Prior to taking action as stated in (1) above, even though it is stated by the Commissioner that the land at Mundhwa admeasuring 3000 sq. mtrs., suggested by the Promoter is suitable, still however, it is necessary that the Commissioner , Pune Municipal Corporation should get himself satisfied about the 12 mtr. wide approach being available to the said land. After satisfying itself the legal action for taking the said Mundhwa land in possession of the Pune Municipal Corporation be completed. After completing these actions only, it is necessary to take action as stipulated in (1) above.

(3) As per the earlier instructions, the Pune Municipal Corporation got executed agreement for construction of 500 sq.mtrs. Since the action with respect to Lohegaon land had remained incomplete, the Municipal Corporation could not grant permission to construct school therein. This construction could have been got done on Mundhwa land. However, from the letter of the Commissioner, Pune Municipal Corporation it is seen that he has not yet decided as to whether the school is to be constructed on the said land or not. On the other hand he has asserted that since the Promoter is ready to pay such amount of construction no loss would be caused to Municipal Corporation by getting deposited such amount. Considering this issue, principally there appears to be no objection on the part of the Commissioner in accepting the proposal of promoter as recommended by him with a view to get available the necessary amenity for the school as per their requirements. However, it would be binding upon the Commissioner to spend the said amount for the construction at such place which may be found necessary and as may be recommended by the Education Committee.

(4) Since the actions to be taken as stipulated in point No. (3) above, are between the Pune Municipal Corporation Education Committee and Commissioner, Pune Municipal Corporation, there is no reason to suspend the action of granting completion certification to the Promoter therefore. Therefore, the Government shall have no objection if the completion certificate is granted by Municipal Corporation to the Promoter after completing the actions as stipulated in para No. 1 and 2 subject to the rules and provisions in that behalf.

If the aforesaid issues are approved, the proposal of the Commissioner in the present circumstances being FOR superior purpose than these contained in the earlier

directives of the Government there should be no reason to object the proposal submitted by the Commissioner and the same ought to be principally approval subject however, to the conditions mentioned in the aforesaid discussion. In accordance hereof the draft or letter to be sent to Pune Municipal Corporation is put up at Page No. _____/PV.

The above proposal will be issued on the same being approved.

Submitted for orders.

Sd/-
27.7.98
(Vidyadhar Deshpande)
Dy. Secretary.
Sd/-27.7.1998"

43. Below this note however, the Additional Chief Secretary to the Chief Minister put up a remark as follows and signed below it:-

"*In this matter the developer and Hon. Chief Minister being related, it is requested that the Hon. Minister of State should take proper decision as per rules".*

Thereafter there is the order of the Minister of State which is as follows:-

'Proposal of Department approved. Orders be issued':-

"Sd/-
28.7.98
N.V.V."

44. The Deputy Secretary thereafter sent a reply dated 29.7.1998 to the letters of the Municipal Commissioner dated 28.5.1998 and 23.7.1998. In para 1 thereof he referred to the Commissioner's letter dated 28.5.1998 seeking to shift

reservation on F.P. No. 110 under DC Rule 13.5 to Mundhawa instead of Lohegaon. Thereafter he stated in para 2 as follows:-

> "……Now the Developer has shown his readiness to make available land at Mundhawa. Therefore, in your letter you have sought approval to recover the proper amount required for the construction of 500 sq.mtrs, after taking action stated in preceding paragraph. Upon due consideration of your request, I have orders to inform you that after recovering such proper amount from the Developer, the said amount be utilized for construction of primary school at such place as may be required and recommended by the Education Committee of Pune Municipal Corporation. Because of this order request made by you in your letter dt. 28.5.98 automatically becomes redundant.
>
> In your letter dt. 23rd July 98 you have sought guidance on the issue of grant of occupancy certificate to the Developer. After taking the action as stated in paragraph 1 and 2, there is no reason for the Government to have objection if in furtherance thereof the Pune Municipal Corporation issues the occupancy certificate subject to the other provisions of the Rules in that behalf."

45. In view of the directions dated 3.9.1996 issued by the State Government, the PMC issued (i) Commencement Certificate (C.C. for short) in the name of the landowner dated 28.11.1996 for constructing a building to rehabilitate the tenants, (ii) the second C.C. dated 3.5.1997 for constructing the other residential buildings consisting of ground plus ten floors (named as Sundew Apartment by the developer), and (iii) the Occupation Certificate (O.C. for short) in part dated 20.12.1997 for the tenants' building. Thereafter, the developer signed a confirming agreement with the landowner and his family members on 16.1.1998 to once again confirm the terms of the earlier referred development agreement entered into between the developer and landowner on 20.10.1995. It is at

this stage, that two petitions bearing no. 4433/1998 and 4434/1998 were filed on 12.8.1998 and 14.8.1998 respectively. A Division Bench first issued Rule Nisi without any interim order. In as much as the construction had started from March 1997 and was substantially completed, only a direction was given in Writ Petition No.4434/1998 not to create any third party interest. The PMC was already directed not to grant completion certificate in respect of the ten storey building. Subsequently, the petitions were heard finally, and the Division Bench consisting of Hon'ble Justice B.N. Srikrishna and Justice S.S Parkar, rendered two concurrent judgments on 6th-15th March 1999, and a common order which have been challenged in the present group of appeals.

Justification of the shifting of reservation under D.C. Rule 13.5: Is it in consonance with the statute?

46. As we have noted, the State Government directed the PMC to shift the reservation on F.P. No. 110 under DC Rule 13.5. The question therefore comes up as to whether the action by the State is in consonance with the statutory scheme, and that apart whether such an action is permissible under DC Rule 13.5? If we look to the scheme of the Act it gives importance to the implementation of the sanctioned plan as it is and it is only in certain contingencies that the provision thereunder is permitted to be modified, and that too after following the necessary procedure made in that behalf.

Signification of the Sanctioned Plan and the provisions for the modification thereof

47. The Planning process under the MRTP Act is quite an elaborate process. A number of town planners, architects and officers of the Planning Authority, and wherever necessary those of the State Government participate in the process. They take into consideration the requirements of the citizens and the need for the public amenities. The planners consider the difficulties presently faced by the citizens, make rough estimate of the

likely growth of the city in near future and provide for their solutions. The plan is expected to be implemented during the course of the next twenty years. After the draft Development Plan is prepared, a notice is published in the official gazette stating that the plan is prepared. Under Section 26(1) of the Act the name and place where copy thereof will be available for inspection to the public at large is notified. Copies and extracts thereof are also made available for sale. Thereafter suggestions and objections are invited. The provisions of regional plan are given due weightage under Section 27 of the Act and then the plan is finalised after following the detailed process under Section 28 of the Act. This being the position, Chapter-III of the MRTP Act on Development Plans requires the sanctioned plan to be implemented as it is. There are only two methods by which modifications of the final Development Plan can be brought about. One is where the proposal is such that it will not change the character of the Development Plan, which is known as minor modification and for which the procedure is laid down under Section 37 of the Act. The other is where the modification is of a substantial nature which is defined under Section 22A of the Act. In that case the procedure as laid down under Section 29 is required to be followed. There is also one more analogous provision though it is slightly different i.e. the one provided under Section 50 of the Act, for deletion of the reservation where the appropriate authority (other than the planning authority) no longer requires the designated land for the particular public purpose, and seeks deletion of the reservation thereon.

48. The Government's action to shift the reservation on F.P. No. 110 is under DC Rule 13.5 and not under Section 37 of the MRTP Act. We may therefore refer to DC Rule 13.5 and Section 37.

DC Rule 13.5 reads as follows:-

"*13.5 If the land proposed to be laid out is affected by any reservation/s or public purpose/s authority may*

agree to adjust the location of such reservation/s to suit the development without altering the area of such reservation. Provided however, that no such shifting of the reservation/s shall be permitted.

(a) beyond 200 m. of the location in the Development Plan.

(b) beyond the holding of the owner in which such reservation is located, and

(c) unless the alternative location is at least similar to the location of the Development Plan as regards access, levels etc.

All such alterations in the reservations/alignment of roads shall be reported by the Planning Authority to Govt. at the time of sanctioning the layout."

49. As can be seen from the D.C. Rule 13.5, shifting of the reservation thereunder has to be without altering the size of the area under reservation. Besides it is permissible only on three conditions namely, that (1) it cannot be beyond 200 metres of the original location in the Development Plan, (2) it has to be within the holding of the owner in which the reservation is located, and (3) the alternative location ought to have a similar access and land level as the original location. Obviously the shifting of the reservation from F.P. No. 110 to a far off place could not be justified under D.C. rule 13.5.

Minor Modifications

50. Section 37 of the MRTP Act, reads as follows:-

"**37. Modification of final Development Plan**

(1) Where a modification of any part of or any proposal made in, a final Development plan is of such a nature that it will not change the character of such

Development plan, the Planning Authority may, or when so directed by the State Government [shall, within sixty days from the date of such direction, publish a notice] in the Official Gazette [and in such other manner as may be determined by it] inviting objections and suggestions from any person with respect to the proposed modification not later than One month from the date of such notice; and shall also serve notice on all persons affected by the proposed modification and after giving a hearing to any such persons, submit the proposed modification (with amendments, if any), to the State Government for sanction.

[(1A) If the Planning Authority fails to issue the notice as directed by the State Government, the State Government shall issue the notice, and thereupon the provisions of sub-section (1) shall apply as they apply in relation to a notice to be published by a Planning Authority.]

[(1AA) (a) Notwithstanding anything Contained in sub-sections (1), (1A) and (2), where the State Government is satisfied that in the public interest it is necessary to carry out urgently a modification of any part of, or any proposal made in, a final Development Plan of such a nature that it will not change the character of such Development Plan, the State Government may, on its own, publish a notice in the Official Gazette, and in such other manner as may be determined by it, inviting objections and suggestions from any person with respect to the proposed modification not later than one month from the date of such notice and shall also serve notice on all persons affected by the proposed modification and the Planning Authority.

(b) The State Government shall, after the specified period, forward a copy of all such objections and suggestions to the Planning Authority for its say to the Government within a period of one month from the receipt of the copies of such objections and suggestions from the Government.

(c) The State Government shall, after giving hearing to the affected persons and the Planning Authority and after making such inquiry as it may consider necessary and consulting the Director of Town Planning, by notification in the Official Gazette, publish the approved modifications with or without changes, and subject to such conditions as it may deem fit, or may decide not to carry out such modification. On the publication of the modification in the Official Gazette, the final Development Plan shall be deemed to have been modified accordingly.]

[(1-B) Notwithstanding anything contained in sub-section (1), if the Slum Rehabilitation Authority appointed under section 3A of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971(Mah. XXV-III of 1971) is satisfied that a modification of any part of, or any proposal made in, a final Development Plan is required to be made for implementation of the Slum Rehabilitation Scheme declared under the said Act, then, it may publish a notice in the Official Gazette, and in such other manner as may be determined by it, inviting objections and suggestions from any person with respect to the proposed modification not later than one month from the date of such notice; and shall also serve notice on all persons affected by the proposed modification, and after giving a hearing to any such persons, submit the proposed modification (with amendments, if any) to the State Government for sanction.]

(2) The State Government may, [make such inquiry as it may consider necessary] and after consulting the Director of Town Planning by notification in the Official Gazette, sanction the modification * * * with or without such changes, and subject to such conditions as it may deem fit or refuse to accord sanction. If a modification is

sanctioned, the final Development Plans shall be deemed to have been modified accordingly."

51. As seen from this Section, the minor modification under Section 37 (1) has to be such that it will not change the character of the Development Plan. The section indicates that for setting the procedure under Section 37 into motion, the Planning Authority has to firstly form an opinion that the proposed modification will not change the character of the Development Plan. Such an opinion has to be formed by the Planning Authority meaning the general body of the Municipal Corporation, since this function is not permitted to be delegated to anybody else under Section 152 of the Act. Thereafter the Planning Authority has to publish a notice in the official gazette inviting the objections and suggestions from the public with respect to the proposed modification. It is also required to give a notice to all the persons affected by the proposed modification. Sub-section (1A) lays down that if the Planning Authority does not give the notice, the State Government is required to issue the notice as stated above. The notice to the affected persons in our case will mean notice at least to the two institutions which had applied for developing a Primary school on this very plot of land. Thereafter they have to be heard, and the proposed modification with amendments if any, is to be submitted to the State Government for sanction. Subsequently, after making appropriate enquiries and after consulting the Director of Town Planning the State Government may under sub-section (2) sanction the modification with or without appropriate changes, or subject to such conditions as it may deem fit or refuse to grant the sanction.

52. Sub-section (1AA) of Section 37 lays down the power of the State Government where it feels the urgency for carrying out any such modification. In that case the State Government may publish the notice in the Official Gazette, and follow the similar procedure, but subsequently it has to place the proposal before the general body of the Planning Authority for its say,

and thereafter only it may sanction the modification after consulting the Director of Town Planning in a similar manner. This shows that in the event of a minor modification the general body of the Planning Authority has a say in the matter. The Government has to invite the objections and suggestions from the public at large by publishing the notification in the Official Gazette, plus it has to issue a specific notice to the persons affected by the proposed modification, and last but not the least it has to consult the Director of Town Planning before arriving at its decision. In the present case nothing of the kind has been done.

53. In the instant case the officers of the Urban Development Department as well as of the PMC took the stand (until it was possible), that the procedure under Section 37 will have to be followed. This was because what was contemplated was a modification of a proposal made in the Development Plan. A reservation for an amenity was sought to be shifted (which will in fact mean it was sought to be deleted) from the place where it was provided. If that was the official view of UDD and PMC, what was required was a compliance of the procedure under Section 37(1) and (2). Ultimately, since the direction was given by the State Government, (and if the State Government thought that there was an urgency), it was necessary for it to act under Section 37 (1AA), and to publish a notice in the Official Gazette to invite objections and suggestions from the public at large, and also from the persons affected by the proposed modification. Thereafter the State Government was required to send the proposal to PMC for its say and then it had to consult the Director of Town Planning.

Modifications of a substantial nature

54. Where the modification is of a substantial nature, a different procedure is prescribed under Section 22A of the Act. This Section reads as follows:-

"*22A. Modifications of a substantial nature*

In section 29 or 31, the expression "of a substantial nature" used in relation to the modifications made by the Planning Authority or the officer appointed by the State Government under sub-section (4) of section 21 (hereinafter referred to as "the said Officer") or the State Government, as the case may be, in the Draft Development Plan means,—

(a) reduction of more than fifty per cent., or increase by ten per cent. in area of reservations provided for in clauses (b) to (i) of section 22, in each planning unit or sector of a draft Development Plan, in sites admeasuring more than 0.4 hectare in the Municipal Corporation area and 'A' Class Municipal area and 1.00 hectare in 'B' Class and 'C' Class Municipal areas;

(b) all changes which result in the aggregate to a reduction of any public amenity by more than ten per cent of the area provided in the planning unit or sector in a draft Development Plan prepared and published under section 26 or published with modification under section 29 or 31, as the case may be;

(c) reduction in an area of an actually existing site reserved for a public amenity except for marginal area upto two hundred square meteres required for essential public amenity or utility services;

(d) change in the proposal of allocating the use of certain lands from one zone to any other zone provided by clause (a) of section 22 which results in increasing the area in that other zone by ten per cent. in the same planning unit or sector in a draft Development Plan prepared and published under section 26 or published with modification under section 29 or 31, as the case may be;

(e) any new reservation made in a draft Development Plan which is not earlier published under section 26, 29 or 31, as the case may be;

(f) alternation in the Floor Space Index beyond ten per cent. of the Floor Space Index prescribed in the Development Control Regulations prepared and published under section 26 or published with modification under section 29 or 31, as the case may be.]."

Additional requirement of notice in local newspapers before effecting modifications of substantial nature:-

55. The modification under Section 22A requires following of the procedure under Section 29 of the MRTP Act. It lays down that apart from a notice in the official gazette, a notice will have to be published in the local newspapers for the information at the public at large, so that they may make their suggestions or file objections thereto if they so deem it fit. Section 29 reads as follows:-

"**29. Modification made after preparing and publishing notice of draft Development plan.**

Where the modifications made by a Planning Authority or the said Officer in the draft Development plan are [of a substantial nature], the Planning Authority or as the case may be, the said Officer shall publish a notice in the Official Gazette and also in the local newspapers inviting objections and suggestions from any person with respect to the proposed modifications not later than sixty days from the date of such notice; and thereupon, the provisions of section 28 shall apply in relation to such suggestions and objections as they apply to suggestions and objections dealt with under that section."

56. As seen from this Section 22A, it treats modifications of six types as substantial modifications. They are as follows:-

(a) if a plot is admeasuring more than 0.4 hectare (i.e. 4000 sq. metres) in the Municipal Corporation area or an A class Municipal area a reduction of more than 50 per cent would be

considered as a substantial modification. In B & C class Municipal Areas such a plot has to be of one hectare.

(b) secondly, under sub-section (b) all changes which result in the aggregate to a reduction of any public amenity by more than ten per cent of the area provided in the planning unit are considered a substantial change.

(c) where there is an actually existing site reserved for a public amenity, except for marginal area upto two hundred square metres required for essential public amenities or utility services their reduction will be a substantial modification.

(d) shifting of the allocation of use of land from zone to zone which results in increasing the area in the other zone by ten per cent in the same planning unit will be a substantial modification.

(e) any new reservation made in a draft Development Plan which is not earlier published will be a substantial modification, and

(f) alternation in the Floor Space Index beyond ten per cent will be a substantial modification.

Importance given to the spaces reserved for public amenities

57. As we have noted, all such substantial modifications can be effected only after following the additional requirement laid down in Section 29 viz. a notice in the local newspapers inviting objections and suggestions within sixty days from the public at large with respect to the proposed modification. Sub-section (a) deals with reduction of more than fifty percent in area provided in clauses (b) to (i) of Section 22 which sub-sections are concerned with proposals for designation of land for public purposes such as schools, colleges, markets, and open spaces, playgrounds, transport and communications, water supply, drainage and sewerage and other public amenities. It can be seen that sub-sections (b) and (c) of section

22A give importance to retention of places reserved for public amenities. Sub-section (b) deals with a reduction of any public amenity by more than ten per cent of the area reserved in the planning unit. Sub-section (c) deals with any reduction in an actually existing site reserved for a public amenity (other than marginal area upto 200 sq. metres required for essential public amenities or utility services for e.g. road widening). Both are treated as substantial modifications. Section 2 (2) of the MRTP Act defines what is an "amenity". It is relevant to note that this definition of amenity includes primary and secondary schools and colleges and polytechnics. It reads as follows:-

> "**2** [(2). "amenity" means roads, streets, open spaces, parks recreational grounds, play grounds, sports complex, parade grounds, gardens, markets, parking lots, primary and secondary schools and colleges and polytechnics, clinics, dispensaries and hospitals, water supply, electricity supply, street lighting, sewerage, drainage, public works and includes other utilities, services and conveniences]."

58. In the present case we have a situation where the reservation for a Primary school on a plot of an area of 3450 sq. metres is deleted. Would it not amount to a substantial modification under sub-section (b) of Section 22A since it results into deletion of a public amenity in the entire planning unit? Would it not mean that in view thereof it was necessary to follow the procedure required under Section 29 of the Act which provides for a public notice in the Official Gazettee and also in the local newspapers inviting objections and suggestions? Would it not mean that thereafter it was necessary to follow the procedure to deal with the suggestions and objections laid down while finalizing the draft Development Plan under Section 28 of the Act? Whether the shifting of this reservation is covered under Section 37 or Section 22A is a moot point to consider. One thing is however very clear, that it could not be justified under D.C. Rule 13.5. If the statute

provides for doing a particular act in a specified manner, it has got to be done in that manner alone, and not in any other manner.

Alleged Conflict between D.P. Plan and the erstwhile T.P. Scheme canvassed for the first time in the High Court –

Can a provision in the erstwhile T.P. Scheme be relied upon in the face of a contrary reservation in the subsequent D.P. Plan?

59. In as much as the action of the State Government could not be defended under D.C. Rule 13.5, the appellants came up with the submission for the first time in the High Court and then in this Court that under the erstwhile Town Planning Scheme, this F.P. No. 110 could be developed for residential purposes, and that purpose subsisted in spite of the subsequent reservation for a public purpose on that plot of land under the D.P. Plan.

60. It was pointed out that a Town Planning Scheme was framed under the then Bombay Town Planning Act of 1915 for Pune City to become effective *from 1.3.1931*. Regulation 14 of the Principal scheme framed under that Act provided for the areas included in the scheme which were intended mainly for residential purposes wherein this plot was included as original plot No. 230/C. It was subsequently allotted *F.P. No. 110*. There was no reservation on this plot for any public purpose. The 1915 Act was repealed and replaced by the Bombay Town Planning Act 1957 w.e.f. *1.4.1957* whereunder the concept of a Development Plan was introduced. However, by virtue of Section 90 of the 1954 Act the previous schemes were saved. The erstwhile Town Planning scheme as varied, was sanctioned by the State Government w.e.f. *15.8.1979,* and thereunder the permissible user of F.P. No. 110 continued to be *residential*. In the meanwhile, in exercise of its power under the 1954 Act, the State Government sanctioned the Development Plan of

Pune City w.e.f. 15.8.1966 whereunder F.P. No. 110-112 were reserved for a garden. The 1954 Act was repealed and replaced by the MRTP Act 1966 w.e.f. 11.1.1967. By virtue of Section 165 of the MRTP Act, however, the erstwhile Principal T.P. scheme (as varied), as well as the D.P. Plan were both saved. Subsequently, when the D.P. Plan of Pune City was revised in 1982 and finalized in 1987 under the provisions of the MRTP Act, the reservation on the plot was initially proposed to be changed for a play-ground, but ultimately shifted for a primary school in the final 1987 DP Plan.

61. It is contended on behalf of the landowner and the developer that the permission for the user of the concerned plot of land for residential purposes under the T.P. Scheme effective from 15.8.1979 continued to survive by virtue of the saving clause under Section 165(2) of the MRTP Act, and, therefore, the order passed by the Government on 3.9.1996 as well as the commencement certificates were valid even on that count. It is submitted that until the Town Planning scheme is varied under Section 39 read with 92 of MRTP Act, the proposals in the Final Development Plan of 1987 cannot have any effect on the land covered by the erstwhile Town Planning scheme. The Development Plan and Town Planning scheme will both have their independent operation until the Town Planning scheme is varied to bring it in accord with the Development Plan. As noted earlier that right from 8.5.1979, when the landowner issued purchase notice, and led the State Government and PMC to acquire the plot of land, this plea was never raised (and the High Court would have been within its rights not to entertain this plea on the ground of acquiescing into the change of user under the D.P. Plan). The plea having been considered and rejected in the impugned judgment, is canvassed once again in this Court. To consider this plea, it becomes necessary to examine the relevant provisions of the Act.

Relevant provisions of the Act in the context of the D.P. Plan as against the erstwhile T.P. Scheme

62. The preamble of the MRTP Act shows that this is an Act to make provisions for:

(1) planning the development and use of land in regions established forthat purpose and for constitution of regional planning boards therefor,

(2) to make better provisions for the preparation of development plans with a view to ensuring that T.P. Schemes are made in the propermanner and their execution is made effective,

(3) to provide for the creation of new towns by means of development authorities,

(4) to make provisions for the compulsory acquisition of land required for public purposes in respect of the plans, and

(5) for purposes connected with the matters aforesaid.

63. (i) Chapter I of the Act contains the Preliminary provisions. Chapter II of the Act is concerning the Regional Plans. Chapter III is about the Development Plan, and Chapter IV about Control of Development and Use of Land included in Development Plans. Chapter V is about the T.P. Schemes.

(ii) Section 3 of the Act permits the State Government to establish any area in the State to be a Region. A Regional Plan is supposed to be prepared for various subjects which are mentioned in Section 14 of the Act. The 'Development Plan' is defined under Section 2 (9) of the Act as a plan for the development or re-development of the area within the jurisdiction of a planning authority. Section 2 (19) defines the Planning Authority to mean a local authority, and it includes some other specified

authorities also. There is no dispute that the development plan has to be prepared 'in accordance with the provisions of a Regional plan' which is what is specifically stated in Section 21 (1) of the Act.

(iii) It is, however, disputed by the developer that the T.P. scheme which is normally supposed to be a detailed scheme for a smaller part of a Municipal Area has necessarily to be in consonance with the development plan. As against this submission we have the mandate of Section 39 of the Act, which reads as follows:-

"*39. Variation of town planning scheme by Development Plan.*

Where a final Development plan contains proposals which are in variation, or modification of those made in a town planning scheme which has been sanctioned by the State Government before the commencement of this Act, the Planning Authority shall vary such scheme suitably under section 92 to the extent necessary by the proposals made in the final Development plan."

This Section states that the T.P. scheme shall be suitably varied to the extent necessary wherever the final development plan contains proposals which are in variation or modification of the proposals contained in the T.P. Scheme. In the instant case, we are concerned with the final development plan of 1987 which contains the reservation for a Primary School on F.P. No.110 as against the plot being placed in a residential zone in the final T.P. scheme of 1979. It is submitted by the appellant that the planning authority may take steps to vary the T.P. scheme suitably to bring it in consonance with the D.P plan, but until that is done, the provisions in the T.P. scheme will survive. The High Court has rejected this submission by holding that the D.P. plan overrides the T.P. Scheme.

64. As noted above, Section 39 lays down that the T.P.

Scheme is to be varied suitably in accordance with the D.P. Plan under Section 92 of the Act. Section 92 appears in Chapter V which is on Town Planning schemes. The first section in this chapter V is Section 59. Section 59 reads as follows:-

"*59. Preparation and contents of Town Planning Scheme*

(1) Subject to the provisions of this Act or any other law for the time being in force-

(a) a Planning Authority may for the purpose of implementing the proposals in the final Development Plan, prepare one or more town planning schemes for the area within its jurisdiction, or any part thereof;

(b) a town planning scheme may make provision for any of the following matters, that is to say-

(i) any of the matters specified in section 22;

(ii) the laying out or re-laying out of land, either vacant or already built upon, including areas of comprehensive development;

(iii) the suspension, as far as may be necessary for the proper carrying out of the scheme, of any rule, by-law, regulation, notification or order made or issued under any law for the time being in force which the Legislature of the State is competent to make;

(iv) such other matter not inconsistent with the object of this Act, as may be directed by the State Government.

(2) In making provisions in a draft town planning scheme for any of the matter referred to in clause (b) of sub-section (1), it shall be lawful for a Planning Authority with the approval of the Director of Town Planning and

subject to the provisions of section 68 to provide for suitable amendment of the Development plan."

As can be seen, Section 59 states two things: firstly the opening part of sub-section 1 of Section 59 states that the T.P. scheme is to be prepared "subject to the provisions of this Act". Thereafter, Sub-section 1(a) of this section specifically states that the planning authority is to prepare one or more T.P. schemes for the area within its jurisdiction "for the purpose of implementing the proposals in the final Development Plan". Thus, Section 39 read with Section 59 do indicate the approach of legislature, namely, superiority of the D.P. plan over the T.P. scheme.

65. The learned senior counsel for the developer, Shri Naphade relied on the provisions contained in Section 59 (1) (b) (i), and 59 (2) of the Act in support of his arguments. Section 59 (1) (b) (i) provides that a town planning scheme may make provision amongst others for any of the matters specified in Section 22 of the Act. Section 22 lays down as to what ought to be the contents of a Development Plan. Section 59 (2) states that in making the draft T.P. scheme for any of the matters referred to in sub-section 1 (b), it shall be lawful for a planning authority to provide for suitable amendments of the Development Plan. It is, therefore, submitted that there is no primacy between the Development Plan and the T.P. scheme. It is contended that if the purpose of the T.P. Scheme is only to implement the Development Plan, it will militate against the plain reading of Section 51 (2) and 59 (1) (b) and that, in such a case, Section 59 (1) (b) will become otiose. Shri Naphade, therefore, submitted that the D.P. Plan and the T.P. Scheme both are of equal strength.

66. While examining this submission, we must note that Section 39 requires the T.P. scheme to be varied to the extent necessary in accordance with the final Development Plan. The provision in Section 59 (1) (b) (i) is infact made to see to it that

there is no conflict between the T.P. scheme and the Development Plan. Otherwise, the question will arise as to what meaning will be given to Section 59 (1) (a) which specifically states that the T.P. scheme is to be prepared for the purpose of implementing the proposals in the final Development Plan. Merely because Section 59 (1) (b) provides that the T.P. scheme may make provision for any of the matters specified in Section 22, the T.P. scheme cannot be placed on the same pedestal as a Development Plan. Section 59 (2) is only an enabling provision. It may happen that in a given situation a suitable amendment of the Development Plan may as well become necessary while seeing to it that the T.P. scheme is in consonance with the Development Plan. Section 59 (2) will only mean that the legislature has given an elbow room to the planning authority to amend the Development Plan if that is so necessary, so that there is no conflict between the T.P. Scheme and the D.P. Plan. In fact what is indicated by stating that "it shall be lawful to carry out, such an amendment" is that normally such a reverse action is not expected, but in a given case if it becomes so necessary, it will not be unlawful. Use of this phrase in fact shows the superiority of the D.P. Plan over the T.P. scheme. Besides, the phrase put into service in this sub-section is only 'to provide for a suitable amendment'. This enabling provision for an appropriate amendment in the D.P. plan cannot therefore, be raised to the level of the provision contained in Section 39 which mandates that the planning authority shall vary the T.P. scheme if the final D.P. Plan is in variation with the T.P. Scheme sanctioned before the commencement of the MRTP Act. It also indicates that subsequent to the commencement of the Act, a T.P. Scheme will have to be inconsonance with the D.P. Plan. Similarly, Section 59 (1) (b) (i) cannot take away the force of the provision contained in Section 59 (1) (a) of the Act. As noted above, Section 39 specifically directs that the planning authority shall vary the T.P. scheme to the extent necessary by the proposal made in the final Development Plan, and Section 59 (1) (a) gives the purpose of the T.P. scheme, viz. that it is for

implementing the proposals contained in the final Development Plan. Under Section 31 (6) of the act, a Development plan which has came into operation is binding on the planning authority. The Planning Authority cannot act contrary to D.P. plan and grant Development permission to defeat the provision of the D.P. plan. Besides, it cannot be ignored that a duty is cast on every planning authority specifically under Section 42 of the Act to take steps as may be necessary to carry out the provisions of the plan referred in Chapter III of the Act, namely the Development Plan. Section 46 of the Act also lays down specifically that the planning authority in considering an application for permission for development shall have "due regard" to the provisions of any draft or any final plan or proposal submitted or sanctioned under the Act. It indicates that the moment a Draft Plan is proposed, a permission for a contrary development can no more be granted, since it will lead to a situation of conflict. Section 52 of the Act in fact provides for penalty for unauthorised development or for use otherwise then in conformity with the development plan. Thus, when it comes to the development in the area of a local authority, a conjoint reading of the relevant sections makes the primacy of the Development Plan sufficiently clear.

67. Much emphasis was laid on Section 69 (6) which reads as follows:-

> "(6) *The provisions of Chapter IV shall, mutatis mutandis, apply in relation to the development and use of land included in a town planning scheme in so far as they are not inconsistent with the provisions of the Chapter."*

It was, therefore, submitted that thus the provisions of Chapter IV which are about the Control of Development and use of land included in the Development Plan, are mutatis mutandis applicable to the development and the use of land included in the T.P. scheme, and therefore the D.P. plan and T.P. scheme are on par.

68. Now, it is material to note that sub-sections (1) to (5) of Section 69 operate when the draft T.P. scheme is under preparation. Sub-section (6) will have to be read on that background because this sub-section itself states that provisions of Chapter IV will apply in relation to the development of the land included in a T.P. scheme "in so far as it is not inconsistent with the provision of this Chapter", i.e. Chapter V on Town Planning Schemes wherein Section 69 is placed. Chapter IV is on control of Development and use of land included in Development Plans. And as noted above, Section 59 (1) (a) which is the first section of Chapter V clearly contains the direction that the T.P. scheme is to be prepared for the purpose of implementing the proposals in the final Development Plan. Therefore, merely because by incorporating the provisions of Chapter IV those provisions are made applicable to T.P. schemes, the mandate of Section 59 (1) (a) cannot be lost sight of.

69. It is then submitted by the appellant that the Development Plan and the T.P. scheme operate independent of each other, and, until the State Government exercises its power of eminent domain under the Development Plan, and acquire the land, the landowner can develop his property as per the user permitted under the T.P. scheme. In view of the scheme of the relevant sections and particularly Section 46 which we have noted above, this submission cannot be accepted. It will mean permitting a development contrary to the provisions of the Development Plan, knowing fully well that the user under the T.P. scheme is at variance with the Development Plan. Any such interpretation will make provisions of Section 39, 42, 46 and 52 meaningless.

70. There is one more aspect of the matter. Section 43 of the Act lays down that after the date on which the declaration of intention to prepare a Development Plan is published, no person shall carry out any development on land without the

permission of the Planning Authority. The principal part of this section reads as follows:-

"43. Restrictions on development of land

After the date on which the declaration of intention to prepare a Development plan for any area is published in the Official Gazette [or after the date on which a notification specifying any undeveloped area as a notified area, or any area designated as a site for a new town, is published in Official Gazette] no person shall institute or change the use of any land or carry out any development of land without the permission in writing of the Planning Authority."

71. This section will have to be read along with the requirement provided in Section 39. Section 39 provides for a T.P. Scheme sanctioned and subsisting prior to the Development Plan. The section mandates that such a prior scheme shall be varied to the extent necessary by the proposals made in the final Development Plan. Section 43 provides that once the declaration of intention to prepare a Development Plan is gazetted, no development contrary thereto can be permitted. As provided under Section 59 (1) (a), the town planning scheme is to be prepared for the purpose of implementing the proposals in the final Development Plan. Therefore, even if such a variation as directed under Section 39 does not take place, the land cannot be put to use in any way in contradiction with the provision in the D.P. Plan. In the instant case, we have a provision of the T.P. Scheme effective from 15.8.1979 as against the D.P. Plan containing a contrary provision which was notified on 18.9.1982. Shri Dholakia, learned senior counsel appearing for the State Government, therefore, rightly submitted that in view of Section 165 of the MRTP Act, if the construction was completed, partly started or plans were submitted, or any such appropriate steps were taken prior to 18.9.1982, the same could have been permitted. Once the State Government published the draft Development Plan on

18.9.1982, providing for the reservation for a primary school, any construction contrary thereto could not be permitted. This can only be the interpretation of the provisions contained in Section 39 read with Section 43 and Section 165 of the MRTP Act. For convenience, we may refer to Section 165 (1) and (2), which read as follows:-

"165. Repeal and saving.

(1) *The Bombay Town Planning Act, 1954 and sections 219 to 226A and clause (xxxvi) of sub-section (2) of section 274 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, are hereby repealed.*

(2) Notwithstanding the repeal of the provisions aforesaid, anything done or any action taken (including any declaration of intention to make a development plan or town planning scheme, any draft development plan or scheme published by a local authority, any application made to the State Government for the sanction of the draft development plan or scheme, any sanction given by the State Government to the draft development plan or scheme or any part thereof, any restriction imposed on any person against carrying out any development work in any building or in or over any land or upon an owner of land or building against the erection or re-erection of any building or works, any commencement certificate granted, any order or suspension of rule, bye-law, regulation, notification or order made, any purchase notice served on a local authority and the interest of the owner compulsorily acquired or deemed to be acquired by it in pursuance of such purchase notice, any revision of development plan, any appointment made of Town Planning Officer, any proceeding pending before, and decisions of, a Town Planning Officer, any decisions of Board of Appeal, any final scheme forwarded to, or sanctioned, varied or withdrawn by the State Government, any delivery of possession enforced, any eviction

summarily made, any notice served, any action taken to enforce a scheme, any costs of scheme calculated and any payments made to local authorities by owners of plots included in a scheme, any recoveries made or to be made or compensation awarded or to be awarded in respect of any plot, any rules or regulations made under the repealed provisions shall be deemed to have been done or taken under the corresponding provisions of this Act, and the provisions of this Act shall have effect in relation thereto."

72. The learned senior counsel Shri Virendra Tulzapurkar appearing for the tenants went to the extent of contending that by provisions in the T.P. Scheme are superior to those in the D.P. Plan. In support to his submission he relied upon the judgment of a Division Bench of Gujarat High Court in *Gordhanbhai Vs. The Anand Municipality & Ors*. reported in XVI (1975) Gujarat Law Report 558 which was under the Bombay Town Planning Act 1954 (the 1954 Act for short) as applicable to Gujarat. The petitioner therein was aggrieved by the development permission granted by the Anand Municipality to the respondents Nos. 4 to 12 to put up a structure on the plot adjoining to his plot. One of the objections raised by the petitioner was that the disputed construction did not observe the margins prescribed in the regulations framed under the Development Plan (comparable to the D.C. regulations in the present case). The respondents pointed out that the regulations which were published and sanctioned by the State Government as a part of the T.P. scheme specifically provided that no margin should be imposed on the particular final plot of the respondents Nos. 4 to 12. In view thereof, the Division Bench in para 6 of its judgment referred to Section 18 (2) (k) of the 1954 Act which specifically provided that the Town Planning scheme may provide for the suspension, so far as may be necessary for the proper carrying out of the scheme of any rule, by-law, regulation, notification or order made or issued under any Act of the State Legislature. Since that had been done, the permission for construction in the particular case could not be

faulted. It was in this context that the Division Bench observed that the provisions of the scheme which are contrary to those regulations shall prevail over the same. It is material to note that this provision in Section 18 (2) (k) of the 1954 Act is pari-materia to Section 59 (1) (b) (iii) of the MRTP Act. It is also material to note that like Section 59 (1) (a) of the MRTP Act, Section 18 (1) of the 1954 Act provides as follows:-

"Making and contents of town planning scheme

18. *Subject to the provisions of this Act or any other law for the time being in force:-*

(1) a local authority for the purpose of implementing the proposals in the final development plan may make one or more town planning schemes for the area within its jurisdiction or any part thereof;"

Section 18 of the 1954 Act as well as Section 59 of the MRTP Act provide for suspension of the regulations in a given case by making a specific provision in the T.P. scheme, which is basically with the object of implementing the proposals in the Final Development Plan. This judgment cannot therefore be relied upon to canvass a general proposition that the provisions in the Town Planning scheme are superior to the Development Plan.

The need for a holistic interpretation

73. The provision of a statute are required to be read together after noting the purpose of the Act, namely that there should be an orderly development in the region, local authority as well as in the town area. The MRTP Act does not envisage a situation of conflict. Therefore one will have to iron out the edges to read those provisions of the Act which are slightly incongruous, so that all of them are read in consonance with the object of the Act, which is to bring about an orderly and planned development. The provision of Section 165 can not be

read to mean a right to carry out a development contrary to the Development Plan, and in any case without a valid development permission particularly when the landowner had not taken any step in pursuance to the erstwhile T.P. scheme nor had objected to the changes brought in by the authorities by following the due process of law. The submissions of Shri Naphade and Tulzapurkar with respect to the alleged conflict between T.P. and D.P. can not, therefore, be accepted.

74. The observations of *O. Chinnappa Reddy J.* in para 33 of the Judgment in *Reserve Bank of India Vs. Peerless Corpn.* reported in [AIR 1987 SC 1023 = 1987 (1) SCC 424] are instructive in this behalf –

"33. Interpretation must depend on the text and the context. *They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important.* ***That interpretation is best which makes the textual interpretation match the contextual.*** *A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act.* ***No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.****"……*

(emphasis supplied)

75. The counsel for the landowner criticised the impugned judgment for accepting the observations of another Division Bench of Bombay High Court in *Rusy Kapadia v. State of Maharashtra* reported in [1998 (2) ALL MR 181], In that matter certain private land was reserved in the D.P. plan of Pune for a public park. The landowner had no objection to the same, but the land was not acquired. The landowner sold the land to some other persons, who moved the Government for de-reservation of the land to use it for residential purpose. The Government invited objections under Section 37 of the MRTP Act and thereafter issued the notification granting de-reservation. At that stage some other citizens filed this PIL challenging that notification on the ground that the land was ear-marked for environmental purposes and should not be de-reserved. It was submitted in that matter on behalf of the purchasers of the land that in the T.P. scheme the use for residential purpose was permissible, and since the T.P. scheme was sanctioned subsequent to the development plan, it shall prevail. Rejecting that argument, the Division Bench observed in para 8 of its judgment as follows:-

> "…… We heard and also perused the provisions with the assistance of the Ld. Counsel for the parties. Town Planning Scheme is provided and dealt with by Chapter V of the Act. This Chapter has beginning with Section 59 and opening of the section itself refers that the provisions of this Chapter are subject to the provisions of the Act. The provisions precedent to section 59 are from section 1 to section 58 which include section 31, sub-section (6) which proclaims that the Draft Plan is final and binding on the Planning Authority. As such the binding force would carry even when they anyway deal with the Town Planning Scheme. Besides this section 39 and section 42 of the Act unequivocally indicate that the Development Plan has to definitely prevail over anything and everything including the Town Planning Scheme. In view of this the submission is without any merit."

76. The Division Bench deciding *Rusy Kapadia's* case (supra) referred to para 25 of the Judgment of this Court in *Bangalore Medical Trust Vs. B.S. Muddapa* reported in [1991 (4) SCC 54] to emphasize the importance of protecting environment. The High Court quashed the decision of the Government granting de-reservation but kept it in abeyance for a period of two years, and directed that if during this period the private respondents (i.e. purchasers of the land) provided adequate green area as envisaged in the development plan, this order will not operate. This order of the High Court in *Rusy Kapadia* (supra) was challenged by those private respondents, the judgment in which Appeal is reported in the case of *Raju S. Jethmalani Vs. State of Maharashtra* reported in [2005 (11) SCC 222]. This Court in the case of *Raju Jethmalani* noted that the observations in *Bangalore Medical Trust* were in the context of Section 38 (A) of that Act. The Court also noted that though the development plan provided the area for the garden, no proceedings for acquisition of the concerned plot had ever been initiated. In that context, the court observed that there is no prohibition for preparing the development plan comprising the private land, but the plan cannot be implemented unless the said private land was acquired. It was for this reason that the court allowed the appeal and set aside the order in *Rusy Kapadia's* case, but this time directed the petitioners of the PIL (i.e. Rusy Kapadia & Ors.) to raise funds in six months if they wanted the park to be maintained, in order to assist the Government to acquire the land, failing which it will be open to the appellants to develop the land. This direction was given because the State Government and PMC had expressed inability to raise the necessary funds to acquire the concerned plot of land. It is material to note that in *Raju Jethmalani's* case this Court did not deal with the controversy concerning the superiority of the Development Plan vis-a-vis the T.P. scheme, nor can the Judgment be read as laying down a proposition that development contrary to the D.P. plan is permissible. The observations in the case of *Rusy Kapadia* as quoted above are approved in the presently impugned judgment, and have

been once again reiterated by another Division Bench of the Bombay High Court in *Indirabai Bhalchandra Bhajekar Vs. The Pune Municipal Corporation and Ors.,* reported in [2009 (111) Bom LR 4251]. Having noted the inter-relation amongst the various sections of the statute, in our view, it cannot be said that the T.P. scheme is either superior or of equal strength as the Development Plan.

77. The counsel for the developer then relied upon the judgment of this Court in *Laxmi Narayan Bhattad Vs. State of Maharashtra* reported in [2003 (5) SCC 413] for further supporting the submission in this behalf. The appellant in this case was allotted an alternative plot of land and monetary compensation under an award when part of his land was acquired to implement the T.P. scheme finalized in 1987. The appellant however wanted additionally the Transferable Development Rights (TDR) as provided under Development Control Regulations framed later in 1991. This Court declined to accept the submission of the appellant. It was held that the appellant will be eligible only for the benefits under the T.P. scheme, since the acquisition of his land was to implement the same. The D.C. Regulations of 1991 had come subsequently. There was no provision for TDR under the T.P. scheme and therefore, the appellant could not get T.D.R which are provided subsequently in the D.C. Regulations of 1991. This judgment also cannot be read as laying down that the T.P. scheme will prevail over or is of equal strength as the D.P. plan.

78. Thus from the analysis of the relevant provisions and the judgments it is clear that the right claimed under the erstwhile T.P. scheme could not be sustained in the teeth of the reservation for a Primary school under the 1987 D.P. plan. The submission in this behalf cannot be accepted.

Additional submissions in this Court in defence of the Government Order:-

79. The appellants came up with some more submissions

in this Court. They submitted that the shifting was protected under Rule 6.6.2.2, and the reference to Rule 13.5 in the Government's order dated 3.9.1996 was erroneous. Now, this Rule 6.6.2.2 reads as follows:-

> "6.6.2.2 In specific cases where a clearly demonstrable hardship is caused the Commissioner may by special written permission
>
> (i) Permit any of the dimensions/provisions prescribed by these rules to be modified provided the relaxation sought does not violate the health safety, fire safety, structural safety and public safety of the inhabitants, the buildings and the neighborhood. However, no relaxation from the set back required from the road boundary or FSI shall be granted under any circumstances.
>
> While granting permissions under (i) conditions may be imposed on size, cost or duration of the structure abrogation of claim of compensation payment of deposit and its forfeiture for non-compliance and payment of premium."

As can be seen from this Rule it provides for variations with respect to dimensions and structural requirements. This rule 6.6.2.2 is a part of Rule 6 which contains the 'Procedure for obtaining building permission/ commencement certificates'. It does not deal with shifting of a particular reservation from one plot to another which is covered under Rule 13.5 (with certain restrictions) to which we have already referred. Thus Rule 6.6.2.2 has no application at all.

80. The request of the landowner was to shift the reservation of a primary school from F.P. No. 110, and to grant him the permission for development under Section 45 of the Act. It is also material to note that though subsequent to the Government orders, Commencement Certificates were issued, there was no order specifically setting aside the earlier order

of the City Engineer of PMC passed under Section 45 of the MRTP Act rejecting the building permission by his letter/order dated 6.11.1995. We are, therefore, required to infer from the Commencement Certificate which refers to Section 44 and 45 (alongwith other sections) that the appeal against the order of the City Engineer is impliedly allowed under Section 47 of the Act. This is because there is no such specific mention of reversal of the order dated 6.11.1995 even in the aforesaid order of the State Government dated 3.9.1996.

81. It was therefore contended on behalf of the developer that the order passed by the Government made a reference to a wrong provision of law. It was submitted that Section 47 was erroneously relied upon, and the order was in fact an order passed under Section 50 of the Act.

Section 50 reads as follows:-

"50. Deletion of reservation of designated land for interim draft of final Development Plan.

(1) The Appropriate Authority (other than the Planning Authority), if it is satisfied that the land is not or no longer required for the public purpose for which it is designated or reserved or allocated in the interim or the draft Development plan or plan for the area of Comprehensive development or the final Development plan, may request—

(a) the Planning Authority to sanction the deletion of such designation or reservation or allocation from the interim or the draft Development plan or plan for the area of Comprehensive development, or

(b) the State Government to sanction the deletion of such designation or reservation or allocation from the final Development plan.

(2) On receipt of such request from the Appropriate

Authority, the Planning Authority, or as the case may be, the State Government may make an order sanctioning the deletion of such designation or reservation or allocation from the relevant plan:

Provided that, the Planning Authority, or as the case may be, the State Government may, before making any order, make such enquiry as it may consider necessary and satisfy itself that such reservation or designation or allocation is no longer necessary in the public interest.

(3) Upon an order under sub-section (2) being made, the land shall be deemed to be released from such designation, reservation, or, as the case may be, allocation and shall become available to the owner for the purpose of development as otherwise permissible in the case of adjacent land, under the relevant plan."

As can be seen, Section 50 provides for deletion of a reservation at the instance of an Appropriate authority (other than the planning authority) for whose benefit the reservation is made. Such is not the present case. Under sub-section (1) of Section 50, the appropriate authority has to be satisfied that the land is not required for the public purpose for which it is reserved. "Appropriate authority" is defined under Section 2 (3) of the Act to mean a public authority on whose behalf the land is designed for a public purpose in any plan or scheme and which it is authorised to acquire. In the instant case, the acquiring body is PMC, and it will mean the general body of PMC. Assuming that the section applies in the instance case, the general body has to be satisfied that the land is no longer required for the public purpose for which it is designed or reserved. In the instant case, it is on the direction of the Minister of State that the Municipal Commissioner has given a report which has been used by the State Government to pass an order of shifting the reservation from F.P. No.110. The officers of the Planning Authority as well as of the concerned Government department were not in favour of deleting the reservation. The

Commissioner's opinion could not have been treated as the opinion of PMC. Under certain circumstances the Municipal Commissioner can act on behalf of the Municipal Corporation, and those sections are specifically mentioned in Section 152 of the MRTP Act. Section 50 is not one of those sections and, therefore, the State Government could not have made any such order sanctioning the deletion of reservation on the basis of the report of the Municipal Commissioner. Section 50 is, therefore, of no help to the appellants.

82. One of the sections which was pressed into service to defend the directions of the State Government dated 3.9.1996 and 29.7.1998 and the actions of the Municipal Commission was Section 154 (1) of the MRTP Act. This section reads as follows:-

"154. Control by State Government

(1) Every Regional Board, Planning Authority and Development Authority shall carry out such directions or instructions as may be issued from time to time by the State Government for the efficient administration of this Act.

(2) If in, or in connection with, the exercise of its powers and discharge of it functions by any Regional Board, Planning Authority or Development Authority under this Act, any dispute arises between the Regional Board, Planning Authority or Development Authority, and the State Government, the decision of the State Government on such dispute shall be final."

It was submitted that the State Government was thus entrusted with the over-all control in the interest of efficient administration, and its directions had to be followed by the Planning Authority, and such directions could not be faulted on any count. In a similar situation in *Bangalore Medical Trust* (supra), a reservation for a public park was sought to be shifted

for the benefit of a private nursing home. Amongst others Section 65 of the Bangalore Development Act, 1976 was sought to be pressed into service which authorised the Government to issue directions to carry out the purposes of the act. This Court observed in para 52 of that judgment that the section authorises the Government to issue directions to ensure that provisions of law are obeyed and not to empower itself to proceed contrary to law. In the present matter, it is to be seen that the section provides for directions or instructions to be given by the State Government for the efficient administration of the Act. This implies directions for that purpose which are normally general in character, and not for the benefit of any particular party as in the present case. The provisions of law cannot be disregarded and ignored merely because what was done, was being done at the instance of the State Government. Consequently, Section 154 cannot save the directions issued by the State Government or the actions of the Municipal Commissioner in pursuance thereof.

83. Thus, the reliance on these provisions is of no use to the appellants. It was submitted that while passing the order the Government has referred to a wrong provision of law and reference to a wrong provision of law does not vitiate the order if the order can be traced to a legitimate source of power. Reliance was placed on the judgment of this Court in *PR Naidu v. Government of Andhra Pradesh* (reported in AIR 1977 SC 854) = [1977 (3) SCC 160] and *VL and Co. v. Bennett Coloman and Co.* [AIR 1977 SCC 1884] = [1977 (1) SCC 561]. In the instant case, however, the order of the Government dated 3.9.1996 cannot be traced to any legitimate source of power, and therefore, the situation cannot be remedied by reference to other sources of power. The Division Bench has therefore, rightly commented on this submission in paragraph 180 of its judgment that 'the rub is that the action taken by the Planning authority was otherwise not legal and justified'. It could not therefore be justified by reference to other provisions of law because basically the decision itself was illegal.

84. Thus the submission canvassed on behalf of the appellants is that although the landowner never objected to the reservation either for a garden or a primary school during the process of the revision of the D.P. Plan during 1982 to 1987, and although he had received the compensation for its acquisition, he retained the right to develop the property for residential purposes merely because under the erstwhile Town Planning scheme residential use was permissible, and it is supposed to be saved under Section 165 (2) of the MRTP Act. However, as seen from the conjoint reading of Section 39, 42 and 46, and the scheme of the Act, such a submission cannot be accepted. That apart, ultimately it was contended on his behalf the deletion of the reservation of a primary school on this plot u/s 37 of the MRTP Act is not necessary, and the order passed by the State Government in his favour can be explained u/s 50 of the MRTP Act read with D.C. Rule 6.6.2.2. As we have seen Section 50 as well as D.C. Rule 6.6.2.2. have no application to the present case, nor can the power of the State Government under Section 154 of the Act help the appellants. Besides, independent of one's right either under the D.P. Plan or the T.P. Scheme, one ought to have a permission for development granted by the planning authority traceable to an appropriate provision of law. In the present case there is none. The appellants are essentially raising all these submissions to justify a construction which is without a valid and legal development permission. The appellants have gone on improving and tried to change their stand from time to time with a view to justify Government's order in their favour. However, "Orders are not like old wine becoming better as they grow older" as aptly stated by Krishna Iyer J. in para 8 of *Mohinder Singh Gill Vs. Chief Election Commissioner, New Delhi* reported in 1978 (1) SCC 405. The submissions of the appellants in defence of the decision of the State Government are devoid of any merit and deserve to be rejected.

Legality of the acquisition of the land:

Whether the acquisition lapses on account of change of purpose of acquisition

85. As seen earlier, the letter of the landowner had led to the subsequent steps for acquisition. The landowner was interested in good return for his land. The tenants were interested only in the rehabilitation on the same plot of land. That was their stand until the award dated 12.5.1983. The Civil Court has held the acquisition for the changed purpose under the D.P Plan as bad in law on the ground that the initially designated public purpose for acquisition was changed. Was the civil suit maintainable? Was the view taken by the Civil Court a correct view? We are required to go into that question also, since the order of the Civil Court is sought to be defended by the landowner as well as by the developer.

86. The Learned Civil Judge Senior Division set aside the award by his judgment and decree dated 23.4.1990 on the ground that though the land was initially proposed to be acquired for a garden, it was ultimately to be used for another public purpose i.e. setting up a primary school. It was contended on behalf of the developer that in the instant case the declaration under Section 6 of the L.A. Act was issued when the land was reserved for a garden, and the purpose of acquisition must subsist as initially designated until the possession of the land is taken. The Court accepted the contention that the acquisition had lapsed due the change of purpose of reservation by the time the award was made. In the instant case, the award was made on 12.5.1983, but pursuant to the award the possession of the plot was not taken in the circumstances mentioned earlier. According to the appellant the acquisition was not complete, and the jurisdiction to further continue with the acquisition was no longer available.

87. Two judgments of Bombay High Court were relied upon on behalf of the appellants i.e. *Industrial Development*

& Investment Company Pvt. Ltd. Vs. State of Maharashtra reported in 1988 Mh.LJ 1027 (which was relied upon by the Learned Civil Judge Senior Division also), and *Santu Kisan Khandwe Vs. Special Land Acquisition Officer No. 2 Nasik & Ors* reported in 1995 (1) Mh.LJ 363, in support of the proposition that the purpose of acquisition must subsists till vesting. As far as the first judgment of the High Court in the case of Industrial Development Company is concerned, the same is about the provisions of MRTP Act, and it has been specifically overruled by this Court in *Municipal Corporation of Greater Bombay Vs. Industrial Development Investment Co. Pvt. Ltd. & Ors.* reported in 1996 (11) SCC 501. It was a case where the concerned parcel of land situated in Dharavi, Mumbai was acquired by the Municipal Corporation under the MRTP Act initially for the setting up of a Sewage Purification Plant, but subsequently the land was sought to be used for the residential and commercial purposes of its employees, since this Sewage Treatment Plant was shifted to another parcel of land. This utilisation was held to be completely valid and permissible by K. Ramaswamy, J.

88. The appellants before us contended that Majmudar, J., the other Learned Judge deciding the I.D.I Co's. case had taken a different view on the issue of change of user, and therefore, the issue remained undecided, and that the view taken by the Bombay High Court in the above referred two judgments deserved acceptance. The appellants submitted that Majmudar, J. agreed with K. Ramaswamy, J. only to the extent that the petition filed by the respondents in the High Court deserved to be dismissed on the ground of delay and laches. As far as the ground of change of purpose is concerned, Majmudar J., expressed his different opinion in the following few sentences:-

> "33. Even though the proposal under Section 126(1) is for acquisition of land for a specified public purpose, if the planning authority wants to acquire the land subsequently for any other public purpose earmarked in the

> modified scheme as has happened in the present case that is if the appellant-Corporation which had initially proposed to acquire the land for extension of sewerage treatment plant wanted subsequently to acquire the same land for its staff quarters then such a purpose must be specifically indicated in the plan meaning thereby that the land must be shown to be reserved for the staff quarters of the Corporation and then the Special Planning Authority which had become the appropriate planning authority, i.e., BMRDA would be required to issue a fresh proposal under Section 126(1) read with Section 40(3)(e) and Section 116 of the MRTP Act and follow the gamut thereafter. So long as that was not done the earlier proposal under Section 126(1) and the consequential notification by the State Government under Section 126(2) which had lost their efficacy could not be revitalised……."

89. The appellants relied upon the judgment of this Court in *Special Land Acquisition Bombay Vs. M/s Godrej & Boyce* reported in AIR 1987 SC 2421, in support of their contention, that the purpose for acquisition must continue until possession is taken. In that matter this Court held that the title to the land vests in the Government only when the possession is taken. It is however, material to note that this judgment is concerning Section 16 of the L.A. Act. As far as this submission is concerned, as held by *K. Ramaswamy J., in I.D.A Co's* case (supra), one must note that the scheme of MRTP Act is different from that under the L.A. Act. In para 11 and 12 of his judgment in *I.D.I Co's.* case (supra) he has specifically held that Section 126 (1) of the MRTP Act is a substitute for the notification under Section 4 of the L.A. Act. A declaration under Section 126 (2) is equivalent to a declaration under Section 6 of the L.A. Act. The objections of the persons concerned are considered before such land gets earmarked for public purpose in the plan. Therefore, there is no need of any enquiry as under Section 5A of the L.A. Act. Section 126 (1) (c) specifically states that when an application is made to the State Government for acquiring

the land under the L.A. Act, the land vests absolutely with the Planning Authority. Therefore, it was held that in the scheme of the MRTP Act, it is not necessary that the original public purpose should continue to exist till the award was made and possession taken.

90. The observations of K. Ramaswamy, J. in paragraph 11 of the judgment in *I.D.A. Co's* case (supra) are relevant in this behalf. This para reads as follows:-

> **"11.** If we turn to Chapter III of the MRTP Act, we find that the entire machinery is provided for preparation, submission and sanction of development plan proceeding from Section 21 and ending with Section 31. These provisions, in short, provide for preparation of draft development plant by the planning authority inviting objections of persons concerned against such proposals, hearing of objections filed by the objectors as per Section 28 sub-section (3) by the Planning committee and then submitting its report to the planning authority which ultimately gets the proposals approved by the State Government under Section 30. All these provisions do indicate that requirement, designation, reservation or earmarking of any land for acquisition for any specified public purpose as indicated in the plan has already undergone the process of hearing after the objections of the persons concerned were considered and then such land gets earmarked for public purpose in the plan. It is after that stage, therefore, when need to acquire such earmarked, designated or reserved land for public purpose under the plan arises, that Section 126(1) proposal gets issued by the planning authority concerned and which itself becomes a substitute for Section 4(1) notification under the Act. *It would thus, appear that the scheme of acquisition of earmarked land under the plan for a specified public purpose thereunder, is a complete scheme or code under the MRTP Act. It is a distinct and*

> *independent scheme as compared to general scheme of acquisition under the Land Acquisition Act."*
>
> (emphasis supplied)

91. In this connection, we must note Section 126(1) of the MRTP Act provides for three modes of acquisition of land for public purposes specified in the plan. The third mode is by making an application to the State Government for acquiring such land under the L.A. Act, and thereafter the land so acquired vests absolutely in the Planning Authority. Sections 126(1) and (2) are extracted herein below for ready reference.

> *"126 - Acquisition of land required for public purposes specified in plans*
>
> (1) Where after the publication of a draft Regional Plan, a Development or any other plan or Town Planning Scheme, any land is required or reserved for any of the public purposes specified in any plan or scheme under this Act at any time the planning Authority, Development Authority, or as the case may be, [any Appropriate Authority may, expect as otherwise provided in section 113A] [acquire the land,—
>
> (a) by agreement by paying an amount agreed to, or
>
> (b) in lieu of any such amount, by granting the land-owner or the lessee, subject, however, to the lessee paying the lessor or depositing with the Planning Authority, Development Authority or Appropriate Authority, as the case may be, for payment to the lessor, an amount equivalent to the value of the lessor's interest to be determined by any of the said Authorities concerned on the basis of the principles laid down in the Land Acquisition Act, 1894(I of 1894), Floor Space Index (FSI) or Transferable Development Rights (TDR) against the area of land surrendered free of cost and free from all

encumbrances, and also further additional Floor Space Index or Transferable Development Rights against the development or construction of the amenity on the surrendered land at his cost, as the Final Development Control Regulations prepared in this behalf provide, or

(c) by making an application to the State Government for acquiring such land under the Land Acquisition Act, 1894(I of 1894),and the land (together with the amenity, if any so developed or constructed) so acquired by agreement or by grant of Floor Space Index or additional Floor Space Index or Transferable Development Rights under this section or under the Land Acquisition Act, 1894(I of 1890), as the case may be, shall vest absolutely free from all encumbrances in the Planning Authority, Development Authority, or as the case may be, any Appropriate Authority.]

(2) On receipt of such application, if the State Government is satisfied that the land specified in the application is needed for the public purpose therein specified, or [if the State Government (except in cases falling under section 49 [and except as provided in section 113A)] itself is of opinion] that any land included in any such plan is needed for any public purpose, it may make a declaration to that effect in the Official Gazette, in the manner provided in section 6 of the Land Acquisition Act, 1894(I of 1894), in respect of the said land. The declaration so published shall, notwithstanding anything contained in the said Act, be deemed to be a declaration duly made under the said section:

[Provided that, subject to the provisions of sub-section (4), no such declaration shall be made after the expiry of one year from the date of publication of the draft Regional Plan, Development Plan or any other Plan, or Scheme, as the case may be.]

(3) ……..

(4) ……..”

92. Section 128 of the MRTP Act strengthens the view that we are taking. Section 128 deals with a situation where the land is sought to be acquired for a purpose other than the one which is designated in the plan or the scheme. In that case provisions of the L.A. Act apply with full force. This Section reads as follows:-

“128. Power of State Government to acquire lands for purpose other than the one for which it is designated in draft plan or scheme.

(1) Where any land is included in [any plan or scheme] as being reserved, allotted or designated for any purpose therein specified or for the purpose of Planning Authority or Development Authority or Appropriate Authority and the State Government is satisfied that the same land is needed for a public purpose different from any such public purpose or purpose of the Planning Authority, Development Authority or Appropriate Authority, the State Government may, notwithstanding anything contained in this Act, acquire such land under the provisions of the Land Acquisition Act, 1894(I of 1894).

[(1A) Save as otherwise provided in this Act or any other law for the time being in force where any land included in any plan or scheme as being reserved, allotted or designated for any purpose therein specified or for the purposes of a Planning Authority or Development Authority or Appropriate Authority, is being acquired by the State Government under the provisions of the Maharashtra Industrial Development Act, 1961(Mah. III of 1962), for the Maharashtra Industrial Development Corporation (being the Special Planning Authority deemed to have been appointed as such under sub-section (1A) of section 40),

the provisions of sub-sections (2) and (3) of this section shall mutatis mutandis, apply to such acquisition proceedings.]

(2) In the proceedings under the Land Acquisition Act, 1894(I of 1894), the Planning Authority, or Development Authority or Appropriate Authority, as the case may be, shall be deemed to be a person interested in the land acquired; and in determining the amount of compensation to be awarded, the market value of the land shall be assessed as if the land had been released from the reservation, allotment or designation made in the [any plan or scheme] or new town, as the case may be, and the Collector or the Court shall take into consideration the damage, if any, that Planning Authority or Development Authority or Appropriate Authority, as the case may be, may sustain by reason of acquisition of such land under the Land Acquisition Act, 1894(I of 1894), or otherwise, and the proportionate cost of the Development plan or town planning scheme or new town, if any, incurred by such Authority and rendered abortive by reason of such acquisition.

(3) On the land vesting, in the State Government under sections 16 or 17 of the Land Acquisition Act, 1894(I of 1894), as the case may be, the [relevant plan or scheme] shall be deemed to be suitably varied by reason of acquisition of the said land."

Sub-section (1) of this Section states that in such situations the provision of L.A. Act will apply notwithstanding anything contained in the MRTP Act, and sub-section (3) specifically states that in such an event the vesting will take place under Section 16 and 17 of the L.A. Act as the case may be. That is not the case with respect to the acquisition under Section 126 of the MRTP Act, where the vesting takes place in the three circumstances mentioned thereunder. In the present case also the acquisition is resorted to by issuing a notification under

Section 126 read with Section 6 of the L.A. Act. The vesting therefore takes place at that stage.

93. After the declaration is made under Section 126 (2) of the MRTP Act, the proceedings to determine the compensation follow the procedure as laid down under the L.A. Act until Section 11 thereof. A notice is given to the interested persons as required under Section 9 of the L.A. Act to lodge their claims to compensation for all the interests in such land. Thereafter, they are heard in the inquiry made by the Collector or the S.L.A.O., and after following the requirements as laid down in Section 11, the compensation is arrived at. The change of purpose of utilisation of the land acquired under Section 126 of the Act does not make any difference in this behalf. There is no prejudice caused to the landowners since the award is made only after affording them full hearing concerning their claims for compensation.

94. (i) When it comes to urgency also, there is a separate provision in the MRTP Act, distinct from the one in the L.A. Act. Section 129 of the MRTP Act contains provisions different from Section 17 of the L.A. Act. Under sub-Section (2) of Section 129 there is the requirement of paying to the owner of the land concerned, an interest @ 4% per annum on the amount of compensation, from the date of taking possession of the land until the date of payment.

(ii) Thus the MRTP Act contains a separate scheme in Chapter VII of the Act distinct from the one in L.A. Act. This is because MRTP Act is a special act enacted for the purpose of planned development and the provisions concerning land acquisition are made therein in that context.

95. We may mention at this stage that recently a Constitution Bench of this Court has also held in the context of Section 11A of the L.A. Act (providing for two years period to make the award) in *Girnar Traders (3) Vs. State of Maharashtra*

& Ors. reported in 2011 (3) SCC 1, that only the provisions with respect to the acquisition of land, payment of compensation and recourse of legal remedies under the L.A. Act can be read into Chapter VII of the MRTP Act concerning Land Acquisition, and Section 11A of the L.A. Act will not apply thereto. It held that in the scheme of the MRTP Act, the provisions of Land Acquisition Act would apply only until the making of the award under Section 11 of the Act. The Court held that MRTP Act is a self contained code and Sections 126 to 129 thereof clearly enunciate the intention of the framers that substantive provisions of L.A. Act are not applicable to MRTP Act. In para 129 of the judgment the Constitution Bench has specifically held:-

> "129. …… Vesting, unlike Section 16 of the Land Acquisition Act which operates only after the award is made and compensation is given, whereas under the MRTP Act it may operate even at the initial stages before making of an award, for example, under Sections 126(1)(c) and 83."

96. The appellants herein have contended, and so had the respondents in *I.D.A. Co's* case (supra) contended that the original public purpose should continue till the award was made and possession taken. While dealing with this proposition, K. Ramaswamy, J. took an overview of the leading judgments in this behalf. The Learned Judge in arriving at his conclusions referred to the law laid down by this Court in *Ghulam Mustafa Vs. State of Maharashtra* reported in 1976 (1) SCC 800, *Mangal Oram Vs. State of Orissa* reported in 1977 (2) SCC 46, *State of Maharashtra Vs. Mahadeo Deoman Rai* reported in 1990 (3) SCC 579 , *Collector of 24 Parganas Vs. Lalit Mohan Mullick* reported in 1986 (2) SCC 138, and *Ram Lal Sethi Vs. State of Haryana* reported in 1990 Supp. SCC 11.

97. It is relevant to refer to these judgments. *Ghulam Mustafa* (supra) & *Mangal Oram* (Supra) were both cases concerning the acquisition under the Land Acquisition Act. In

the case of *Ghulam Mustafa,* V.R. Krishna Iyer J., observed as follows:-

> "…..once the original acquisition is valid and title has vested in the municipality how it uses the excess land is no concern of the original owner and cannot be the basis for invalidating the acquisition. There is no principle of law by which a valid compulsory acquisition stands voided because long later the requiring authority diverts it to a public purpose other than the one stated in the Section 6(3) declaration."

In *Mangal Oram* (supra) a bench of three Judges specifically held that use of land after a valid acquisition for a different public purpose will not invalidate the acquisition. In Collector of 24 Parganas (supra) the notification under Section 4 of the West Bengal Land Development and Planning Act was issued for settlement and rehabilitation of displaced persons. Subsequently the land was utilised for establishment of a Hospital for crippled children, which was held to be not vitiated. In *Union of India Vs. Jaswant Rai Kochhar* reported in 1996 (3) SCC 491 land acquired for housing scheme was utilised for commercial purpose i.e. a District Centre. This Court held in that matter that it is will settled law that land sought to be acquired for one public purpose may be used for another public purpose. In *State of Maharashtra Vs. Mahadeo Deoman Rai* reported in 1990 (3) SCC 579 yet another Bench of three Judges had held that requirement of public purpose may change from time to time but the change will not vitiate the acquisition proceeding. The opinion rendered by K. Ramaswamy J. is in conformity with this line of judgments. Following this law, K. Ramaswamy, J. held in para 22 as follows:-

> "**22.** It is thus well-settled legal position that the land acquired for a public purpose may be used for another public purpose on account of change or surplus thereof.

> The acquisition validly made does not become invalid by change of the user or change of the user in the Scheme as per the approved plan…….. It would not, therefore, be necessary that the original public purpose should continue to exist till the award was made and possession taken."

This being the position, there is no difficultly in stating that the two judgments of the Bombay High Court which are relied upon by the appellants (viz. in the cases of *I.D.I. Co.* (supra) and *Santu Kisan Khandwe* (supra) do not lay down the correct position of law. We are in respectful agreement with the opinion rendered by K.Ramaswamy J. in *I.D.I. Co's* Case. The acquisition of the land in the present case cannot said to be invalid on account of change of purpose during acquisition.

98. That apart, there is also the question as to whether the Civil Court had the jurisdiction to entertain a suit to challenge the acquisition after the award was rendered. This is because when it comes to acquisition, the L.A. Act provides for the entire mechanism as to how acquisition is to be effected, and the remedies to the aggrieved parties. In *State of Bihar Vs. Dhirendra Kumar & Ors.* reported in 1995 (4) SCC 229 this Court in terms held that since the Act is a complete code, by necessary implication the power of the Civil Court to take cognizance of a case under Section 9 of the CPC stands excluded, and Civil Court had no jurisdiction to go into the question of the validity or legality of the notification under Section 4 and declaration under Section 6, which could be done only by the High Court in a proceeding under Article 226 of the Constitution. In view of this dictum the civil suit itself was not maintainable in the present case.

Conduct of the Landowner/Developer

99. The facts as narrated earlier can be placed into proper prospective if we note the conduct of the landowner and the

developer appointed by him as it emerges from stage to stage which is as follows:-

(a) The landowner never raised any objection when the F.P. No. 110 was sought to be reserved for a public purpose, viz. either for a garden/playground or subsequently for a primary school.

(b) On his issuing the purchase notice to the Government to purchase the land and to commence the proceedings for acquisition, the State Government responded by confirming the purchase notice under Section 49 (4) of the Act by its letter dated 5.12.1979.

(c) When SLAO started the acquisitions proceedings, and when the notice under Section 9 of the L.A. Act was issued, the landowner replied the same but did not challenge the acquisition as such. He merely demanded compensation at a rate of Rs. 480 per sq.m, and demanded that the material removed after demolition of the temporary structures (of the tenants) on the property be handed over to him.

(d) After the SLAO rejected the objections of the landowner as well as the tenants, and gave his award dated 12.5.1983, the landowner accepted the compensation on 15.3.1985, though under protest.

(e) After the Reference Court enhanced the solatium and the special component by its order dated 15.4.1988, the landowner accepted the enhanced amount, once again under protest. However, he did not file the statutory appeal available to him under Section 54 of the L.A. Act.

(f) When the notice to take possession was given, it is the tenants alone who filed a suit to challenge the acquisition.

(g) After the injunction in that suit No. 966 of 1983 was vacated, the tenants represented to the Minister of State

for UDD, pointing out their difficulties. The landowner did not challenge the acquisition in any manner whatsoever.

(h) After the Development Plan under the MRTP Act was sanctioned, though the reservation was continued, the purpose of utilization of the land was changed in the 1987 D.P. plan from garden to primary school. Thereafter, when the SLAO gave one more notice to take possession on 1.3.1988, some of the tenants filed another Civil Suit bearing No. 397 of 1988 in the Court of Civil Judge, Senior Division Pune. It was at that stage that the landowner who was a defendant in that suit, applied for transposing himself as a plaintiff which application was allowed on 2.4.1988. The Civil Court having held that the acquisition had lapsed due to the change of purpose of acquisition (from what it originally was in 1966), the PMC filed an Appeal which is pending thereafter.

(i) After Shri Manohar Joshi took over as the Chief Minister on 14.3.1995, the landowner entered into a Development agreement with M/s Vyas Constructions on 20.10.1995. Besides, he executed two powers of attorney, one in favour of its proprietor Shri Girish Vyas on 20.10.1995 for carrying out development on F.P. No. 110, and another in favour of Shri Shriram Karandikar on 26.10.1995 to take necessary steps concerning this development. Thereafter the follow-up steps were taken by Shri Karandikar, until the last stage when Shri Girish Vyas stepped in.

(j) After the City Engineer, Pune rejected the proposal of the Architect of the landowner for building permission by his reply dated 6.11.1995, the above referred Shri Karandikar straightaway wrote to the Minister of State for UDD on 20.11.1995, and sought a direction to the Municipal Commissioner to consider landowner's application for development of the property. This application was not addressed to the State Government or to the Secretary concerned, but straightaway to the

Minister of State for UDD, and did not bear any inward stamp of the department. The noting of the Private Secretary of the Minister of State in UDD in the margin of the application showed that it was directly received at the Minister's level. Thereafter as directed by the Minister of State, the Under Secretary of UDD immediately called a meeting of high ranking officers such as Secretary UDD, Director Town Planning, Commissioner of PMC, City Engineer of PMC, and Under Secretary UDD, which meeting would not have been possible unless one had a clout with the Ministry.

(k) The initial stand of the administration was clearly reflected in the notings, and in the record of the meeting held on 3.2.1996. The preliminary note dated 2.2.1996 from the department clearly stated that the land had been acquired after taking the necessary action on the purchase notice, and the compensation had been accepted. The question of returning of the plot to the landowner therefore did not arise.

(l) During the meeting held on 3.2.1996 the City Engineer of PMC also pointed out that landowner had never objected to the reservation on the plot, or the change in the purpose of its utilization from 1982 to 1987, i.e. during the entire process of revising the development plan. If the proceeding before the Minister of State was in the nature of an appeal under Section 47 of the MRTP Act (against the rejection of the proposal of development) under Section 45, the same could not be entertained, and the appeal had to be rejected. If it was an application for de-reservation then it had to be considered under Section 37 of the MRTP Act and not otherwise.

(m) The landowner initially took the stand that it was not an appeal, but subsequently wrote a letter on 23.3.1996 through Shri Karandikar that it was an appeal under Section 47 of the MRTP Act. The landowner and the

developer have been changing their stand from time to time.

The conduct of the Minister of State for UDD, the then Chief Minister, and the Municipal Commissioner

100. We may now refer to the conduct of the then Minister of State for UDD, the then Chief Minister and the then Municipal Commissioner.

(a) As stated above the application of the landowner was received directly at the level of the Minister of State and immediately a meeting of high ranking officers was called, which is normally not done.

(b) In spite of a clear initial stand taken by the City Engineer PMC, as well as by the senior officers of UDD such as its Secretary, in view of the landowner submitting that on the adjoining plots schools had been developed, the Minister of State for UDD asked the Municipal Commissioner to survey the property and make a report, whether the PMC really needed the concerned property. The note of the meeting dated 3.2.1996 shows that initially the Minister of State for UDD was also of the view that if necessary a direction may be issued under Section 37 of the Act, and only a part of F.P. 110 could be released if PMC did not have any objection to reduce the area under reservation.

(c) In view of the direction of the Minister of State, the Municipal Commissioner who is the Chief Executive of PMC and an I.A.S. officer of a high rank was asked to make a report after personally making a site inspection. A direction to a high ranking officer to make a site inspection is not expected in such a case, and is quite unusual and disturbing to say the least.

(d) In his letter dated 17.4.1996 the Municipal Commissioner reiterated the earlier stated stand of PMC to begin with, and then gave the report about the schools

in the vicinity. However, he volunteered to add thereafter that private institutions may not come to this plot to set up a primary school, and PMC may as well spend its funds elsewhere. This was not correct since the applications of two reputed educational institutions for this very plot were pending with the PMC, and this fact was not stated by the Commissioner in his report.

(e) In view of the direction of the State Government, the Commissioner held discussions with Shri Karandikar, who offered to give an alternate unencumbered plot of land of about 5000 to 10,000 sq. feet free of cost. Thereafter the Commissioner recorded in his letter the two proposals given by Shri Karandikar, and observed that if the school was to be shifted from F.P. No. 110, an action under Section 37 of the MRTP Act as well as the permission from PMC will be required.

(f) On 24.4.1996 there is a noting (which is subsequent to the letter of the Municipal Commissioner dated 17.4.1996) that the file was called by the then Chief Minister for his perusal. Thus the Chief Minister had kept himself fully abreast with the developments in this matter.

(g) The UDD department did not accept the proposal of shifting the school from F.P. No. 110 to a place far away, as seen from the note prepared by the department (signed by the Deputy Secretary on 4.6.1996) recording that if the school was to be shifted from F.P. No. 110, it had to come up in the vicinity of approximately 200 metres as per rule 13.5 of Pune D.C. Rules. The note suggested acceptance of the proposal of reduction of 50% of the area under reservation by resorting to the procedure under Section 37 of MRTP Act.

(h) The Minister of State did not approve this note dated 4.6.1996, and in view of Shri Karandikar insisting on

shifting the school from F.P. No. 110, the subsequent note dated 13.6.1996 recorded that if the condition of 200 metres is to be relaxed, orders will have to be obtained from the Chief Minister (which power is disputed by the Principal Secretary, UDD in his subsequent note dated 24.7.1998).

(i) Thereafter, the developer offered another parcel of land at Lohegaon (which is a far off place), on which proposal the department prepared a note to give four directions to PMC which have been referred earlier. Under that proposal, Lohegaon land was to be exchanged for the concerned F.P. No. 110 which was to be released by invoking DC Rule 13.5, and the landowner was to return to PMC the amount of compensation received. This note was approved by the Chief Minister on 21.8.1996 and accordingly a direction was given to the Municipal Commissioner on 3.9.1996 to accept the proposal of the developer and issue the development permission for F.P. No. 110.

(j) The Senior Law Officer of the PMC recorded an objection that such permission will require the approval of the general body of the Municipal Corporation, but the Municipal Commissioner overruled him on 21.9.1996, in view of the direction of the government to act under DC Rule 13.5 as stated above, and ignored the mandatory provision of Section 37 of MRTP Act.

(k) Thereafter the commencement certificates have been issued on 28.11.1996, and an occupation certificate for the tenants' building was also given on 20.12.1997.

(l) At this stage, the land developer Shri Girish Vyas had written on 15.7.1998 to PMC on learning that according to PMC the Lohegaon land was not suitable for a school. He offered to handover another parcel of land in a residential zone at Mundhwa (which is also a far off place),

and to deposit whatever amount that was required for the construction of a school of 500 sq. feet area at Mundhwa or elsewhere, but the Completion Certificate for the building for the other occupants of F.P. No. 110 (named as Sun-Dew Apartment) be issued.

(m) There is a clear office note dated 22.7.1998 on record which shows that there was already a criticism of this matter in the newspapers and in the General Body of PMC, that one educational amenity in that area was being destroyed. The note recorded that Sr. Chief Secretary of Chief Minister had issued instructions, to put up a self-explanatory note for the perusal of the Chief Minister, to enable him to answer the probable questions in the assembly. This note dated 22.7.1998 was specifically marked for the Chief Minister.

(n) The Principal Secretary UDD had opined on 24.7.1998 that resort to DC Rule 13.5 will not be legal, and an action be taken under Section 37 of MRTP Act. Yet, in view of the favourable indication of the Municipal Commissioner in his letter dated 17.4.1996, a note was prepared on 27.7.1998 to continue to maintain the decision under DC Rule 13.5.

(o) When Shri Girish Vyas had entered into the picture through his above referred letter, the Additional Chief Secretary made a note that since the developer is related to the Chief Minister, the Minister of State may take proper decision as per the rules. It is only because of this note that the Minister of State had signed the papers approving the proposal of the department, and directing that the necessary orders be issued to the PMC. Accordingly, the Deputy Secretary of UDD issued the consequent letter dated 29.7.1998 to the Municipal Commissioner, permitting him to accept the land at Mundhwa or elsewhere, as well as the amount to construct a school building of 500 sq. feet, and to issue the occupancy

certificate for the Sundew Apartments.

(p) Thus it has got to be inferred that not only the then Chief Minister was fully aware about this matter right from April 1996, until the last direction of UDD dated 29.7.1998, but was associated with the decision making process and the directions issued all throughout.

101. The events in this matter disclose that although the officers of UDD and the PMC initially took the clear stand opposing the proposal on behalf of the landowner to put up a residential building in place of a Primary School, the Minister of State for Urban Development asked the Municipal Commissioner to personally carry out a survey of the property, on the ground that two schools had come up in the near vicinity, ignoring the fact that they had so come up as per the provision in the D.P. Plan itself. Thereafter when it was pointed out that the permission of the general body of the Municipal Corporation will be required for the modification, that submission was by-passed. The provision of DC Rule 13.5 requiring alternate land to be provided for the same purpose within 200 meters was also given a go-bye, and this rule was utilized to accept the proposal to shift the school to a very far off place. The mandatory provision for modification under Section 37 of the MRTP Act was totally ignored. Ultimately only an amount for constructing a school building elsewhere and the land therefor was offered to the Municipal Corporation, for getting a reserved plot of land in a prime area of the city released from a public amenity. Last but not the least, the Municipal Corporation was instructed to withdraw the First Appeal which it had filed to challenge the decision of the District Court in favour of the landowner in the matter of acquisition.

102. It is material to note that after the Municipal Commissioner sent his report dated 17.4.1996, the Private Secretary to the then Chief Minister Shri Manohar Joshi had called for the file for his perusal. After all necessary directions were decided, the Chief Minister placed on record his approval

on 21.8.1996 with an apparently innocent remark 'All actions be taken in accordance with law', though he did not forget to record "No objection". Thus, the decision of the Government dated 3.9.1996 to shift the reservation of a primary school from F.P. 110 under D.C. Rule 13.5 was under his order dated 21.8.1996. Subsequently, when his son-in-law Shri Girish Vyas wrote the letter dated 15.7.1998 that money be received for constructing a school somewhere else, it became obvious on the record that the son-in-law of the then Chief Minister was behind the project. At that stage also the Chief Minister had to be pointed out by the Addl. Chief Secretary that the developer is related to him, and therefore, the necessary decision may not be taken by him, but by the Minister of State. Therefore, the file went to the Minister of State for UDD on whose direction the last necessary letter has been sent to PMC by the Deputy Secretary UDD on 29.7.1998. However this subsequent decision is in continuation to the initial decision of the Chief Minister dated 21.8.1996, and therefore the responsibility for the clearance of this disputed construction squarely lies on his shoulders.

A brief summary

103. This is not a case where the landowner or his developer have approached the appropriate authority on the basis of their allegedly subsisting rights under the erstwhile T.P. scheme contending that setting up of a primary school on that plot contrary thereto would be affecting their right to develop the property and is therefore illegal. It is also not a case where they have approached the appropriate authority pointing out that there are sufficient number of schools in the near vicinity with supporting information and, therefore, sought deletion of reservation on the concerned plot. This is a case where the landowner never raised either of the two pleas to begin with. He was conscious of the fact that the land was reserved for a public garden in the 1966 D.P. Plan and, therefore, gave a purchase notice in May, 1979 which was confirmed by the State

Government in December, 1979. When the D.P. Plan was revised during 1982-1987, he never raised any of the above two submissions. He did not even challenge the subsequent reservation for a primary school finalized in 1987. Only in 1995 when Shri Manohar Joshi became the Chief Minister, he appointed his son-in-law as a developer and another power of attorney Shri Karandikar to approach the Ministers directly. He pointed out that two schools had come up on the adjoining plots (which was in fact as per the D.P. Plan itself), and the Minister used this information to get a report from the Municipal Commissioner who suppressed the fact that applications for this very plot from two educational institutions were pending with PMC. Then also the order of deletion was not passed either under Section 37 (leave aside Section 22A), or Section 50 of the Act which was invoked for the first time in this Court (and which otherwise also could not be applied). The order of deletion was passed under D.C. Rule 13.5 which had no application.

104. The effect of what has been done is this: that a landowner accepts compensation for his land when acquisition proceedings are initiated at his instance. The landowner does not challenge either the acquisition proceedings or the amount of compensation, but in fact collects the amount. When the tenants challenge the acquisition, the land owner joins the same subsequently. When the award is set aside by the civil court, and the Municipal Corporation files the appeal, the landowner approaches a close relative of the Chief Minister, who happens to be a property developer. The development permission is granted by-passing the objections of the concerned department of the Government and the Municipal Corporation, and flouting all relevant provisions of law. The Municipal Corporation is asked to withdraw the appeal against the judgment holding that acquisition has lapsed. When the actions are challenged in a public interest litigation, the landowner contends that he had a subsisting right under the erstwhile T.P. Scheme, in spite of a subsequent reservation for a public amenity in the D.P. Plan

holding the field, and that the construction is permissible though its legality cannot be traced to any provision of law.

105. Present case is not one where permission was sought for the construction under erstwhile T.P. scheme, or under Section 50 of the MRTP Act. This is a case where the personal relationship of the developer with the Chief Minister was apparently used to obtain permission for construction without following any due process of law. This is a case of rules and procedures being circumvented to benefit a close relative of the Chief Minister. It is a clear case of *mala fide* exercise of the powers and, therefore, the High Court was perfectly justified in canceling the development permission which was granted by the State Government. The development permission could not be defended either under Rule 6.6.2.2 or under Section 50. The MRTP Act requires a valid development permission under chapter IV of the act, and in the instant case there is none. Consequently, the construction put up on the basis of such permission had to be held to be illegal. In the circumstances, we uphold the judgment of the Division Bench as fully justified in law and in the facts of the case.

Impugned Order passed by the Division Bench

106. (i) As seen above, the Division Bench in the impugned judgment came to the conclusion that the disputed construction by the developer was totally illegal, and also concluded that there was nothing wrong with the acquisition of F.P. No.110. Having held so, it passed the impugned order which can be split into two parts. The first part of the order is arising out of the determination concerning the legality of the construction, and it can be seen in sub-paragraphs (a) to (d) of para 227 of the judgment. The order pertaining to costs is connected with this part and it is in sub-paragraph (f). The second part of the order is regarding appropriate criminal investigation which is in sub-paragraph (e).

(ii) In the first part of its order the Division Bench directed:-

(a) the cancellation of the commencement certificate dated 20.8.1996, 3.5.1997 and 3.7.1998, and occupation certificate dated 20.12.1997,

(b) the PMC and its Commissioner to call upon the landowner and the developer to restore F.P. No.110 to the position prior to the date of the earliest of the commencement certificates, failing which these authorities will take action to demolish the disputed construction, and collect the cost of such action from the landowner and the developer,

(c) the PMC to move an application for restoration of First Appeal (stamp no.18615 of 1994),

and

(d) rejected the prayer to revive first appeal without the demolition of the structure.

(f) the Division Bench directed payment of cost of Rs. 10,000/- each by the State of Maharashtra, the PMC, the then Chief Minister, the then Minister of State, the developer and the Municipal Commissioner to the petitioners.

107. In view of the gross illegality in the order of the State Government and PMC in granting the development permission, the direction (a) for cancellation of Commencement Certificates and Occupation Certificate had to be issued and the same can not be faulted. As far as the direction (c) is concerned, it was noted by the High Court that the PMC had been forced by the

State Government to apply for withdrawal of its First Appeal so that the judgment of the Civil Court remains undisturbed. Since the High Court came to the conclusion that there were nothing illegal about the acquisition, the First Appeal had to be restored. The direction is therefore fully justified. We may note that PMC has already filed an application for restoration of the First Appeal.

Direction to demolish the disputed building, and rejection of the objection based on alleged delay and laches

108. The direction (b) in the impugned order was issued basically on two grounds. Firstly, the development permission had no legal validity whatsoever, and secondly it was clearly a case of showing favouritism by going out of the way and circumventing the law. Besides, since the challenge to acquisition was being rejected, it would not have been proper to postpone the demolition of the disputed construction on the ground of pendency of the First Appeal, since the construction was absolutely illegal. Hence, the High Court issued direction (d) as above.

109. The demolition was objected to by the appellants amongst others on the ground that there was delay and laches in moving the petitions to the High Court. It was submitted that if the petitioners were vigilant, they could have seen the building coming up from November 1996 onwards, but the petitions have been filed only in August 1998. According to them by the time the petitions were filed, the tenants' wing was complete, and even the other wing of Sundew Apartments was nearing completion The Division Bench has rejected this submission in paragraph 220 of its judgment by observing that merely because a construction is coming up, a citizen cannot assume that it is illegal or that the developer had obtained the construction permission in a manner contrary to law. Besides, when the petitioner in Writ Petition No. 4434 of 1998 (who is a Corporator) sought the information about the construction, he was informed by PMC that the same could not be made

available under the relevant rules, though no such rules were shown to the Division Bench. The High Court has on the other hand noted that as a matter of fact even the construction of the building meant for the tenants was actually said to have commenced in March 1997 only. Hence, in the facts of the present case it could not be said that the writ petitions suffered on account of delay or laches, and therefore the High Court was right in rejecting that contention.

110. With respect to the direction for demolition, we may note that similar direction was given way back in the case of *Pratibha Cooperative Housing Society Vs. State of Maharashtra* reported in 1991 (3) SCC 341. The appellant society situated in a prime area in Mumbai had added eight upper floors in excess of the F.S.I. permissible, and the Municipal Corporation directed removal of those floors. The petitioner society challenged the order of the Municipal Corporation. A Division Bench of the Bombay High Court dismissed the Writ Petition, but permitted the society to give proposals to reduce the area of construction upto the permissible limit. During the pendency of the appeal from the judgment of the High Court, the proposal of the society was examined by the Municipal Corporation and was found unacceptable. While dismissing the appeal, this Court noted in the aforesaid judgment that 'the tendency of raising unlawful construction by the builders in violation of the rules and regulations of the Corporation was rampant' in the city of Mumbai. Thereafter it observed in para 6 of the judgment:-

> "We are also of the view that the tendency of raising unlawful construction and unauthorised encroachments is increasing in the entire country and such activities are required to be dealt with by firm hands.
>
> Having noted so it upheld the demolition of the upper eight floors and further observed in the last para of the judgment '

> "Before parting with the case we would like to observe that this case should be a pointer to all the builders that making of unauthorised constructions never pays and is against the interest of the society."

111. The observations of the Court however, have had no effect. In *M.I Builders Pvt. Ltd. Vs. Radhey Shyam Sahu & Ors.* reported in 1999 (6) SCC 464, the issue was with respect to the retention of a public amenity viz. a park in a congested area of city of Lucknow. The park was of historical importance and also an environmental necessity. The Lucknow Mahapalika had permitted the appellant builder to put up a shopping complex and a parking facility thereon. The appellant was permitted to do so without calling any bids and for hardly any monetary gain to the Municipal Corporation. This was also a case where the construction was on the basis of an agreement with the builder which agreement amounted to a fraud on the powers of the Mahapalika, and a clear case of favouritism, as in the present case. This Court dismissed the appeal and directed the demolition of the disputed construction and observed as follows in para 73 of its judgment:-

> "73. ……. This Court in numerous decisions has held that no consideration should be shown to the builder or any other person where construction is unauthorised. This dicta is now almost bordering the rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. Such a discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law……"
>
> (emphasis supplied)

112. In the present case, one would have thought of retaining the building and utilising it for a school. The PMC had shown its willingness to consider such a proposal. But the developer wanted to retain half of the flats of this ten storey building which would have been contrary to the provision in the Development Plan, and hence the proposal fell through. That apart, such a compounding would have been contrary to the above dicta in *M.I Builders* case (supra). There is no redeeming feature whatsoever in the present case. It is clearly a case of misuse of one's position for the benefit of a relative leading to an action which is nothing short of fraud on one's power and also on the statute. There is no reason for us to interfere in the order passed by the High Court directing the demolition of the disputed buildings.

113. The building constructed for the tenants is meant for accommodating them, and it has been stated on behalf of the developer that he is not interested in dis-housing them. The learned senior counsel for PMC Shri R.P. Bhat has also stated on instructions, that PMC has no objection to the retention of the building constructed for the erstwhile occupants of the plot, however these occupants will now have to continue in that building as tenants of PMC. As far as these occupants are concerned, their status at the highest was that of tenants of the landowner. They claim to have been residing on this plot for over fifty years, and appear to be belonging to economically weaker section of the society. Their only request during the acquisition proceedings was that they should be accommodated on this very plot of land. It is another matter that in the High Court and in this Court they supported the landowner and the developer, in view of the promise given to them that in the event the landowner and the developer succeed, the tenants will get ownership rights. Now that the plea of the landowner and the developer is rejected, the best that can happen to these occupants is to get the tenancy rights on this very plot of land. That apart, in view of their long stay on this plot, they had to be rehabilitated. The offer of PMC to accommodate them on the

very plot of land is more than fair, and deserves acceptance. Since, the tenants were already in possession of a part of the plot for residential purpose, they are being continued to remain on that plot for that very purpose. In that event, the tenants may not be entitled to receive any monetary compensation since this offer is as per their original demand and it very much compensates them. However, since the amount of compensation awarded to them was too meagre, if they have collected it, they need not return the same to PMC. This being the position, in our view, the main operative order passed by the High Court needs to be modified appropriately. In the circumstances, we modify and restrict the operative order of demolition only to the extent it directs the removal / demolition of the building meant for the persons other than these tenants (i.e. the ten storey building named as Sundew Apartments).

114. We may as well mention at this stage that as far as this building viz. Sundew Apartments is concerned, no one, except a bank had come forward to claim any third party rights, or prejudice on account of the order of demolition passed by the High Court in spite of the well publicised litigation of this matter. The concerned bank had advanced a loan to the developer against the security of two flats in that building, and it intervened only at the last stage of passing of the order. The Division Bench has rightly rejected the claim of the bank in paragraphs 224 to 226 of its judgment by observing that the court could not accept the contention of the bank that it was not aware of the illegality on the part of the developer. The court did not accept the bank's plea of innocently advancing the money, since the mortgage was executed on 13.8.1998, whereas the allegations concerning the illegality of this transaction had appeared in the newspapers right from March 1998. The bank should have considered the matter in depth before advancing the loan. In any case the demolition will only extinguish its security though its claim against the developer may remain.

Adverse remarks, and the direction for criminal investigation

115. The second part of the operative order in the impugned judgment was based on the adverse inferences drawn by the Division Bench against the then Chief Minister, the Minister of State and the Municipal Commissioner. The petitioners had infact sought a prosecution against all of them. However, after considering the facts and circumstances of the case the court was not inclined to grant that relief, without appropriate prior investigation. Therefore, with respect to this prayer the Court passed an order which is contained in paragraph 227 (e) in two parts as follows:

> (i) to direct the State of Maharashtra to make appropriate investigation against the then Chief Minister, the Minister of State and the Municipal Commissioner by an impartial agency, and
>
> (ii) if satisfied that any criminal offences have been committed by the aforesaid respondents in the discharge of their duties, to take such action as is warranted in law.
>
> These three appellants have therefore made two fold prayers viz. expunging the adverse observations, and setting aside the direction for appropriate investigation to be followed by such action as is warranted in law.

Adverse remarks by the Division Bench against the Municipal Commissioner, Minister of State and the then Chief Minister:-

Adverse remarks against the Municipal Commissioner

116. Apart from other allegations, it has been specifically alleged in Writ Petition 4434 of 1998 that the then Municipal Commissioner "wilted under the pressure of the Chief Minister…..", "acted in flagrant disregard to the provisions of

the law", and "with a view to favour his son-in-law Shri Girish Vyas acted illegally and *mala fide*". As we have seen from the notings on the file, initially he did take a stand which could be said to be as per the record, and in consonance with law. In his affidavit before the High Court, he took the stand that he acted under the directions of the Minister, and hence, he should not be blamed for the ultimate decision. Shri Narshima, learned senior counsel appearing for him drew our attention to the Maharashtra Government Rules of Business framed under Article 166 of the Constitution in this behalf. He also tried to defend the Commissioner's action by invoking Section 154 of the MRTP Act which lays down amongst others that the Planning Authority has to carry out the directions and instructions of the State Government for the efficient administration of the act. The Division Bench declined to accept this explanation. We have already dealt with this submission and recorded our reasons as to why we also cannot accept this reliance on Section 154.

117. (i) It was submitted on behalf of the Commissioner that he brought the correct legal position to the notice of the Minister of State to begin with, but ultimately had to give up due to the instructions from the Minister of State, meaning thereby that he cannot be blamed since he was acting under the directions of his superiors. Reliance was placed in this behalf on the proposition in paragraph 16 of *Tarlochan Das Vs. State of Punjab & Ors* reported in 2001 (6) SCC 260 to the following effect:-

> "No government servant shall in the performance of his official duties, or in the exercise of power conferred on him, act otherwise than in his best judgment except when he is acting under the direction of his official superior."

(ii) This defence cannot help him much if we see his actions atleast on two occasions. Firstly, when he made his report dated 17.4.1996 to the Minister of State, he overlooked the fact that the reservation on this plot was for a primary school, and not merely for a municipal primary

school. As has been noted by the Division Bench, two private schools had already come up on the adjoining plots as per the D.P. provision itself. Besides, two renowned educational institutions had applied way back for this plot of land for running of schools thereon. The Commissioner did not place this very vital information before the Minister of State in his report. On the other hand he stated that Prabhat Road being a higher middle class area, a municipal school may not get adequate students. The Division Bench has therefore, observed in paragraph 143 of its judgment, that his report was "far from truth". Secondly, he bypassed the general body of the Municipal Corporation in the matter of deleting the reservation on F.P. No. 110 inspite of being aware of the correct legal position, and his attention having been specifically drawn thereto by the senior law officer of PMC.

118. Both these acts on the part of the Municipal Commissioner clearly amounted to failure on his part to discharge his duty correctly for which he cannot blame anybody else. This is the least that is got to be stated about his conduct by this Court. The Division Bench has commented that he acted "as a loyal soldier perhaps more loyal to the king than king himself", which was "with a view to please his bosses". It is true that in the first meeting called by the Minister of State for UDD, it was pointed out on behalf of PMC that the land had been acquired. The Commissioner had also pointed out that if the reservation was to be reduced or to be deleted, the permission of the Municipal Corporation will have to be obtained. His report of 17.4.1996, cannot however be said to be fully satisfactory and he failed in his duty when he permitted the by-passing of the Municipal Corporation in the matter of deletion of reservation on F.P. No.110, which he claims to have done in view of the direction from the Chief Minister under the D.C. Rules. We can say that a high ranking IAS Officer was expected to show his mettle, and he failed to come up to the expectations, but noticing that he had no personal interest in

the matter, and he was acting under the directions of his superior, the Division Bench could have avoided making the particular remarks against him.

The conduct of the Minister of State

119. In paragraph 3 of Writ Petition 4434 of 1998, there is a specific allegation against the then Minister of State as well as the then Chief Minister of "the blatant misuse of executive powers", "with a sole objective of ensuring a substantial monetary benefit for M/s Vyas Constructions. The defence of the Minister of State was that he tried to find out a workable solution, and acted on the advice of the officers of his department. As we have seen from the notings and as observed by the Division Bench that initially the Minister of State was also of the view that Section 37 of the MRTP Act should be followed. In this connection, it is relevant to note that after receiving the letter dated 17.4.1996 from the Municipal Commissioner, the UDD department prepared its note in which it specifically recommended that only half the area of the concerned plot be released to the landowner, and that he should accommodate the tenants in his development of the property on that portion of land, and an action under Section 37 be taken for that purpose. Thus, the departmental note was in fact as per the initial stand taken by the Minister of State, yet strangely enough, he declined to approve the note. He contended in his affidavit before the High Court that he was persuaded to accept the suggestion to act under the D.C. Rule 13.5 under which a similar action had been taken in Kothrud, Pune. No particulars of that Kothrud precedent were however, placed before the Court.

120. The Minister of State also tried to contend that until the last he had no knowledge of Shri Murudkar's connection with the son-in-law of Chief Minister. In view of the facts which have emerged on the record, it was just not possible to accept this contention. The Division Bench has given its reasons for

the same and has commented on his conduct as follows at the end of paragraph 140:-

> "…….It is difficult to account for the anxiety of the Minister of State, UDD, to find out some solution to either reduce the area of reservation or shift it to a new place. Only tenable explanation is that it was a design to ensure that the representation made by Murudkar on November 20, 1995 was allowed. It is not being suggested by any one that respondent No.6 was personally interested in the proposal or that he had any particular interest in seeing that this proposal was sanctioned. We, therefore, have to fall back on the inference that respondent No.6 was under pressure from respondent No.5."

121. In this behalf it is relevant to note the conduct of the Minister of State from stage to stage.

(i) Firstly, he entertained the application of Shri Karandikar directly at his own level, and thereafter immediately called a meeting of high ranking officers to take a decision thereon. Would such other applications receive such a direct and expeditious attention?

(ii) Secondly, he directed the Municipal Commissioner, a very high ranking officer, to carry out a personal inspection and to make a report. Would he issue such directions in the case of other similar applications?

(iii) Thirdly, after the Commissioner's report, the UDD department supported the initial view of the Minister of State that only a part of F.P.No. 110 be released, and that too under Section 37. Why did he not approve that note?

(iv) He acted as if he was waiting for the Commissioner to state that two schools had come up in the adjoining plots, so that he can release F.P. No. 110 from the reservation for a Primary school. Did he not realise that

those schools had come up as per the Development plan itself?

(v) He relied upon an alleged precedent of release of the land at Kothrud under D.C. Rule 13.5 without having the particulars thereof on record.

(vi) He tried to put the blame on the Municipal Commissioner and the Municipal Officers for the decision arrived at. It is true that the Commissioner failed in his duties to place full facts on record. At the same time the fact that the Minister of State ignored the initial notes of his own department and of PMC, which were in accordance with law, and went on acting and instructing as per the suggestions of Shri Karandikar, which led to the convenient reports cannot be lost sight of. He acted clearly against the provisions of law though he was fully informed about the same. Would he have acted in such a manner on any other similar application?

(vii) Would he not be aware that the file was called by the Chief Minister after receiving the report from the Municipal Commissioner, and for what purpose?

The natural inference which flows from all this conduct is that right from the beginning, the Minister of State was aware about Shri Murudkar's connection with the son-in-law of Chief Minister, and therefore he acted for the benefit of the developer, obviously at the instance of the then Chief Minister as inferred by the Division Bench. We have no reason to disagree.

Observations against the Chief Minister

122. (i) The two Writ Petitions contain serious allegations against the then Chief Minister at various places. Thus in paragraph 2 of the Writ Petition 4433 of 1998, it is alleged that the then Chief Minister misused his executive powers and

authority for the purpose of securing benefits for his near relatives, and in paragraph 3 it is specifically stated that this was for ensuring a substantial monetary benefit for M/s Vyas Constructions. A specific averment in paragraph 2 in this behalf is as follows:-

> "It is the claim of the petitioner that on account of this close relationship, the executive powers vested in the State of Maharashtra have either been misused and/or actions which cannot be taken in exercise of the executive powers under the Act are presumably take in purported exercise of such executive powers with a full knowledge that the actions are illegal and ultra vires the provisions of the Act."

(ii) As we have noted earlier, on 24.4.1996 the initial report made by the Municipal Commissioner dated 17.4.1996 was called for the perusal of the then Chief Minister. The basic order dated 21.8.1996 granting no objection, thereby approval to the release of the reservation on F.P. No. 110 was that of the then Chief Minister. The disputed permission dated 3.9.1996 was issued in pursuance thereto. There is a note dated 22.7.1998 on record which was meant for the perusal of the then Chief Minister to enable him to answer the probable questions concerning this matter in the assembly. The last order proposed at the Government level was also brought to his notice, and he was going to sign it, but for the advice of the Additional Chief Secretary that since his son-in-law had written a letter by that time to the Commissioner, the papers be sent for the signature of the Minister of State. Thus it is quite clear that he was aware about the developments in the matter, and the orders therein were issued with his approval and knowledge. He cannot therefore, escape the responsibility for all the illegal actions in this matter.

(iii) The learned senior counsel for the then Chief Minister Shri Shyam Diwan objected to the language used in

paragraphs 111 and 131 of the judgment which accused him of "pettifogging or obfuscation of facts". It is stated in the judgment that the then Chief Minister "furtively" sought a copy of the report dated 17.4.1996 on the basis of the file note dated 24.4.1996 prepared by his private secretary to the Minister of State for Urban Development calling for the file for the then Chief Minister's perusal. It was submitted that there was no need for the then Chief Minister to act secretively. In our view, there is no use in taking umbrage behind the language used by the Court. The question is whether the inference that the Chief Minister had called for the file for his perusal can be disputed. A private secretary will not make such a note unless the file is required by the Chief Minister. In our view the inference was fully justified. It was also sought to be contended that the petitions were politically motivated and one of the petitioners did not have clean antecedents. We are concerned in the present case with respect to serious allegations against the then Chief Minister misusing his office for the benefit of his son-in-law and in that process destroying a public amenity in the nature of a primary school. Such submissions cannot take away the seriousness of the charge, and the Chief Minister must squarely explain and justify his actions.

123. (i) With respect to the Chief Minister calling the file for his perusal, the Division Bench has posed a question as to whether it was an idle curiosity. "Why were the Chief Minister and the Minister of State interested in one particular case? What momentous public policy decision was sought to be taken in this matter?" Shri Murudkar was not someone for whom the administration could have moved so fast. It was very clear that the Chief Minister was very much interested in knowing the progress of the case all throughout. The obvious inference was that the then Chief Minister and the Minister of State took keen interest in the matter only because Shri Murudkar had appointed the son-in-law of the Chief Minister as his developer.

(ii) The Division Bench has dealt with the affidavit of the then Chief Minister, some of the relevant events in this behalf and then held that the conduct of the then Chief Minister definitely leads to the conclusion that he was very much interested in knowing the progress of the case pertaining to F.P. No.110, and he wanted to apprise himself of report dated 17.4.1996 made by the Commissioner of PMC. Therefore, the Division Bench held at the end of para 131 as follows:-

"We are afraid, unless the Court is naïve and its credulousness is stretched to the extreme, the inference has to be that, not only was there an attempt on the part of respondent No.5 to 'concern' himself with the file even prior to August 1996, but also that respondent No.5 had taken an active interest in the case."

124. (i) Then we come to the merits of the disputed permission dated 3.9.1996 which was in pursuance to the order of the Chief Minister dated 21.8.1996 viz. "All actions be taken in accordance with law. No objection". It was sought to be contended on his behalf that he had clearly stated that all actions be taken in accordance with law. But we cannot ignore that he had simultaneously stated in his remarks of approval, "no objection" to the note containing the proposal which had been put up before him, and which was not in accordance with law. The note clearly stated that the reservation on the land at Lohegaon be shifted from agricultural zone to residential zone by following the procedure under Section 37 of the MRTP Act. But as far as shifting of reservation from F.P. No. 110 was concerned, a different yardstick, namely that of D.C. Rule 13.5 was applied for which there was no explanation whatsoever. Thus he gave no objection to an illegal proposal as proposed in the note, and directed that all actions be taken in accordance with law which will only mean that the proposal be somehow fitted in four corners of law.

(ii) The letter dated 17.4.1996 from the Municipal Commissioner had already been forwarded for his perusal. This report had clearly stated to begin with that the departmental permission had been rejected because the property was under reservation. The report of the Municipal Commissioner also stated that in case the change was proposed in the use of the property, permission had to be taken from the Pune Municipal Corporation. Could not the Chief Minister understand that D.C. Rule 13.5 could not be applied to F.P. No.110 in the manner in which it was suggested? Could he not understand that the permission of Municipal Corporation was required as per the law? In the teeth of these legal provisions he gave no objection to the proposal to shift the reservation of F.P. No. 110 under D.C. Rule 13.5, and to shift the reservation of the plot at Lohegaon under D.C. Rule 37. In between there is a noting of 22.7.1998 which recorded that the Chief Minister had to be briefed about this matter appropriately for him to answer the questions in the legislative assembly. The note has also recorded that there was a criticism about this matter in the local newspaper. Subsequently, thereafter when the land at Mundhwa or elsewhere was sought to be exchanged in place of Lohegaon, the letter of Shri Girish Vyas was already on the file of the PMC and the Government. Still he was going to sign note of approval but for the advice of the Additional Chief Secretary. This shows the keen interest of the then Chief Minister in the matter and it can certainly be inferred that he was so acting for the benefit of his son-in-law.

125. According to Shri Naphade, the learned counsel appearing for the developer, the inference of *mala fides* is misconceived, as it is contrary to the material on record. He submitted that the Municipal Commissioner's report dated 17.4.1996 was not found to be untrue or false by any authority. He emphasized that as per the report (i) There are about 36

structures on the land which are occupied by tenants; (ii) Half the area of the plot is encumbered; (iii) There are two educational institutions in the vicinity of the plot and 11 educational institutions in the area; (iv) The acquisition of the plot has been declared illegal by the Court; (v) The locality in question is inhabited by higher middle class people and there may not be an appropriate response to a Primary School; (vi) Considering the funds available the Pune Municipal Corporation is inclined to develop school on some other plot reserved for school. He defended the decision of the then State Government and the actions taken in pursuance thereof by submitting that (i) There is no detriment to Public Interest, as no Municipal Primary School was required in the locality. (ii) The Appellant made alternative plot available at his own cost in the locality where a Municipal Primary School was required. (iii) The developer paid a sum of Rs. 25 lakhs to the PMC for construction of Municipal Primary School wherever it wanted to put it up. (iv) Tenants occupying dilapidated structures were rehabilitated on the very plot and were to get the ownership right free of cost.

126. These arguments are based on an erroneous premise that the plot was reserved for a Municipal Primary school. It was reserved for a Primary school and not merely a Municipal Primary school. It is on this false premise that the Commissioner had opined that this being a higher middle class area, a Municipal Primary school may not get an appropriate response. The two adjoining plots were also reserved for Primary schools as per the D.P. plan, and thereon two private schools had already come up. That cannot be a ground to say that this plot be released from reservation. The Municipal Commissioner had failed to place on record a very material information that one renowned educational institution had sought this very plot for educational activities way back in 1986. The Municipal Commissioner had not specified as to what he meant by the particular area when he stated that eleven educational institutions had come up therein. The plot had been

reserved for a Primary school after an elaborate planning process wherein the requirements of the particular area are appropriately considered. This is not the first case where there would be three adjoining plots reserved for Primary schools. There are many such schools and educational complexes which always require adjoining plots and are developed accordingly. The submission that the acquisition had been declared illegal by the Court was also a very convenient submission ignoring that the Municipal Appeal therefrom was pending in the High Court. There was no reason for the Corporation to be deterred by the encumbrances on the plot, since the compensation therefor had already been arrived at as per the law, and it did not cast much burden on the Corporation. The report of the Municipal Commissioner was clearly made "to please the bosses" as observed by the Division Bench, and could not be accepted as the basis for a valid legal action. The acceptance of the offer of the developer would mean that whenever anybody wants to delete a reservation of a public amenity in a prime area, he can throw the money to the Municipal Corporation and say that let the amenity come up elsewhere, but the reservation be deleted. Such an approach will mean destruction of the entire planning process and deserves to be rejected. None of these arguments can whitewash the material on the record which clearly leads to the inference, that the impugned actions were motivated to benefit the son-in-law of then Chief Minister.

127. (i) The learned counsel for the then Chief Minister objected to the inference drawn by the Division Bench that the then Chief Minister had pressurized the officers into taking an illegal action. It was submitted that the notings on the file indicated that there were deliberations on issues involved in the matter at the government level on a number of occasions. The course of action suggested in the PMC note dated 26.7.1996 was approved at several levels of authority before the same coming to the then Chief Minister. The Deputy Secretary in the UDD Shri Vidyadhar Despande has also stated in his affidavit that there was no pressure from the office of the Chief Minister

or for himself. That apart there were cogent factors explaining why there was no need for yet another primary school in the locality and generally the thinking was that public interest would gain from the proposed course of action.

(ii) As far as this latter submission about there being no need of one more primary school, one may immediately note the scant respect that the then Chief Minister had for the cause of education and the method of planning. One fails to see as to what public interest was going to be achieved by preventing a primary school from coming up on a designated plot. There is no use stating that instead a primary school will come up in another area. It will of course come up in that area if it is so required. But there is no need to tinker with a school in another area, provided by a proper planning process.

(iii) We have already noted the manner in which the matter had been handled. The application of the developer was entertained directly at the level of the Minister of State. Immediately a meeting of high ranking officers was called. Inspite of a clear stand taken by the offices of UDD as well as by PMC, the Minister of State asked the Commissioner, a high ranking officer to make a personal site inspection and then a report, only because the developer submitted that two schools had come up on the adjoining plots. Was it not clear to the Minister of State that those two schools had come up as per the provisions of the D.P. plan? The Municipal Commissioner in his report, and thereafter the officers of the UDD, initially submitted that if deletion of reservation was to be resorted, the action will have to be initiated under Section 37 of the Act. It is only because of the insistence of the developer that the resort to D.C. Rule 13.5 was adopted. During the course of all these developments the file had been called by the Secretary to the Chief Minister. Were these not clear signals to the officers as to what was the interest of the

then Chief Minister? There will never be any direct evidence of the officers being pressurized, nor will they say that they were so pressurized. Ultimately one has to draw the inference from the course of events, the manner in which the officers have acted and changed their stand to suit the developer and the fact that the son-in-law of the then Chief Minister was the developer of the project. As we have noted earlier the affidavit of the Commissioner clearly indicated that he tried to place the correct legal position initially but ultimately had to give in from the pressure from the superiors. Unless one is naïve one will have to agree with the conclusion which the Division Bench had drawn in para 136 of its judgment to the following effect:-

"We are left with only one conclusion which we have to draw from the facts on record and, to quote the words of the petitioners, "the conduct of respondent No.5 itself indicates that he had 'pressurized' the officials into taking an illegal action" and this, in our view, is certainly misuse of executive powers."

128. The learned senior counsel who had appeared for the then Chief Minister in the High Court had relied upon amongst others on the judgment of this Court in *E.P. Royappa vs. State of Tamil Nadu* [AIR 1974 SC 555]. Krishna Iyer J. had observed in paragraph 92 of his judgment in that matter that "we must not also overlook that the burden of establishing *mala fides* is very heavy on the person who alleges it. The allegations of *mala fides* are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility." Shri Royappa, while challenging his transfer had made allegations of *mala fides* against the then Chief Minister of Tamil Nadu, and this Court had refused to accept those allegations. The Division Bench noted in the presently impunged judgment that Shri Royappa was a Chief Secretary, and hardly any Chief Secretary of a State Government was

known who would be in any way hamstrung, or stopped from getting information or documents on the basis of which he makes out the case of *mala fides* against the officer holding a public office. The Division Bench rightly observed at the end of para 129 as follows:-

> "We do agree with Mr. Salve that a finding of mala fides against public authority, that too of the rank of Chief Minister of the State, should not be lightly drawn. It is quite a serious matter. But, if the Court is required to draw such an inference after examining the record, we feel that the Court cannot flinch from its duty."

129. In one earlier case i.e *Shivajirao Nilangekar Patil v. Dr. Mahesh Madhav Gosavi* [1987 (1) SCC 227], a single Judge of the Bombay High Court had held that in the facts of that case it could be reasonably held that the marksheet of the M.D. Examination was tampered to benefit the daughter of Shri Shivajirao, the then Chief Minister of Maharashtra. The Division Bench of the Bombay High Court took the view that the circumstances relied on clearly formed a reasonable and cogent basis for the adverse comments on the conduct of Shri Shivaji Rao. The Division Bench had noted that the single Judge had followed the tests led down by this Court earlier in *State of U.P. Vs. Mohammad Naim* [AIR 1964 SC 703] which were as follows:-

> "10. ……(a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, an in integral part thereof, to animadvert on that conduct. It has also been recognized that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation and reserve."

Having approved the approach of the High Court this Court

held in the facts of Shri Shivajirao's Case as follows:-

> "50. There is no question in this case of giving any clear chit to the appellant in the first appeal before us. It leaves a great deal of suspicion that tampering was done to please Shri Patil or at his behest. It is true that there is no direct evidence. It is also true that there is no evidence to link him up with tampering. Tampering is established. The relationship is established. The reluctance to face a public enquiry is also apparent. Apparently Shri Patil, though holding a public office does not believe that "Ceaser's wife must be above suspicion….."

130. The facts of the present case are stronger than those in the case of *Shri Shivajirao Nilangekar* (supra). Here also a relationship is established. The basic order dated 21.8.1996 in this matter granting no objection to an illegal action is signed by the then Chief Minister himself. That was after personally calling for the file containing the report dated 17.4.1996 sent by the Municipal Commissioner much earlier. The entire narration shows that the then Chief Minister had clear knowledge about this particular file all throughout, and the orders were issued only because the developer was his son-in-law, and he wanted to favour him. Ultimately, one has to draw the inference on the basis of probabilities. The test is not one of being proved guilty beyond reasonable doubt, but one of preponderance of probabilities.

Appropriate actions taken in a Public Interest Litigation

131. It was contended before the High Court that the rule as to the construction of pleadings should be strictly applied in the present case and that the material as contained in the petitions did not justify any further probe. The High Court rightly rejected that argument. There was a sufficient foundation in the petition for the further steps to be taken by the High Court. The petitions before the High Court were in the nature of public interest litigation. The purpose in such matters is to draw the

attention of the High Court to a particular state of facts, and if the Government action is found to be contrary to law or affecting the rights of the citizen, the court is required to intervene. There was a specific plea in paragraph 10 of Writ Petition No. 4433 of 1998 to the effect that "the fundamental and legal right of the citizens of Pune of submitting objections and suggestions to any modification in the Final Development Plan u/s 37 of the act has been infringed", and that was solely on account of the developer being a close relation of the then Chief Minister who was also the Minister for Urban Development which controls the appointments of a Municipal Commissioner to a Corporation established under the B.P.M.C Act 1949. A prima facie case had been made up in the petitions which got supported when the High Court in exercise of its Writ Jurisdiction rightly called for the relevant files from the State Government and the PMC to explain and defend their decisions.

132. Public Interest Litigation is not in the nature of adversarial litigation, but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful as observed by this Court in paragraph 9 of *Bandhua Mukti Morcha Vs. Union of India* [AIR 1984 SC 802]. By its very nature the PIL is inquisitorial in character. Access to justice being a Fundamental Right and citizen's participatory role in the democratic process itself being a constitutional value, accessing the Court will not be readily discouraged. Consequently, when the cause or issue, relates to matters of good governance in the Constitutional sense, and there are no particular individuals or class of persons who can be said to be injured persons, groups of persons who may be drawn from different walks of life, may be granted standing for canvassing the PIL. A Civil Court acts only when the dispute is of a civil nature, and the action is adversarial. The Civil Court is bound by its rules of procedure. As against that the position of a Writ Court when called upon to act in protection of the rights of the citizens can be stated to be distinct.

133. It was submitted on behalf of the appellants that inference should not be drawn merely on the basis of the notings in the file, and the remarks made by the Division Bench ought to be expunged. In this connection we may profitably refer to the observations of this Court in *P.K. Dave Vs. Peoples' Union of Civil Liberties (Delhi) & Ors.* reported in 1996 (4) SCC 262. A Writ Petition by way of a PIL was filed before the Delhi High Court alleging commission of gross financial irregularities by the Director of Govt. Hospitals in Delhi. Notings in the office file produced by the Government showed that despite suggestions made by the Health Secretary and Chief Secretary to the Delhi Administration, Lt. Governor of the Administration had refused to take any action against the Director. The High Court had passed strictures against the Lt. Governor. The learned senior counsel Shri Venugopal appearing on behalf of the appellant Lt. Governor had submitted that the strictures based on the basis of the notings should be expunged. Rejecting the submission this Court observed in paragraph 8 as follows:-

> "8. ….. Where the relevant departmental files were produced before the court by the Government and the court on scrutiny of the same came to the conclusion that the decision has not been taken fairly, then the court would be entitled to comment on the role of such person who took the decision….. In such circumstances if the contention of Mr. Venugopal is accepted then no administrative authority and his conduct would come under the judicial scrutiny of the court. That an administrative order is subjected to judicial review is by now the settled position and no longer remains res integra. This being the position we fail to appreciate the contentions of Mr. Venugopal that the notings in the file or the orders passed by the Secretary and Chief Secretary as well as the Governor should not have formed the basis of the strictures passed against the appellant."

134. Reliance was placed on the judgment of this Court in *Jasbir Singh Chhabra Vs. State of Punjab* reported in 2010 (4) SCC 192 to submit that the issues and policy matters which are required to be decided by the Government are dealt with by several functionaries, some of whom may record notings on the files, and such notings recorded in the files cannot be made basis for a finding of *mala fides*. There can be no dispute with the preposition when policy matters are involved as in that case where the question was whether the State Government's refusal to sanction change of land use from industrial to residential was vitiated due to *mala fides* claimed to be arising out of such notings. In the present case we are concerned with the notings not concerning with any policy matter, but with respect to the application on behalf of an individual landowner to delete the reservation of a primary school on his land, where the developer is the son-in-law of the Chief Minister. The notings in the present case are quite clear and the inference of *mala fides* therefrom is inescapable.

135. We have noted the observations and the conclusions arrived at by the High Court with respect to the conduct of the then Municipal Commissioner, the Minister of State and the then Chief Minister. The High Court has drawn its inferences and made the remarks after following the dicta in *State of U.P. Vs. Mohd. Naim* (supra). Having seen the totality of facts and guidelines laid down by this Court in *P.K. Dave's* case (supra), we do not see that we can draw any other inference then the one which was drawn by the Division Bench. We will be failing in our duty if we do not draw the inference which clearly arises from the notings on the file, the affidavits filed by the persons concerned and the law with respect to drawing such inference. In the circumstances, we refuse to expunge any of these remarks rendered by the Division Bench.

Orders for Criminal Investigation

136. Having drawn the above inferences, and having made

the adverse remarks about the conduct of the then Chief Minister, Minister of State and Municipal Commissioner the impugned judgment has directed the State of Maharashtra to initiate appropriate investigation against them through an impartial agency, and if satisfied that any criminal offence has been committed to take such action as warranted in law.

137. Now, as far as this direction is concerned, we have to note that as far as the Municipal Commissioner is concerned, though the Division Bench did not approve his conduct and squarely criticized him for being more loyal to the king then the king himself, yet in terms it observed in paragraph 144 of the judgment, that it did not attributive any motive to him for his actions. This para reads as follows:-

> "144. While we may not attribute any motive to respondent No.10 for his actions, we cannot approve of the actions taken by him. We have already pointed out that the action of withdrawing the appeal was wrong. In our view, respondent No.10 would have served the interests of the PMC better if he had placed his dilemma before the PMC and sought a resolution thereof, particularly when he believed that the Government was issuing him instructions contrary to law, which he believed to exist. But, perhaps, this might not have been clear to him at the time when he acted to please his masters. While holding that the actions taken by the tenth respondent were contrary to the provisions of the BPMC Act, MRTP Act and Development Control Rule No.13.5, we find it difficult to accept the suggestion in the writ petitions that he was a willing party to the process of abuse of executive powers."

That apart, Shri Narsimha, learned senior counsel appearing for the Municipal Commissioner drew our attention to Section 147 of the MRTP Act which provides that no suit, prosecution or other legal proceedings shall lie against any person for anything which is in good faith done or entitled to

be done under this Act or any rules or regulations made therein. Reliance was also placed on Section 486 of the B.P.M.C. Act 1949 which is also to the similar effect. The Division Bench has also clearly stated that it did not accept the suggestion in the writ petitions that the Commissioner was willingly a party to the process of abuse of executive powers. This being the position, in our view it would not be correct to direct any criminal investigation against the then Municipal Commissioner, and in our view to that extent the order of the Division Bench requires to be corrected.

138. As far as the Minister of State is concerned also, the Division Bench commented adversely on his conduct in paragraph 140 of its judgment. Yet it also observed in paragraph 142 that there was nothing on record as suggested that he had any personal motive in the matter. The relevant observation at the end of paragraph 142 reads as follows:-

> "…….All that we can say is that there is nothing on record to suggest that he had any other personal motive in the matter. We, therefore, infer that respondent No.6 must have done it to oblige his senior colleague i.e. the then Chief Minister, respondent No.5."

The Division Bench has thus specifically inferred that whatever he has done, was done to oblige his senior Minister i.e. the then Chief Minister and he had no personal motive in the matter. In the circumstances, he is entitled to a benefit of doubt and, therefore, the direction for criminal investigation against him also can not be sustained.

139. As far as the Chief Minister is concerned, however, it is very clear that he was fully aware about the application made by Shri Karandikar who was a camouflage for his son-in-law. He had called for the file after the Municipal Commissioner sent his report in April, 1996. But for his personal interest, the Government and the Municipal officers would not have taken the stand and put up the notes that he

wanted to be on record. The shifting of the reservation from F.P. No.110 was clearly untenable under D.C. Rule 13.5. The by-passing of the Municipal Corporation and ignoring the mandate of Section 37 was also not expected, yet he gave "no objection" to a contrary and totally unjustified order. The earlier part of his order viz. "all action be taken in accordance with law" therefore becomes meaningless, and is nothing but a camouflage. The conduct on the part of the then Chief Minister prima-facie amounts to a misfeasance and Shri Wasudev, learned senior counsel appearing for the original petitioners submits that such a conduct ought to be sternly dealt with.

140. The learned counsel for the Chief Minister on the other hand pointed out that there were no prayers for prosecution in the Writ Petitions, and the direction contained in paragraph 227 (e) was beyond the prayers. The question therefore, is whether the operative order passed by the High Court in this behalf is legally tenable. The direction given by the High Court in paragraph 227 (e) is as follows:-

> "(e) As far as prayer for directing prosecution against Respondent Nos. 5, 6 and 10 is concerned, after considering the facts and circumstances of the case we are not inclined to grant this relief. …... Nonetheless, we direct the first respondent to make appropriate investigations through an impartial agency and, if satisfied that any criminal offences have been committed by the aforesaid respondents in the discharge of their duties, to take action as is warranted in law."

Respondent Nos. 5, 6 and 10 were the then Chief Minister, the then Minister of State and the then Municipal Commissioner.

141. In this context we have to take note of the judgment of a bench of three Judges of this Court in this behalf on a review petition in the case of *Common Cause, A Registered Society Vs. Union of India & Ors.* reported in 1999 (6) SCC 667. The Minister concerned in that matter had committed the

misfeasance of allotment of retail outlets of petroleum products out of the discretionary quota in an arbitrary and *mala fide* manner. Such allotments had been set aside by a bench of two Judges by its judgment between the same parties reported in 1996 (6) SCC 530. The Court had thereafter passed an order that the Minister concerned shall show cause within two weeks why a direction be not issued to the appropriate police authority to register a case and initiate prosecution against him for criminal breach of trust of any other offence under law. This Court held in paragraph 174 of its judgment on the review petition as follows:-

> "174. The other direction, namely, the direction to CBI to investigate "any other offence" is wholly erroneous and cannot be sustained. Obviously, direction for investigation can be given only if any offence is, prima facie, found to have been committed or a person's involvement is prima facie established, but a direction to CBI to investigate whether any person has committed an offence or not cannot be legally given. Such a direction would be contrary to the concept and philosophy of "LIFE" and "LIBERTY" guaranteed to a person under Article 21 of the Constitution. This direction is in complete negation of various decisions of this Court in which the concept of "LIFE" has been explained in a manner which has infused "LIFE" into the letters of Article 21."

142. It could be perhaps argued that the misfeasance on the part of the then Chief Minister and the Minister of State amounts to a criminal misconduct also under Section 13 (1) (d) of the Prevention of Corruption Act, 1988. In the present case however, there is neither any such reference to this section nor any prima facie finding in the impugned judgment rendered way back in March 1999. In the circumstances in view of the proposition of law enunciated by a larger bench in the above case it is difficult to sustain the direction to make appropriate investigations through an impartial agency, and if satisfied that

any criminal offence has been committed by the aforesaid respondents in the discharge of their duties, to take action as is warranted in law.

Epilogue

Approach Towards the Planning Process

143. The significance of planning in a developing country cannot be understated. After years of foreign rule when we became independent, leaders of free India realized that for advancement of our society and for an orderly progress, we had to make a planned effort. Infact, even prior to independence the leaders of the freedom struggle had applied their mind to this aspect. The leaders of Indian Freedom Movement and particularly Pandit Jawaharlal Nehru, our first Prime Minister always emphasised democratic planning as a method of nation building and economic and social upliftment of Indian society. In March, 1931, the Indian National Congress at its Karachi Session passed a resolution to the effect that the State shall take steps to secure that ownership and control of the material resources of the community are so distributed as best to subserve the common good. Pandit Nehru drafted this resolution in consultation with Gandhiji and described it as a very short step in a socialist direction. In 1938, the National Planning Committee of the Congress was set up under the Chairmanship of Pandit Nehru who has been aptly described as *"the Architect of democratic planning in India".* The Economic Programme Committee of the Congress under his Chairmanship made a recommendation of setting up a permanent Planning Commission in 1947-48.

144. Shri H.K. Paranjape, (1924-1993) an eminent Economist and a former Member of Monopolies and Restrictive Trade Practices Commission and former Chairman of Railway Tariff Committee, in his monograph *"Jawaharlal Nehru and the Planning Commission"* (published by Indian Institute of Public Administration in September, 1964) notes that Nehru linked up

the work of Planning Commission directly to the Fundamental Rights and the Directive Principles enunciated in the Constitution. Nehru always wanted to make sure that the objectives of the Planning Commission were well defined and well understood. In this article, the author further records as follows:-

> "When the National Development Council was discussing the Draft Outline of the Third Plan in September, 1960, he emphasized the importance of remembering "what our objectives were and not to lose ourselves in the forest of details that a Plan had to deal with. Because, always when one considered the detail, one must look back on the main thing, how far it fitted in with the main issue; otherwise, it was out of place".

Nehru believed in participation of different sections of society in framing of the Plan. The emphasis has always been amongst others to put land to the best use from the point of the requirements of our society, since land is a scarce resource and it has to be used for the optimum benefit of the society

145. As stated above, we adopted the model of democratic planning which involves the participation of the citizens, planners, administrators, Municipal bodies and the Government as is also seen throughout the MRTP Act. Thus when it comes to the Development Plan for a city, at the initial stage itself there is the consideration of the present and future requirements of the city. Suggestions and objections of the citizens are invited with respect to the proposed plan, and then the planners apply their mind to arrive at the plan which is prepared after a scientific study, and which will be implemented during the next 10 to 20 years as laid down under Section 38 of the MRTP Act. The plan is prepared after going through the entire gamut under Sections 21 to 30 of the Act, and then only the sanction is obtained thereto from the State Government. That is why the powers to modify the provisions of the plan are restricted as noted earlier. If the plan is to be tinkered for the

benefit of the interested persons, or for those who can approach the persons in authority, then there is no use in having a planned development. Therefore, Section 37 which permits the minor modifications provides that even that should not result into changing the character of the development plan, prior whereto also a notice in the gazette is required to be issued to invite suggestions and objections. Where the modification is of a substantial nature, then the procedure under Section 29 of the Act requiring a notice in the local newspapers inviting objections and suggestions from the citizens is to be resorted to. Even the deletion of reservation under Section 50 is at the instance of the appropriate authority only when it does not want the land for the designated purpose.

146. The idea is that once the plan is formulated, one has to implement it as it is, and it is only in the rarest of the rare cases that you can depart therefrom. There is no exclusive power given to the State Government, or to the planning authority, or to the Chief Minister to bring about any modification, deletion or de-reservation, and certainly not by a resort to any of the D.C. Rules. All these constituents of the planning process have to follow the mandate under Section 37 or 22A as the case may be if any modification becomes necessary. That is why this Court observed in paragraph 45 of *Chairman, Indore Vikas Prodhikaran Vs. Pure Industrial Coke & Chemicals Ltd. & Ors.* reported in 2007 (8) SCC 705 as follows:-

> "45. Town and country planning involving land development of the cities which are sought to be achieved through the process of land use, zoning plan and regulating building activities must receive due attention of all concerned. We are furthermore not oblivious of the fact that such planning involving highly complex cities depends upon scientific research, study and experience and, thus, deserves due reverence.
>
> (emphasis supplied)

Role of Municipalities

147. The municipalities which are the planning authorities for the purpose of bringing about the orderly development in the municipal areas, are given a place of pride in this entire process. They are expected to render wide ranging functions which are now enumerated in the constitution. They are now given a status under Part IX A of the Constitution introduced by the 74th Amendment w.e.f. 1.6.1993. Article 243W lays down the powers of the Municipalities to perform the functions which are listed in the Twelfth Schedule. For performing these functions, planning becomes very important. This Twelfth Schedule contains the following items:-

"TWELFTH SCHEDULE

[Article 243W]

1. Urban planning including town planning.
2. Regulation of land-use and construction of buildings.
3. Planning for economic and social development.
4. Roads and bridges.
5. Water supply for domestic, industrial and, commercial purposes.
6. Public health, sanitation conservancy and solid waste management.
7. Fire services.
8. Urban forestry, protection of the environment and promotion ofecological aspects.
9. Safeguarding the interests of weaker sections of society, including the handicapped and mentally retarded.
10. Slum improvement and upgradation.
11. Urban poverty alleviation.
12. Provision of urban amenities and facilities such as parks, gardens,playgrounds.
13. Promotion of cultural, educational and aesthetic aspects.
14. Burials and burial grounds; cremations, cremation grounds andelectric crematoriums.
15. Cattle ponds; prevention of cruelty to animals.
16. Vital statistics including registration of births and deaths.
17. Public amenities including street lighting, parking lots, bus stopsand public conveniences.
18. Regulation of slaughter houses and tanneries."

The primary powers of the Municipal Corporations in Maharashtra such as PMC (excluding some Municipal Corporations which have their separate enactments) and of the Standing Committees of the Corporations are enumerated in the BPMC Act. Coupled with those powers, the Municipal Corporations have their powers under MRTP Act. These are the statutory powers, and they cannot be bypassed.

The Responsibility of the Municipal Commissioner and the Senior Government Officers

148. The Municipal Commissioner is the Chief Executive of the Municipal Corporation. It is his responsibility to act in accordance with these laws and to protect the interest of the Corporation. The Commissioner is expected to place the

complete and correct facts before the Government when any such occasion arises, and stand by the correct legal position. That is what is expected of the senior administrative officers like him. That is why they are given appropriate protection under the law. In this behalf, it is worthwhile to refer to the speech of Sardar Vallabhbhai Patel, the first Home Minister of independent India, made during the Constituent Assembly Debates, where he spoke about the need of the senior secretaries giving their honest opinions which may not be to the liking of the Minister. While speaking about the safeguards for the Members of Indian Civil Service (now Indian Administrative Service), he said-

> "…To-day, my Secretary can write a note opposed to my views. I have given that freedom to all my Secretaries. I have told them 'if you do not give your honest opinion for fear that it will displease your Minister, please then you had better go. I will bring another Secretary.' I will never be displeased over a frank expression of opinion. That is what the Britishers were doing with the Britishers. We are now sharing the responsibility. You have agreed to share responsibility. Many of them with whom I have worked, I have no hesitation in saying that they are patriotic, as loyal and as sincere as myself."

(Ref: Constituent Assembly Debates. Vol.10 p. 50)

Now unfortunately, we have a situation where the senior officers are changing their position looking to the way the wind is blowing.

Expectations from the Political Executive

149. Same are the expectations from the political executive viz. that it must be above board, and must act in accordance with the law and not in furtherance of the interest of a relative. However, as the time has passed, these expectations are belied. That is why in the case of *Shri*

Shivajirao Nilangekar (supra) this Court had to lament in paragraph 51 of the judgment as follows:-

> "51. This Court cannot be oblivious that there has been a steady decline of public standards or public morals and public morale. It is necessary to cleanse public life in this country along with or even before cleaning the physical atmosphere. The pollution in our values and standards in (sic is) an equally grave menace as the pollution of the environment. Where such situations cry out, the courts should not and cannot remain mute and dumb."

150. People of a state look up to the Chief Minister and those who occupy the high positions in the Government and the Administration for redressal of their grievances. Citizens are facing so many problems and it is expected of those in such positions to resolve them. Children are particularly facing serious problems concerning facilities for their education and sports, quality of teaching, their health and nutrition. It is the duty of those in high positions to ensure that their conduct should not let down the people of the country, and particularly the younger generation. The ministers, corporators and the administrators must zealously guard the spaces reserved for public amenities from the preying hands of the builders. What will happen, if the protectors themselves become poachers? Their decisions and conduct must be above board. Institutional trust is of utmost importance. In the case of *Bangalore Medical Trust* (supra) this court observed in paragraph 45 of its judgment that "the directions of the Chief Minister, the apex public functionary of the State, was in breach of public trust, more like a person dealing with his private property than discharging his obligation as head of the State administration in accordance with law and rules". Same is the case in the present matter where Shri Manohar Joshi, the then Chief Minister and Shri Ravindra Mane, the Minister of State have failed in this test, and in discharge of their duties. Nay, they have let down the people of the city and the state, and the children.

Importance of the spaces for public amenities

151. As we have seen, the MRTP Act gives a place of prominence to the spaces meant for public amenities. An appropriately planned city requires good roads, parks, playgrounds, markets, primary and secondary schools, clinics, dispensaries and hospitals and sewerage facilities amongst other public amenities which are essential for a good civic life. If all the spaces in the cities are covered only by the construction for residential houses, the cities will become concrete jungles which is what they have started becoming. That is how there is need to protect the spaces meant for public amenities which cannot be sacrificed for the greed of a few landowners and builders to make more money on the ground of creating large number of houses. The MRTP Act does give importance to the spaces reserved for public amenities, and makes the deletion thereof difficult after the planning process is gone through, and the plan is finalized. Similar are the provisions in different State Acts. Yet, as we have seen from the earlier judgments concerning the public amenities in Bangalore (*Bangalore Medical Trust* (supra) and Lucknow (*M.I Builders Pvt. Ltd.* (supra), and now as is seen in this case in Pune, the spaces for the public amenities are under a systematic attack and are shrinking all over the cities in India, only for the benefit of the landowners and the builders. Time has therefore come to take a serious stock of the situation. Undoubtedly, the competing interest of the landowner is also to be taken into account, but that is already done when the plan is finalized, and the landowner is compensated as per the law. Ultimately when the land is reserved for a public purpose after following the due process of law, the interest of the individual must yield to the public interest.

152. As far as the MRTP Act is concerned, as we have noted earlier, there is a complete mechanism for the protection of the spaces meant for public amenities. We have seen the definition of substantial modification, and when the reservation for a public amenity on a plot of land is sought to be deleted

completely, it would surely be a case of substantial modification, and not a minor modification. In that case what is required is to follow the procedure under Section 29 of the Act, to publish a notice in local newspapers also, inviting objections and suggestions within sixty days. The Government and the Municipal Corporations are trustees of the citizens for the purposes of retention of the plots meant for public amenities. As the Act has indicated, the citizens are vitally concerned with the retention of the public amenities, and, therefore deletion or modification should be resorted to only in the rarest of rare case, and after fully examining as to why the concerned plot was originally reserved for a public amenity, and as to how its deletion is necessary. Otherwise it will mean that we are paying no respect to the efforts put in by the original planners who have drafted the plan, as per the requirements of the city, and which plan has been finalized after following the detailed procedures as laid down by the law.

Suggested safeguards for the future

153. Having noted as to what has happened in the present matter, in our view it is necessary that we should lay down the necessary safeguards for the future so that such kind of gross deletions do not occur in the future, and the provisions of the Act are strictly implemented in tune with the spirit behind.

(i) Therefore, when the gazette notification is published, and the public notice in the local newspapers is published under Section 29 (or under Section 37) it must briefly set out the reasons as to why the particular modification is being proposed. Since Section 29 provides for publishing a notice in the 'local newspapers', we adopt the methodology of Section 6 (2) of the L.A. Act, and expect that the notice shall be published atleast in two daily newspapers circulating in the locality, out of which atleast one shall be in the regional language. We expect the notice to be published in the newspapers with wide circulation and at prominent place therein.

(ii) Section 29 lays down that after receiving the suggestions and objections, the procedure as prescribed in Section 28 is to be followed. Sub-section (3) of Section 28 provides for holding an inquiry thereafter wherein the opportunity of being heard is to be afforded by the Planning Committee (of the Planning Authority) to such persons who have filed their objections and made suggestions. The Planning Committee, therefore, shall hold a public inquiry for all such persons to get an opportunity of making their submission, and then only the Planning Committee should make its report to the Planning Authority.

(iii) One of the reasons which is often given for modification/deletion of reservation is paucity of funds, which was also sought to be raised in the present matter by the Municipal Commissioner for unjustified reasons, in as much as the compensation amount had already been paid. However, if there is any such difficulty, the planning authority must call upon the citizens to contribute for the project, in the public notice contemplated under Section 29, in as much as these public amenities are meant for them, and there will be many philanthropist or corporate bodies or individuals who may come forward and support the public project financially. That was also the approach indicated by this Court in *Raju S. Jethmalani Vs. State of Maharashtra* reported in [2005 (11) SCC 222].

Primary Education

154. Primary education is one of the important responsibilities to be discharged by Municipalities under the Bombay Primary Education Act 1947. Again, to state the reality, even after sixty years after the promulgation of the Constitution, we have not been able to attain full literacy. Of all the different areas of education, primary education is suffering the most. When the Constitution was promulgated, a Directive Principle was laid down in Article 45 which states that the State shall

endeavour to provide, within the period of ten years from the commencement of the Constitution, for free and compulsory education for all children until they complete the age of fourteen years. This has not been achieved yet. The 86th Amendment to the Constitution effected in the year 2002 deleted this Article 45, and substituted it with new Article 45 which lays down that the State shall endeavour to provide early childhood care and education for all children until they complete the age of six years. The amendment has made Right to Education a Fundamental Right under Article 21A. This Article lays down that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. In the year 2009 we passed the Right of Children to Free and Compulsory Education Act 2009. All these laws have however not been implemented with the spirit with which they ought to have been. We have several national initiatives in operation such as the Sarva Shiksha Abhiyan, District Primary Education Programme, and the Universal Elementary Education Programme to name a few. However, the statistical data shows that we are still far away from achieving the goal of full literacy.

155. Nobel laureate Shri Amartya Sen commented on our tardy progress in the field of basic education in his Article 'The Urgency of Basic Education' in the seminar "Right to Education-Actions Now" held at New Delhi on 19.12.2007 as follows:-

> "India has been especially disadvantaged in basic education, and this is one of our major challenges today. When the British left their Indian empire, only 12 per cent of the India population was literate. That was terrible enough, but our progress since independence has also been quite slow. This contrasts with our rapid political development into the first developing country in the world to have a functioning democracy."

The story for Pune city is not quite different. Since the impugned

development permission given by the Municipal Corporation was on the basis of no objection of the Chief Minister dated 21.8.1996, we may refer to the Educational Statistics of Pune city, at that time. As per the Census of India 1991, the population of Pune city was 24,85,014, out of which 17,14,273 were the literate persons which comes to just above 2/3 of the population. The percentage of literacy has gone up thereafter, but still we are far away from achieving full literacy and from the goal of providing quality education and facilities at the primary level.

156. There is a serious problem of children dropping out from the primary schools. There are wide ranging factors which affect the education of the children at a tender age, such as absence of trained teachers having the proper understanding of child psychology, ill-health, and mal-nutrition. The infrastructural facilities are often very inadequate. Large number of children are cramped into small classrooms and there is absence of any playground attached with the school. This requires adequate spaces for the primary schools. Even in the so called higher middle class areas in large cities like Pune, there are hardly any open spaces within the housing societies and, therefore, adequate space for the playgrounds of the primary schools is of utmost importance. Having noted this scenario and the necessity of spaces for primary schools in urban areas, it is rather unfortunate that the then Chief Minister who claims to be an educationist took interest in releasing a plot duly reserved and acquired for a primary school only for the benefit of his son-in-law. It also gives a dismal picture of his deputy, the Minister of State acting to please his superior, and so also of the Municipal Commissioner ignoring his statutory responsibilities.

Operative order with respect to the disputed buildings

157. We have held the direction given by the State Government for the deletion of reservation on Final Plot No.110, and the commencement and occupation certificates issued by

the Pune Municipal Corporation in favour of the developer were in complete subversion of the statutory requirements of the MRTP Act. The development permission was wholly illegal and unjustified. As far as the building meant for the tenants is concerned, the developer as well as PMC have indicated that they have no objection to the building being retained. As far as the ten storied building meant for the private sale is concerned, the developer had offered to hand over half the number of floors to PMC, provided it permits the remaining floors to be retained by the developer. PMC has rejected that offer since the plot was reserved for a primary school. The building must therefore be either demolished or put to a permissible use. The illegal development carried out by the developer has resulted into a legitimate primary school not coming up on the disputed plot of land. Thousands of children would have attended the school on this plot during last 15 years. The loss suffered by the children and the cause of education is difficult to assess in terms of money, and in a way could be considered to be far more than the cost of construction of this building. Removal of this building is however not going to be very easy. It will cause serious nuisance to the occupants of the adjoining buildings due to noise and air pollution. The citizens may as well initiate actions against the PMC for appropriate reliefs. It is also possible that the developer may not be able to remove the disputed building within a specified time, in which case the PMC will have to incur the expenditure on removal. It will, therefore, be open to the developer to redeem himself by offering the entire building to PMC for being used as a primary school or for the earmarked purpose, free of cost. If he is so inclined, he may inform PMC that he is giving up his claim on this building also in favour of PMC.

158. The High Court has not specified the time for taking the necessary steps in this behalf. Hence, for the sake of clarity, we direct the developer to inform the PMC within two weeks from today whether he is giving up the claim on the ten storied building named ‘Sundew Apartments’ apart from the tenants’

building in favour of PMC, failing which PMC will issue a notice to the developer within two weeks thereafter, calling upon him to furnish particulars to PMC within two weeks from the receipt of the notice, as to in what manner and time frame he proposes to demolish this ten storied building. In the event the developer declines or fails to do so, or does not respond within the specified period, or if PMC forms an impression after receiving his reply that the developer is incapable of removing the building in reasonably short time, the PMC will go ahead and demolish the same. In either case the decision of the City Engineer of PMC with respect to the manner of removal of the building and disposal of the debris shall be final.

159. As far as the ownership of the plot is concerned, the same will abide by the decision of the High Court in First Appeal Stamp No. 18615 of 1994 which will be decided in accordance with law. The old tenants will continue to occupy the building meant for the tenants.

160. The PMC and the State Government have fairly changed/reviewed their legal position in this Court, and defended their original stand about the illegality of the construction. We therefore, absolve both of them from paying costs to the original petitioners. The order with respect to payment of cost of Rs. 10,000/- against the then Chief Minister and the Minister of State to each of the original petitioners however remains. Over and above we add Rs. 15,000/- for each of them to pay to the two petitioners separately towards the cost of these appeals in this Court. Thus, the then Chief Minister and the Minister of State shall each pay Rs. 25,000/- to the two petitioners separately.

161. The spaces for public amenities such as roads, playgrounds, markets, water supply and sewerage facilities, hospitals and particularly educational institutions are essential for a decent urban life. The planning process therefore assumes significance in this behalf. The parcels of land reserved for

public amenities under the urban plans cannot be permitted to be tinkered with. The greed for making more money is leading to all sorts of construction for housing in prime city areas usurping the lands meant for public amenities wherever possible and in utter disregard for the quality of life. Large number of areas in big cities have already become concrete jungles bereft of adequate public amenities. It is therefore, that we have laid down the guidelines in this behalf which flow from the scheme of the MRTP Act itself so that this menace of grabbing public spaces for private ends stops completely. We are also clear that any unauthorised construction particularly on the lands meant for public amenities must be removed forthwith. We expect the guidelines laid down in this behalf to be followed scrupulously.

The conclusions in nutshell and the consequent order

162. In the circumstances we conclude and pass the following order –

(i) We hold that the direction given by the Government of Maharashtra for the deletion of reservation on Final Plot No. 110, at Prabhat Road, Pune, and the consequent Commencement and Occupation certificates issued by the Pune Municipal Corporation (PMC) in favour of the developer were in complete subversion of the statutory requirements of the MRTP Act. The development permission was wholly illegal and unjustified.

(ii) The direction of the High Court in the impugned judgment dated 6/15.3.1999 in Writ Petition Nos. 4433 and 4434/1998 for demolition of the concerned building was fully legal and justified.

(iii) The contention of the landowner that his right of development for residential purposes on the concerned plot under the erstwhile Town Planning scheme subsisted in spite of coming into force of Development Plan reserving

the plot for a primary school, is liable to be rejected.

(iv) The acquisition of the concerned plot of land was complete with the declaration under Section 126 of the MRTP Act read with Section 6 of Land Acquisition Act and the same is valid and legal.

(v) The order passed by the High Court directing the Municipal Corporation to move for the revival of the First Appeal Stamp No. 18615 of 1994 was therefore necessary. The High Court is expected to decide the revived First Appeal at the earliest and preferably within four months hereafter in the light of the law and the directions given in this judgment.

(vi) The developer shall inform the PMC whether he is giving up the claim over the construction of the ten storied building (named 'Sundew Apartments') apart from the tenants' building in favour of PMC, failing which either the developer or the PMC shall take steps for demolition of the disputed building (Sundew Apartments) as per the time framed laid down in this judgment.

(vii) The former occupants of F.P No. 110 will continue to reside in the building constructed for the tenants on the terms stated in the judgment.

(viii) The corporation will not be required to pay any amount to the developer for the tenants' building constructed by him, nor for the ten storied building in the event he gives up his claim over it in favour of PMC.

(ix) The strictures passed by the High Court against the then Chief Minister of Maharashtra Shri Manohar Joshi and the then Minister of State Shri Ravindra Mane are maintained. The prayer to expunge these remarks is rejected. The remarks against the Municipal Commissioner are however deleted.

(x) The order directing criminal investigation and thereafter further action as warranted in law, is however deleted in view of the judgment of this Court in the case of *Common Cause A Registered Society Vs. Union of India* reported in 1999 (6) SCC 667

(xi) The then Chief Minister and the then Minister of State shall each pay cost of Rs. 15,000/- to each of the two petitioners in the High Court towards these ten appeals, over and above the cost of Rs. 10,000/- awarded by the High Court in the writ petitions payable by each of them to the two writ petitioners.

(xii) The State Government and the Planning authorities under the MRTP Act shall hereafter scrupulously follow the directions and the suggested safeguards with respect to the spaces meant for public amenities.

All the appeals stand disposed of as above.

R.P. Appeals disposed of.

##NEXT FILE

SWAMI VIVEKANAND COLLEGE OF EDUCATION & ORS.

v.

UNION OF INDIA & ORS.

(Civil Appeal No. 5961 of 2010)

OCTOBER 12, 2011

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

National Council for Teacher Education (Recognition Norms and Procedure) Regulations, 2007:

Regulations 8(4) and 8(5) – Educational Institutions imparting teacher training course in B.Ed – Prior to coming into force of Regulations of 2007, the institutions permitted by National Council for Teacher Education (Council) additional intake of students without seeking accreditation and Letter Grade B from National Assessment and Accreditation Council (NAAC) –Regulations 8(4) and 8(5) of Regulations 2007, requiring the institutions to be accredited with NAAC with a Letter Grade B – Challenged – Held: In view of ss.12(k), 15 and 32(2)(h) of NCTE Act, the 'Council' is empowered to frame Regulations laying down 'conditions' for proper conduct of a new course or training under clause (a) of sub-s. (3) of s.15 – Under Regulation 8(4), the 'Council' having prescribed a 'condition' of accreditation and Letter Grade B by NAAC for recognition, it can not be held to be sub-delegation of power – National Council for Teacher Education Act, 1993 – ss. 12(k), 15, and 32(2)(h) – Administrative Law – Delegation / sub-delegation of power– National Council for Teacher Education (Recognition Norms and Procedure) Regulaltions,2009–Regulations 8(4) and 8(5).

Regulation 8(5) – Institution granted additional intake, required to be accredited with NAAC with a Letter Grade B – Held: "The norms and standards" were prescribed under Regulation 8 of Regulation 2002 and were notified by NCTE Regulations 2005 and retained in the NCTE Regulations, 2005 – Thus, Regulations 8(3) and 8(4) remained in force even after amended Regulations 2006, but with a rider that in case new norms are published for any such teacher training course after notification of Regulations of .2005, the conditions prescribed in Regulations 8(3) and 8(4) of the Regulations, 2005 shall not be applicable for such course – Subsequently, when Regulations 2007 were enacted, the Regulations 8(3) and 8(4) of Regulations 2005 were retained – In the circumstances, by Regulation 8(5) it was clarified that if any institution has been granted additional intake in B.Ed. and B.P.Ed. courses after enactment of Regulations 2005 i.e. 13.1.2006, such institution is required to be accredited with NAAC with a Letter Grade-B – Regulations 8(3) and 8(4) of Regulations 2005 having been retained, it was always open to NCTE to remind the institutions that they were required to follow Regulations 8(3) and 8(4), if were allowed additional intake after 13.1.2006 – Therefore, Regulation 8(5) cannot be held to be retrospective –Interpretation of Statutes – Retrospective operation of Regulations.

The Appellants-institutions recognised by the National Council for Teacher Education (Council) and imparting teacher training course (B.Ed.), were permitted by the Council additional intake of students for the course without seeking accreditation and Letter Grade B from National Assessment and Accreditation Council (NAAC). The 'Council' framed "National Council for Teacher Education (Recognition. Norms and Procedure) Regulations, 2007 requiring the institutions to be accredited with NAAC with a Letter Grade B. The institutions which had been granted additional intake were also required to get themselves accredited with the NAAC with a Letter Grade-B before 1.4. 2010. The appellants challenged the Regulations of 2007 before the

High Court, which declined to interfere. Aggrieved, the institutions filed the appeal. Meanwhile, the 'Council' framed the "National Council for Teacher Education (Recognition Norm and Procedure) Regulations, 2009 containing identical Regulations 8(4) and 8(5) so far as B.Ed. course was concerned. The Court permitted the appellants to challenge also the validity of Regulations 8(4) and 8(5) of Regulations of 2009.

It was contended for the appellants that the Council could not sub-delegate its functions and duties conferred upon it by the NCTE Act, 1993 to an outside institution, namely, NAAC, in absence of express authorisation by the Act and, as such, Regulation 8(4) was ultra vires the NCTE Act, 1993; and that since the Act did not authorise the Council to frame the Regulations retrospectively, Regulation 8(5) being ex-facie retrospective was violative of Article 19(1)(g) of the Constitution of India.

Dismissing the Appeal, the Court

HELD: 1.1 A delegate of the legislature is conferred with the power to make rules and regulations to carry out the purposes of the legislation and such rules and regulations are called delegated legislation or subordinate legislation. [para 26]

Hamdard Dawakhana and Another v. Union of India and Others **1960 SCR 671 = AIR 1960 SC 554;** *Indian Express Newspapers (Bombay) Private Ltd. and others v. Union of India and Others* **1985 (2) SCR 287 = (1985) 1 SCC 641;** *Clariant International Ltd. and Another v. Securities & Exchange Board of India* **2004 (3) Suppl. SCR 843 = (2004) 8 SCC 524;** *Vasu Dev Singh and Others v. Union of India and others.* **2006 (8) Suppl. SCR 535 = (2006) 12 SCC 753 – referred to.**

1.2 If Regulation 8(4) is in broad conformity with the objects and policy of the NCTE Act, 1993, and is not in conflict with any statutory or constitutional provisions, the regulation made by the delegate, namely, the Council, will have to be held to be valid. [para 30]

1.3 The NCTE Act, 1993 was enacted with the objects: (i) to achieve planned and co-ordinated development of the teacher education system throughout the country and (ii) for laying down the proper maintenance of norms and standards in the teacher education system. The 'Council' has been empowered by the parent Act to regulate development of teacher education, proper maintenance of norms and the standards. A combined reading of s. 12(k), s.15 and s.32(2)(h), makes it clear that the 'Council' is empowered to frame Regulations laying down 'conditions' for proper conduct of a new course or training under clause (a) of sub-s. (3) of s.15. [para 31- 33]

1.4 What will be the 'condition' to be laid down for starting a new course or training or for increase in the intake of students can be determined only by the 'Council' in view of clause (h) of sub-s. (2) of s. 32. It can prescribe such 'condition', as it deems fit and proper with only rider that such 'condition' should not be against any of the provisions of the NCTE Act, 1993 or Rules framed thereunder. [para 34]

1.5 Under s. 12(k) the 'Council' is required to evolve suitable performance appraisal system, norms and mechanism for enforcing accountability on recognised institutions. In fulfilment of the provisions u/s 12(k) of NCTE Act, 1993 and for quality assurance of Teacher Education Institutions, the NAAC entered into a "Memorandum of Understanding" with the 'Council' for executing the process of assessment and accreditation of all Teacher Education Institutions coming under the

provisions of NCTE Act, 1993. NAAC is an autonomous body established by the University Grants Commission (UGC) of India to assess and accredit institutions of higher education in the country. It is an outcome of the recommendations of the National Policy in Education (1986) that laid special emphasis on upholding the quality of higher education in India. The efforts of 'Council' and NAAC are to ensure and assure the quality of Teacher Education Institutions in the country complementary to each other. Combining the teacher education and quality assurance, the NAAC developed the methodology for assessment and accreditation of Teacher Education Institutions as appears from the "Manual for Self-appraisal of Teacher Education Institutions". [para 25]

"*Manual of Accreditation" (Revised Edition, January, 2004) published by National Board of Accreditation All India Council for Technical Education, I.G. Sports Complex, I.P. Estate, New Delhi –referred to.*

1.6 In the case in hand under Regulation 8(4) the 'Council' having prescribed a 'condition' for recognition that an institution accredited by NAAC with a Letter Grade B is entitled to apply for enhancement of intake in Secondary Teacher Education Programmes of B.Ed. and B.P.Ed., it can not be held to be sub-delegation of power. [para 34]

2.1 Regulations 8(3) and 8(4) were already in vogue since 13.1.2006 when Regulations dated 27.12.2005 came into effect. As per Regulation 8(3) only after three academic sessions an institution was eligible to apply for enhancement of intake of students in the course. Under Regulation 8(4) only such institution which had accredited itself with NAAC with a Letter Grade B+ was entitled to apply for enhancement of intake of students in the Secondary Teacher Education Programme, B.Ed. and B.P.Ed. [para 36]

State Bank's Staff Union (Madras Circle) vs. Union of India and others **2005 (3) Suppl. SCR 200 = (2005) 7 SCC 584 – referred to.**

2.2 Thus, Regulations 8(3) and 8(4) remained in force for all the Teachers Education Courses, e.g. Elementary Teachers Education Programme, Bachelor of Elementary Education (B.El.Ed.), Standard for Secondary Teacher Education Programme, Master of Education (M.Ed.) Programme etc., even after amended Regulations 2006, but with a rider that in case new norms are published for any such Course after notification of Regulations dated 27.12.2005, the conditions prescribed in Rule 8(3) and 8(4) of the Regulations, 2005 dated 27.12.2005 shall not be applicable for such course. [para 38]

2.3 Subsequently, when Regulations 2007 were enacted, the Regulations 8(3) and 8(4) of Regulations 2005 were retained. In the circumstances, by Regulation 8(5) it was clarified that if any institution has been granted additional intake in B.Ed. and B.P.Ed. teachers training courses after enactment of Regulations 2005 i.e. 13.1.2006, such institution is required to be accredited with NAAC with a Letter Grade B. Regulations 8(3) and 8(4) of Regulations 2005 dated 27.12.2005 having been retained, it was always open to NCTE to remind the institutions that they were required to follow Regulations 8(3) and 8(4), if were allowed additional intake after 13.1.2006. Therefore, Regulation 8(5) cannot be held to be retrospective. Regulations 8(3), 8(4) and 8(5) having nexus with maintenance of standards of teacher education and to make qualitative improvement in the system of teacher education by phasing out sub-standard teaching, the validity of Regulation 8(4) and 8(5) cannot be questioned. [para 39-40]