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] [958-H; 959-A]

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] [960-B]

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] [960-D-H; 961-A]

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] [961-B]

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] [958-A-C]

"*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] [961-E]

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] [963-H; 964-A-B]

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] [966-C-D]

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] [966-E-H; 967-C]

Case Law Reference:

1960 SCR 671	**referred to**	**para 26**
1985 (2) SCR 287	**referred to**	**para 27**
2004 (3) Suppl. SCR 843	**referred to**	**para 28**
2006 (8) Suppl. SCR 535	**referred to**	**para 29**
2005 (3) Suppl. SCR 200	**referred to**	**para 35**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5961 of 2010.

From the Judgment and Order dated 23.04.2009 of the High Court of Delhi at New Delhi in W.P. (C) No. 8433 of 2009.

T.S. Doabia, Sanjay Sharawat, Amitesh Kumar, Ravi Kant, Gopal Singh, R. Malhotra, D.S. Mehra, S.S. Rawat and Naveen R. Nath for the appearing parties.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. Appellants-institutions, which are recognised by the National Council for Teacher Education (hereinafter referred to as the 'Council'), impart teacher training course (B.Ed.). On their request the 'Council' permitted additional intake of students for such course without seeking accreditation and Letter Grade B from National Assessment and Accreditation Council (NAAC). Subsequently, the 'Council' framed "National Council for Teacher Education (Recognition Norms and Procedure) Regulations, 2007 (hereinafter referred to as 'Regulations, 2007) by notification dated 10th December, 2007 introducing Regulation 8(4) and 8(5) which the appellants unsuccessfully challenged before the High Court.

2. As per Regulation 8(4) an institution is required to be accredited with the NAAC with a Letter Grade B, whereas as per Regulation 8(5) those institutions which had been granted

additional intake in B.Ed. and B.P.Ed. teacher training courses after promulgation of the Regulations, 2005 i.e. 13th January, 2006 are required to get themselves accredited with the NAAC with a Letter Grade B before Ist April, 2010.

3. The validity of Regulation 8(4) and 8(5) was challenged by the appellants on the following grounds:

(i) Their right to establish and run their institutions enshrined under Article 19(1)(g) of the Constitution of India stands curtailed;

(ii) they will suffer constitutional injury on account of the 'Council' outsourcing its statutory functions in the absence of statutory authorisation for sub-delegation of the delegated power;

(iii) by giving a retrospective effect to the Regulations and

(iv) due to non-performance of statutory duties by the 'Council'.

4. The Division Bench of the Delhi High Court held that the Regulation 8(4) merely puts a 'condition' for making an application that the applicant should have itself accredited with the NAAC with a Letter Grade B; the Court further held that the Regulation 8(5) is prospective in nature, being a 'condition' imposed in continuation of additional intake.

5. During the pendency of the present appeal the 'Council' framed the "National Council for Teacher Education (Recognition Norm and Procedure) Regulations, 2009 w.e.f. 31st August, 2009 (hereinafter referred to as the "NCTE Regulations, 2009") but as Regulation 8(4) and 8(5) is identically worded so far as B.Ed. course, this Court by order dated 15th March, 2010 permitted the appellants to challenge the validity of new Regulation 8(4) and 8(5) of Regulations, 2009.

STAND OF THE APPELLANTS

6. Learned counsel for the appellants while contending that there was no requirement for any approved institutions to get them accredited with NAAC for enhancement of intake of seats in the course, the following submissions were made:

(i) The 'Council' cannot sub-delegate its functions and duties conferred upon it by the parent Act i.e. NCTE Act, 1993 to an outside institution namely NAAC in absence of express authorisation by the parent Act. Therefore, Regulation 8(4) ultra vires the NCTE Act, 1993 and Article 14 of the Constitution of India being against the principle "delegates non potest delegare".

(ii) The NCTE Act, 1993 does not authorise the 'Council' to frame Regulations retrospectively; in absence of such power the delegatee the 'Council' cannot make subordinate legislation retrospectively. The requirement, therefore, contemplated under Regulation 8(5) being ex-facie retrospective, taking away the right of the appellants to continue with the additional seats of B.Ed. course, is violative of Article 19(1)(g) of the Constitution.

(iii) Regulation 8(5) and paragraph 6 of notice dated Ist October, 2008 issued by the 'Council' asking all institutions which were already granted additional intake in B.Ed./ B.P.Ed. courses after Ist January, 2006 to get themselves accredited with NAAC with Grade B certificate ultra vires the NCTE Act, 1993 disturbing and altering the vested and accrued fundamental rights of the institutions.

7. Learned counsel for the appellants referred to provisions of NCTE Act, 1993 and relevant Rules and the decisions of this Court which will be discussed at an appropriate stage.

Stand of respondent-NCTE

8. Per contra, according to the learned counsel for the respondent-'Council' Regulation 8(4) does not amount to delegation of any of the powers of the 'Council'. It merely imposed a 'condition' required for opening a new course or intake for students as empowered under the NCTE Act, 1993. The Regulation 8(5) does not amount to giving effect from retrospective date, as such power was already extending under Regulations, 2005.

9. He would further submit as follows:

(i) The condition as stipulated in impugned Regulation 8((4) was already existing even earlier in Regulations, 2005. Regulation 8(3) and 8(4) of Regulations, 2005 was relaxed for certain period vide notification dated 20th July, 2006 and 10th December, 2007. Some of the institutions had made applications to the Regional Committees of the 'Council' for grant of permission or recognition for additional intake of seats in favour of recognised course during the period from 21st July, 2006 to 10th December, 2007. Their applications were processed and decided without insisting upon the requirement of having three academic sessions of running the course as was stipulated under Regulation 8(3) or having accredited with NAAC with a Letter Grade B as was stipulated under Regulation 8(4). Since, the conditions under Regulation 8(3) and 8(4) were brought into force by Regulations, 2007, it was decided that those institutions which have been granted recognition for enhancement of seats without insisting upon the condition of having accredited with the NAAC, have been directed to get themselves accredited with NAAC.

(ii) The condition stipulated under Regulation 8(4) does not amount to sub-delegation of power but merely a 'condition' laid down for grant of recognition of new course or for

enhancement of additional intake in the existing course. So far as processing, scrutinising and deciding upon an application for recognition/permission for conducting teacher training course is concerned, it is the 'Council' and its Regional Committees which are alone responsible and entrusted with discharging such functions as enshrined under the Act.

(iii) The Regulation 8(5) only provides that the institutions who have been granted recognition for enhancement of additional intake of seats during the period of relaxation to obtain accreditation before Ist April, 2010 and the same is prospective in nature.

10. In this case the questions arise for determination are:

(i) Whether under Regulation 8(4) the 'Council' has sub-delegated any of its functions and duties conferred by parent Act to NAAC; and

(ii) Whether Regulation 8(5) is retrospective in nature affecting fundamental rights of appellants guaranteed under Article 19(1)(g) of Constitution of India.

11. Before examining the contentions raised by the learned counsel for the parties, it would be convenient to notice the relevant provisions of the NCTE Act, 1993 and the Regulations framed thereunder.

12. The NCTE Act, 1993 was enacted to maintain standards of teacher education with a view to achieve planned and co-ordinated development of the teacher education system throughout the country. It was decided that the 'Council' would be provided with necessary resources and capability to accredit institutions of teacher education and provide guidance regarding curricula and methods. It was also decided to provide statutory powers to the 'Council' with the objective of determination, maintenance and co-ordination of standards in

teacher education, laying down norms and guidelines for various courses, promotion of innovation in this field and to establish a suitable system of continuing education of teachers (see: Statement of Objects and Reasons of the National Council for Teacher Education Act, 1993).

13. Section 12 of the NCTE Act, 1993 empowers the 'Council' to take all steps for ensuring planned and co-ordinated development of teacher education and for the determination and maintenance of standards of teacher education. For the purposes of such functions the Council is empowered to evolve suitable performance appraisal system, norms and mechanism for enforcing accountability on recognised institutions under Section 12(k) which is as follows:

"**12(k)** evolve suitable performance appraisal system, norms and mechanism for enforcing accountability on recognised institutions;"

14. For the purpose of ascertaining whether the recognised institutions are functioning in accordance with the provision of the Act, the Council is empowered to cause inspection of any such institution in such manner as may be prescribed under Section 13 of the NCTE Act, 1993.

15. The 'Council' is empowered to recognise institutions offering course or training in teacher education under Section 14. For opening a new course or training by recognised institutions the 'Council' is empowered under Section 15 to grant permission in such form and in such manner as may be determined by regulations.

16. Under Section 32 the 'Council' is empowered to make regulations not inconsistent with the provisions of the NCTE Act, 1993 and the rules made thereunder. Clause (f) and (h) of sub-section (2) of Section 32 empowers the 'Council' to frame regulations and to lay down 'conditions' for the proper functioning of the institution and 'conditions' for granting

recognition under clause (a) of sub-section (3) of Section 14 and clause (a) of sub-section (3) of Section 15 respectively, as evident from the said provisions and reproduced hereunder:

"32.POWER TO MAKE REGULATIONS

(1) The Council may, by notification in the Official Gazette, make regulations not inconsistent with the provisions of this Act and the rules made thereunder, generally to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely :-

xxx xxx xxx

(f) conditions required for the proper functioning of the institution and conditions for granting recognition under clause (a) of sub-section (3) of Section 14;

xxx xxx xxx

(h) conditions required for the proper conduct of a new course or training and conditions for granting permission under clause (a) of sub-section (3) of Section 15;

xxx xxx xxx"

17. In exercise of powers conferred under Section 32 the 'Council' framed Regulations National Council for Teacher Education (Recognition Norms & Procedure) Regulations, 2005 (hereinafter referred to as the "NCTE Regulations, 2005") notified by Notification No.F.49-42/2005-NCTE (N&S) dated 27th December, 2005 published on 13th January, 2006. The NCTE Regulation, 2005 were applicable to all matters relating to teacher education programme, covering norms and standards and conditions for grant of such recognition. Clause (3) and Clause (4) of Regulation 8 of NCTE Regulations, 2005 were as follows:

"**8(3)** An institution shall be permitted to apply for enhancement of intake in a teacher education course already approved after completion of three academic sessions of running the course.

(4) An Institution shall be permitted to apply for enhancement of intake in Secondary Teacher Education Programme – B.Ed & B.P.Ed. Programme, if it has accredited itself with the National Assessment and Accreditation Council (NAAC) with a Letter Grade B developed by NAAC."

18. It was stipulated that pending finalisation of new norms and standards, the existing norms were to continue till then.

19. Subsequently, by notification dated 20th July, 2006 the 'Council' framed "National Council for Teacher Education (Recognition Norms & Procedure) (Amendment) Regulations, 2006 (hereinafter referred to as the "Amendment Regulations, 2006) as under:

"Now, therefore, in exercise of the powers conferred under sub-section (2) of Section 32 of the National Council for Teacher Education Act, 1993 (73 of 1993), the National Council for Teacher Education hereby makes the following regulations, namely:-

1. <u>Short Title and Commencement:</u>

(1) These regulations may be called the "National Council for Teacher Education (Recognition Norms & Procedure)(Amendment) Regulations, 2006."

2. **<u>Applicability</u>**

(1) These regulations shall be applicable to all matters pertaining to grant of recognition/ permission to conduct a secondary teacher education programme in face to face mode leading to B.Ed. degree or equivalent.

(2) They shall come into force from the date of their publication in the Official Gazette.

3. **Extent of Amendment**

(i) The appendix – 7 of the norms and standards which was notified by NCTE Regulations, 2002 and retained in the NCTE Regulations, 2005 shall be replaced by the appendix – 1 to this amendment and be read as part thereof.

Note:- For enhancement of intake in the course where new norms have been published after notification of the Regulations dated 27.12.2005, the conditions prescribed in Rule 8(3) and 8(4) of the said Regulation shall not be applicable."

It was followed by Regulations, 2007 framed by the 'Council' bringing back the condition of accreditation of institution with NAAC with the Letter Grade B as was prescribed under Regulation 8(4) of NCTE Regulations, 2005. Those institutions who were granted additional intake in B.Ed and B.P.Ed. teacher training courses after NCTE Regulations, 2005 i.e 13th January, 2006 were also asked to get themselves accredited with NAAC with a Letter Grade B. Apart from the impugned Regulation 8(4) and 8(5), Regulation 8(3) of NCTE Regulations, 2007 being also relevant are quoted hereunder:

"**8(3)** An institution shall be permitted to apply for enhancement of course wise intake in teacher education courses already approved, after completion of three academic sessions of running the respective courses.

(4) An Institution shall be permitted to apply for enhancement of intake in Secondary Teacher Education Programme – B.Ed & B.P.Ed. Programme, if it has accredited itself with the National Assessment and Accreditation Council (NAAC) with a Letter Grade B developed by NAAC.

(5) *An institution that has been granted additional intake in B.Ed. and B.P.Ed. teacher training courses after promulgation of the Regulations, 2005,i.e., 13.1.2006 shall have to be accredited itself with the National Assessment and Accreditation Council (NAAC) with a Letter Grade B under the new grading system developed by NAAC before Ist April, 2010 failing which the additional intake granted shall stand withdrawn w.e.f. the academic session 2010-2011."*

20. As stated earlier, during the pendency of the present civil appeal the NCTE Regulations, 2009 was enacted with similar worded provisions under Regulation 8(3), 8(4) and 8(5).

21. The National Assessment and Accreditation Council (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, as appears from "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 – 110 002.

22. The system of higher education in India has expanded rapidly during the last fifty years and in spite of built-in regulatory mechanisms that ensure satisfactory levels of quality in the functioning of higher education institutions, there have been criticisms that the country has permitted the mushrooming of institutions of higher education with fancy programme and substandard facilities and consequent dilution of standards. To address the issues of deterioration in quality, the National Policy on Education (1986) and the Plan of Action (POA-1992) was made which spelt out the strategic plans for the policies and advocated the establishment of an independent national

accreditation body. Consequently, the NAAC was established in 1994 with its headquarters at Bangalore.

23. The Methodology for the assessment of a unit, the NAAC follows a three-stage process which is a combination of self-study and peer review, as follows:

(1) *The preparation and submission of a self-study report by the unit of assessment.*

(2) The on-site visit of the peer team for validation of the self-study report and for recommending the assessment outcome to the NAAC.

(3) The final decision by the Executive Committee of the NAAC.

The self-study report validated by peers is the backbone of the whole exercise. Manuals have been developed to suit different units of higher education, with detailed guidelines on the preparation of the self-study report and the other aspects of assessment and accreditation.

24. Section 12 of NCTE Act, 1993 deals with function of the Council. Under Section 12(k) the 'Council' is required to evolve suitable performance appraisal system, norms and mechanism for enforcing accountability on recognised institutions which reads as under:

> **"12**. Functions of the Council.- It shall be the duty of the Council to take all such steps as it may think fit for ensuring planned and co-ordinated development of teacher education and for the determination and maintenance of standards for teacher education and for the purposes of performing its functions under this Act, the Council may –
>
> **(k)** evolve suitable performance appraisal system, norms and mechanism for enforcing accountability on recognised institutions;

25. In fulfilment of the provisions under Section 12(k) of the NCTE Act, 1993 i.e. to evolve suitable performance appraisal systems, norms and mechanisms for enforcing accountability on recognised institutions and for quality assurance of Teacher Education Institutions, the NAAC entered into an "Memorandum of Understanding"(MOU) with the 'Council' for executing the process of assessment and accreditation of all Teacher Education Institutions coming under the provisions of NCTE Act, 1993. The efforts of 'Council' and NAAC are to ensure and assure the quality of Teachers 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". The aforesaid facts can be noticed from the documents supplied by the parties which prescribe the methodology of assessment required to be followed by the NAAC as per strategic plans, policies and memorandum of understanding reached between NAAC and the 'Council'.

26. Before we decide on the validity of Regulations 8(4) and 8(5), we must first deal with the law as laid down by this Court in different decisions with regard to the power of a delegate of a legislature, such as the Council in this case, to make rules and regulations. In *Hamdard Dawakhana and Another v. Union of India and Others* [AIR 1960 SC 554], this Court held:

> ".....Thus when the delegate is given the power of making rules and regulations in order to fill in the details to carry out and subserve the purposes of the legislation the manner in which the requirements of the statute are to be met and the rights therein created to be enjoyed it is an exercise of delegated legislation....."

Thus, 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.

27. This Court has also laid down the grounds on which such delegated legislation or subordinate legislation can be challenged in the Court. In *Indian Express Newspapers (Bombay) Private Ltd. and others v. Union of India and Others* [(1985) 1 SCC 641], this Court has observed in Para 75 at page 689:

> "A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent Legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition, it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary……"

28. Again in *Clariant International Ltd. and Another v. Securities & Exchange Board of India* [(2004) 8 SCC 524], this Court held in Para 63 at page 547:

> "When any criterion is fixed by a statute or by a policy, an attempt should be made by the authority making the delegated legislation to follow the policy formulation broadly and substantially and in conformity therewith."

29. The grounds on which the validity of a delegated legislation can be challenged have also been discussed at length in *Vasu Dev Singh and Others v. Union of India and*

others [(2006) 12 SCC 753] in which the Court has reiterated the aforesaid law.

30. The aforesaid law laid down by the Court on the grounds of judicial review of delegated legislation or subordinate legislation will have to be borne in mind while deciding the validity of Regulation 8(4) made by the Council. In other words, if the Regulation 8(4) is in broad conformity with the objects and policy of the Act 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.

31. We find that the NCTE Act, 1993 was enacted with the object (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.

Section 12(k) empowers the 'Council' to maintain teacher education, its performance appraisal system and to lay down norms and mechanism for enforcing accountability on recognised institutions.

Under Section 15 the 'Council' can determine as to which institution be allowed to offer new course or training in teacher education; for which the 'Council' is empowered under Section 32(2)(h) to prescribe 'condition' for grant of such permission and recognition.

32. The 'Council' is also empowered to cause inspection of any institution through any person under Section 13 of the NCTE Act, 1993.

33. Combined reading of Section 12(k), Section 15 and Section 32(2)(h), makes it clear that the 'Council' is empowered to frame a Regulation laying down 'conditions' for

proper conduct of a new course or training under clause (a) of sub-section (3) of Section 15.

34. 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-section (2) of Section 32. It can prescribe the 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.

For example the 'Council' may prescribe a condition that the qualification of a teacher should be a degree of a particular subject obtained from a recognised University, to grant recognition to start a new course. If such condition is prescribed it will not amount to delegation of its power to an University to grant such degree.

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 Programme-B.Ed. &B.P.Ed., it can not be held to be sub-delegation of power, as contended by the appellants. The first question is, thus answered in negative against the appellants.

35. In the case of *State Bank's Staff Union (Madras Circle) vs. Union of India and others* reported in (2005) 7 SCC 584, Supreme Court noticed and defined the expression "retrospective" as under:

> "**19.** Every sovereign legislature possesses the right to make retrospective legislation. The power to make laws includes the power to give it retrospective effect. Craies on Statute Law (7th Edn.) at p. 387 defines retrospective statutes in the following words:
>
> "A statute is to be deemed to be retrospective,

> which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."

20. Judicial Dictionary (13th Edn.) by K.J. Aiyar, Butterworth, p. 857, states that the word "retrospective" when used with reference to an enactment may mean (i) affecting an existing contract; or (ii) reopening up of past, closed and completed transaction; or (iii) affecting accrued rights and remedies; or (iv) affecting procedure. Words and Phrases, Permanent Edn., Vol. 37-A, pp. 224-25, defines a "retrospective or retroactive law" as one which takes away or impairs vested or accrued rights acquired under existing laws. A retroactive law takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.

21. In Advanced Law Lexicon by P. Ramanath Aiyar (3rd Edn., 2005) the expressions "retroactive" and "retrospective" have been defined as follows at p. 4124, Vol. 4:

> "Retroactive.—Acting backward; affecting what is past. (Of a statute, ruling, etc.) extending in scope or effect to matters that have occurred in the past. — Also termed retrospective. (Black's Law Dictionary, 7th Edn., 1999)
>
> ' "Retroactivity" is a term often used by lawyers but rarely defined. On analysis it soon becomes apparent, moreover, that it is used to cover at least two distinct concepts. The first, which may be called "true retroactivity", consists in the application of a new rule of law to an act or transaction which was

completed before the rule was promulgated. The second concept, which will be referred to as "quasi-retroactivity", occurs when a new rule of law is applied to an act or transaction in the process of completion.... The foundation of these concepts is the distinction between completed and pending transactions....' T.C. Hartley, Foundations of European Community Law, p. 129 (1981).

* * *

Retrospective.—Looking back; contemplating what is past.

Having operation from a past time.

'Retrospective' is somewhat ambiguous and that good deal of confusion has been caused by the fact that it is used in more senses than one. In general, however, the courts regard as retrospective any statute which operates on cases or facts coming into existence before its commencement in the sense that it affects, even if for the future only, the character or consequences of transactions previously entered into or of other past conduct. Thus, a statute is not retrospective merely because it affects existing rights; nor is it retrospective merely because a part of the requisite for its action is drawn from a time antecedent to its passing." (Vol. 44, Halsbury's Laws of England, 4th Edn., p. 570, para 921.)"

Therefore, it is to be seen as to whether Regulation 8(5) takes away any right of the appellants or impairs any vested right acquired by appellants under the existing law or has created any new obligation in their part.

36. Regulations 8(3) and 8(4) were already in vogue since

13th January, 2006 when Regulations dated 27th December, 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 the 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.

37. "The norms and standards" were prescribed under Regulation 8 of Regulation 2002 as follows:-

"Norms and Standards for various teacher education programmes

(i) The Norms and Standards for various teacher education courses are given in the Appendices 3 to 14 as indicated below which an institution offering the said course is required to comply with.

(i)	Norms and Standards for Pro School Teacher Education Programme	Appendix-3
(ii)	Norms and Standards for Nursery Teacher Education Programme	Appendix-4
(iii)	Norms and Standards for Elementary Teacher Education Programme	Appendix-5
(iv)	Norms and Standards for Bachelor of Elementary Education (B.El.Ed)	Appendix-6
(v)	Norms and Standards for Secondary Teacher Education Programme	Appendix-7
(vi)	Norms and Standards for Master of Education (M.Ed.) Programme	Appendix-8
(vii)	Norms and Standards for Master of Education (M.Ed.) Programme (Part time)	Appendix-9
(viii)	Norms and Standards for Certificate in Physical Education (C.P.Ed.) Programme	Appendix-10

(ix)	Norms and Standards for Bachelor of Physical Education (B.P.Ed.) Programme	Appendix-11
(x)	Norms and Standards for Master of Physical Education (M.P.Ed.) Programme	Appendix-12
(xi)	Norms and Standards for B.Ed. (Open and Distance Learning System)	Appendix-13
(xii)	Norms and Standards for M.Ed. (Open and Distance Learning System)	Appendix-14

(ii) The norms and standards herein notified are minimum and essential. The institution may strengthen further the physical and instructional infrastructure."

The aforesaid "norms and standards" were notified by NCTE Regulations 2002 and retained in the NCTE Regulations, 2005. Appendix-7 was related to "norms and standards for Secondary Teacher Education Programme".

The norms related to Secondary Teacher Education Programme leading to B.Ed. Degree (face-to-face) were in process of change. After finalization of such norms relating to revision of Secondary Teacher Education Programme leading to B.Ed. Degree Course (face-to-face) the NCTE enacted National Council for Teacher Education (Recognition Norms and Procedure) (Amendment) Regulations, 2006. By amended Regulation 3 the "norms and standards", as was stipulated in Appendix-7 was replaced by Appendix-1 of the Amended Regulations, 2006. The said Appendix-1 was made a part of the main Regulations, 2005 dated 27th December, 2005. By a 'Note' below the said amended Regulation 3 it was clarified that conditions prescribed under Regulation 8(3) and 8(4) shall not be applicable in certain cases, as shown hereunder:

"**3. <u>Extent of Amendment</u>**

(i). The appendix – 7 of the norms and standards which was notified by NCTE Regulation, 2002 and retained in

the NCTE Regulations, 2005 shall be replaced by the appendix-1 to this amendment and be read as part thereof.

Note:- For enhancement of intake in the course where new norms have been published after notification of the Regulations dated 27.12.2005, the conditions prescribed in Rule 8(3) and 8(4) of the said Regulation shall not be applicable."

38. Thereby, the Regulations 8(3) and 8(4) remained in force for all 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 27th December, 2005, the conditions prescribed in Rule 8(3) and 8(4) of the Regulations, 2005 dated 27th December, 2005 shall not be applicable for such course.

39. Subsequently, when Regulations 2007 were enacted, the Regulations 8(3) and 8(4) of Regulations 2005 were retained. In the aforesaid 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. 13th January, 2006, such institution is required to be accredited itself with NAAC with a Letter Grade B.

It is needless to say that Regulations 8(3) and 8(4) of Regulations 2005 dated 27th December, 2005 having 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 13th January, 2006. For the reason aforesaid the Regulation 8(5) cannot be held to be retrospective. The second question is, thereby, answered in

negative against the appellants.

40. Further, as plain reading of the Regulations 8(3), 8(4) and 8(5) makes it clear that right of exemption, if any, accrued to an institution in view of 'Note' below Regulation 3 of amended Regulations 2006, has not been taken away nor impaired any vested right acquired by any institution and as no new obligation on the part of any institution has been created, they being governed by Regulations 8(3) and 8(4) since 13th January, 2006, the Regulation 8(5) cannot be held to be retrospective. The 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. In absence of any merit, the appeal is dismissed but there shall be no order as to costs.

R.P. Appeal dismissed.

GANDURI KOTESHWARAMMA & ANR.
v.
CHAKIRI YANADI & ANR.
(Civil Appeal No. 8538 of 2011)

OCTOBER 12, 2011

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

Hindu Succession Act, 1956 – s. 6 (as amended by Hindu Succession (Amendment) Act, 2005):

Devolution of interest in coparcenary property – Rights and liabilities of the daughter – Held: Daughter of a copercener becomes a coparcener by birth in her own rights and liabilities in the same manner as the son – This is effective from September 9, 2005 – Right accrued to a daughter in the property is absolute, except where disposition or alienation including any partition/testamentary disposition of property has taken place before December 20, 2004, as provided in the proviso to sub-section (1) of s. 6.

Partition of coparcenary property – Suit for partition by one of the son – Preliminary decree dated 19.03.1999, amended on 27.09.2003 – Before passing of the final decree, s. 6 was amended in 2005 whereby daughter was allotted the same share as was allotted to a son – Application by daughters seeking preliminary decree in their favour for partition of schedule property, allotting them one share each, allowed by the trial court – Said order set aside by High Court – On appeal, held: Section 6 (as amended) is not applicable to partition effected before 20.12.2004 – On facts, in the suit for partition only the shares were determined by preliminary decree dated 19.03.1999 which was amended on 27.09.2003 – Commissioner had submitted the report as regards the division of the property and final decree for partition was yet to be passed – Or. XX r. 18 C.P.C. creates no impediment for

more than one preliminary decree if after passing of the preliminary decree events have taken place necessitating the readjustment of shares as declared in the preliminary decree – Once a preliminary decree has been passed, it is capable of modification even if no appeal has been preferred from such preliminary decree – Thus, order passed by the High Court is set aside and that of the trial court is restored –Code of Civil Procedure, 1908 – Or. XX r. 18.

Respondent No. 1 filed a suit for partition in respect of a coparcenary property impleading his father, brother and two sisters (appellants). The trial court passed a preliminary decree dated March 19, 1999 and the same was amended on September 27, 2003 declaring the share of respondent No. 1. Thereafter, respondent No. 1 filed applications before the trial court for passing the final decree. Before passing of the final decree, Section 6 of the Hindu Succession Act 1956 was amended by the Hindu Succession (Amendment) Act, 2005. The appellants filed an application for passing the preliminary decree in their favour for partition of schedule property, allotting them one share each by metes and bounds and for delivery of possession. The trial court allowed the same holding that the appellants were entitled for re-allotment of share in the preliminary decree. Respondent No. 1 then filed an appeal and the same was allowed. Therefore, the appellants filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 The new Section 6 as substituted by the Hindu Succession (Amendment) Act, 2005 provides for parity of rights in the coparcenary property among male and female members of a joint Hindu family on and from September 9, 2005. The Legislature has now conferred substantive right in favour of the daughters. According to the new Section 6, the daughter of a copercener becomes a coparcener by birth in her own rights and

liabilities in the same manner as the son. The declaration in Section 6 that the daughter of the coparcener shall have same rights and liabilities in the coparcenary property as she would have been a son is unambiguous and unequivocal. Thus, on and from September 9, 2005, the daughter is entitled to a share in the ancestral property and is a coparcener as if she had been a son. [Para 14] [978-H; 979-A-B]

1.2 The right accrued to a daughter in the property of a joint Hindu family governed by the Mitakshara Law, by virtue of the Hindu Succession (Amendment) Act, 2005 is absolute, except in the circumstances provided in the proviso appended to sub-section (1) of Section 6. The excepted categories to which new Section 6 of the 1956 Act is not applicable are where the disposition or alienation including any partition has taken place before December 20, 2004; and where testamentary disposition of property has been made before December 20, 2004. Sub- section (5) of Section 6 leaves no room for doubt as it provides that this Section shall not apply to the partition which has been effected before December 20, 2004. For the purposes of new Section 6 it is explained that 'partition' means any partition made by execution of a deed of partition duly registered under the Registration Act 1908 or partition effected by a decree of a court. [Para 15] [979-C-E]

1.3 The partition of a Joint Hindu family can be effected by various modes, *inter-alia*, two of these modes are (one) by a registered instrument of a partition and (two) by a decree of the court. In the instant case, admittedly, the partition has not been effected before December 20, 2004 either by a registered instrument of partition or by a decree of the court. The only stage that has reached in the suit for partition filed by the respondent No.1 is the determination of shares vide

preliminary decree dated March 19, 1999 which came to be amended on September 27, 2003 and the receipt of the report of the Commissioner. [Para 16] [980-B-C]

1.4 A preliminary decree determines the rights and interests of the parties. The suit for partition is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of joint Hindu family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final decree is passed. If in the interregnum i.e. after passing of the preliminary decree and before the final decree is passed, the events and supervening circumstances occur necessitating change in shares, there is no impediment for the court to amend the preliminary decree or pass another preliminary decree redetermining the rights and interests of the parties having regard to the changed situation. [Para 17] [980-D-F]

1.5 The High Court erred in not properly appreciating the scope of Order XX Rule 18 of C.P.C. In a suit for partition of immovable property, if such property is not assessed to the payment of revenue to the government, ordinarily passing of a preliminary decree declaring the share of the parties may be required. The court would thereafter proceed for preparation of final decree. The Code of Civil Procedure Code creates no impediment for even more than one preliminary decree if after passing of the preliminary decree events have taken place necessitating the readjustment of shares as declared in the preliminary decree. The court has always power to revise the preliminary decree or pass another preliminary decree if the situation in the changed circumstances so demand. A suit for partition continues after the passing of the preliminary decree and the proceedings in the suit get extinguished only on passing of the final decree. It is

not correct statement of law that once a preliminary decree has been passed, it is not capable of modification. The rights of the parties in a partition suit should be settled once for all in that suit alone and no other proceedings. [Para 20] [984-B-E]

1.6 Section 97 of C.P.C. provides that where any party aggrieved by a preliminary decree passed after the commencement of the Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree. It does not create any hindrance or obstruction in the power of the court to modify, amend or alter the preliminary decree or pass another preliminary decree if the changed circumstances so require. It is true that the final decree is always required to be in conformity with the preliminary decree but that does not mean that a preliminary decree, before the final decree is passed, cannot be altered or amended or modified by the trial court in the event of changed or supervening circumstances even if no appeal has been preferred from such preliminary decree. [Paras 21 and 22] [984-G-H; 985-A]

1.6 The impugned judgment of the High Court is set aside and that of the trial court is restored. The trial court shall now proceed for the preparation of the final decree in terms of its order dated June 15, 2009. [Para 24] [985-C]

Phoolchand and Anr. v. Gopal Lal **AIR 1967 SC 1470;** *S. Sai Reddy vs. S. Narayana Reddy and Other***s (1991) 3 SCC 647 – relied on**

Case Law Reference:

AIR 1967 SC 1470	**Relied on**	**Para 19, 20, 23**
(1991) 3 SCC 647	**Relied on**	**Para 19, 23**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8538 of 2011.

From the Judgment and Order dated 26.08.2009 of the High Court of Andhra Pradesh at Hyderabad in AS No. 462 of 2009.

R. Nedumaran (for Promila) for the appellants.

G.V.R. Choudary, K. Shivraj Choudhuri and A. Chandra Sekhar for the Respondents.

The following Judgment of the Court was delivered

R.M. LODHA, J. 1. Leave granted.

2. The question that arises in this appeal, by special leave, is: whether the benefits of Hindu Succession (Amendment) Act, 2005 are available to the appellants.

3. The appellants and the respondents are siblings being daughters and sons of Chakiri Venkata Swamy. The 1st respondent (plaintiff) filed a suit for partition in the court of Senior Civil Judge, Ongole impleading his father Chakiri Venkata Swamy (1st defendant), his brother Chakiri Anji Babu (2nd defendant) and his two sisters – the present appellants – as 3rd and 4th defendant respectively. In respect of schedule properties 'A', 'C' and 'D' – coparcenary property – the plaintiff claimed that he, 1st defendant and 2nd defendant have 1/3rd share each. As regards schedule property 'B'—as the property belonged to his mother—he claimed that all the parties have 1/5th equal share.

4. The 1st defendant died in 1993 during the pendency of the suit.

5. The trial court vide its judgment and preliminary decree dated March 19, 1999 declared that plaintiff was entitled to 1/3rd share in the schedule 'A', 'C' and 'D' properties and further

entitled to 1/4th share in the 1/3rd share left by the 1st defendant. As regards schedule property 'B' the plaintiff was declared to be entitled to 1/5th share. The controversy in the present appeal does not relate to schedule 'B' property and is confined to schedule 'A', 'C' and 'D' properties. The trial court ordered for separate enquiry as regards mesne profits.

6. The above preliminary decree was amended on September 27, 2003 declaring that plaintiff was entitled to equal share along with 2nd, 3rd and 4th defendant in 1/5th share left by the 1st defendant in schedule property 'B'.

7. In furtherance of the preliminary decree dated March 19, 1999 and the amended preliminary decree dated September 27, 2003, the plaintiff made two applications before the trial court (i) for passing the final decree in terms thereof; and (ii) for determination of mesne profits. The trial court appointed the Commissioner for division of the schedule property and in that regard directed him to submit his report. The Commissioner submitted his report.

8. In the course of consideration of the report submitted by the Commissioner and before passing of the final decree, the Hindu Succession (Amendment) Act, 2005 (for short, '2005 Amendment Act') came into force on September 9, 2005. By 2005 Amendment Act, Section 6 of the Hindu Succession Act, 1956 (for short '1956 Act') was substituted. Having regard to 2005 Amendment Act which we shall refer to appropriately at a later stage, the present appellants (3rd and 4th defendant) made an application for passing the preliminary decree in their favour for partition of schedule properties 'A', 'C' and 'D' into four equal shares; allot one share to each of them by metes and bounds and for delivery of possession.

9. The application made by 3rd and 4th defendant was contested by the plaintiff. Insofar as 2nd defendant is concerned he admitted that the 3rd and 4th defendant are entitled to share as claimed by them pursuant to 2005

Amendment Act but he also submitted that they were liable for the debts of the family.

10. The trial court, on hearing the parties, by its order dated June 15, 2009, allowed the application of the present appellants (3rd and 4th defendant) and held that they were entitled for re-allotment of shares in the preliminary decree, i.e., they are entitled to 1/4th share each and separate possession in schedule properties 'A', 'C' and 'D'.

11. The plaintiff (present respondent no. 1) challenged the order of the trial court in appeal before the Andhra Pradesh High Court. The Single Judge by his order dated August 26, 2009 allowed the appeal and set aside the order of the trial court.

12. 1956 Act is an Act to codify the law relating to intestate succession among Hindus. This Act has brought about important changes in the law of succession but without affecting the special rights of the members of a Mitakshara Coparcenary. The Parliament felt that non-inclusion of daughters in the Mitakshara Coparcenary property was causing discrimination to them and, accordingly, decided to bring in necessary changes in the law. The statement of objects and reasons of the 2005 Amendment Act, inter alia, reads as under :

> ".....The retention of the Mitakshara coparcenary property without including the females in it means that the females cannot inherit in ancestral property as their male counterparts do. The law by excluding the daughter from participating in the coparcenary ownership not only contributes to her discrimination on the ground of gender but also has led to oppression and negation of her fundamental right of equality guaranteed by the Constitution. Having regard to the need to render social justice to women, the States of Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra have made necessary

> changes in the law giving equal right to daughters in Hindu Mitakshara coparcenary property."

13. With the above object in mind, the Parliament substituted the existing Section 6 of the 1956 Act by a new provision vide 2005 Amendment Act. After substitution, the new Section 6 reads as follows :

> "6. Devolution of interest in coparcenary property.— (1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,—
>
> (a) by birth become a coparcener in her own right in the same manner as the son;
>
> (b) have the same rights in the coparcenary property as she would have had if she had been a son;
>
> (c) be subject to the same liabilities in respect of the said coparcenary property as that of a son,
>
> and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:
>
> Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.
>
> (2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force in, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,—

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation.— For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious

obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt:

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect—

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Explanation.—For the purposes of clause (a), the expression "son", "grandson" or "great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005.

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation. —For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court."

14. The new Section 6 provides for parity of rights in the coparcenary property among male and female members of a joint Hindu family on and from September 9, 2005. The

Legislature has now conferred substantive right in favour of the daughters. According to the new Section 6, the daughter of a copercener becomes a coparcener by birth in her own rights and liabilities in the same manner as the son. The declaration in Section 6 that the daughter of the coparcener shall have same rights and liabilities in the coparcenary property as she would have been a son is unambiguous and unequivocal. Thus, on and from September 9, 2005, the daughter is entitled to a share in the ancestral property and is a coparcener as if she had been a son.

15. The right accrued to a daughter in the property of a joint Hindu family governed by the Mitakshara Law, by virtue of the 2005 Amendment Act, is absolute, except in the circumstances provided in the proviso appended to sub-section (1) of Section 6. The excepted categories to which new Section 6 of the 1956 Act is not applicable are two, namely, (i) where the disposition or alienation including any partition has taken place before December 20, 2004; and (ii) where testamentary disposition of property has been made before December 20, 2004. Sub- section (5) of Section 6 leaves no room for doubt as it provides that this Section shall not apply to the partition which has been effected before December 20, 2004. For the purposes of new Section 6 it is explained that 'partition' means any partition made by execution of a deed of partition duly registered under the Registration Act 1908 or partition effected by a decree of a court. In light of a clear provision contained in the Explanation appended to sub-section (5) of Section 6, for determining the non-applicability of the Section, what is relevant is to find out whether the partition has been effected before December 20, 2004 by deed of partition duly registered under the Registration Act, 1908 or by a decree of a court. In the backdrop of the above legal position with reference to Section 6 brought in the 1956 Act by the 2005 Amendment Act, the question that we have to answer is as to whether the preliminary decree passed by the trial court on March 19, 1999 and amended on September 27, 2003 deprives the appellants of

the benefits of 2005 Amendment Act although final decree for partition has not yet been passed.

16. The legal position is settled that partition of a Joint Hindu family can be effected by various modes, inter-alia, two of these modes are (one) by a registered instrument of a partition and (two) by a decree of the court. In the present case, admittedly, the partition has not been effected before December 20, 2004 either by a registered instrument of partition or by a decree of the court. The only stage that has reached in the suit for partition filed by the respondent no.1 is the determination of shares vide preliminary decree dated March 19, 1999 which came to be amended on September 27, 2003 and the receipt of the report of the Commissioner.

17. A preliminary decree determines the rights and interests of the parties. The suit for partition is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of joint Hindu family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final decree is passed. If in the interregnum i.e. after passing of the preliminary decree and before the final decree is passed, the events and supervening circumstances occur necessitating change in shares, there is no impediment for the court to amend the preliminary decree or pass another preliminary decree redetermining the rights and interests of the parties having regard to the changed situation. We are fortified in our view by a 3- Judge Bench decision of this Court in the case of *Phoolchand and Anr. Vs. Gopal Lal*[1] wherein this Court stated as follows:

> "We are of opinion that there is nothing in the Code of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree some parties die and shares of other parties are thereby augmented. . . . ..

1. AIR 1967 SC 1470.

So far therefore as partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the court can and should do so; ..... there is no prohibition in the Code of Civil Procedure against passing a second preliminary decree in such circumstances and we do not see why we should rule out a second preliminary decree in such circumstances only on the ground that the Code of Civil Procedure does not contemplate such a possibility. . . for it must not be forgotten that the suit is not over till the final decree is passed and the court has jurisdiction to decide all disputes that may arise after the preliminary decree, particularly in a partition suit due to deaths of some of the parties. . . . .a second preliminary decree can be passed in partition suits by which the shares allotted in the preliminary decree already passed can be amended and if there is dispute between surviving parties in that behalf and that dispute is decided the decision amounts to a decree.... ..... ."

18. This Court in the case of *S. Sai Reddy vs. S. Narayana Reddy and Others*[2] had an occasion to consider the question identical to the question with which we are faced in the present appeal. That was a case where during the pendency of the proceedings in the suit for partition before the trial court and prior to the passing of final decree, the 1956 Act was amended by the State Legislature of Andhra Pradesh as a result of which unmarried daughters became entitled to a share in the joint family property. The unmarried daughters respondents 2 to 5 therein made application before the trial court claiming their share in the property after the State amendment in the 1956 Act. The trial court by its judgment and order dated August 24, 1989 rejected their application on the ground that the preliminary decree had already been passed and specific shares of the parties had been declared and, thus, it was not open to the unmarried daughters to claim share in

2. (1991) 3 SCC 647.

the property by virtue of the State amendment in the 1956 Act. The unmarried daughters preferred revision against the order of the trial court before the High Court. The High Court set aside the order of the trial court and declared that in view of the newly added Section 29-A, the unmarried daughters were entitled to share in the joint family property. The High Court further directed the trial court to determine the shares of the unmarried daughters accordingly. The appellant therein challenged the order of the High Court before this Court. This Court considered the matter thus;

"…….A partition of the joint Hindu family can be effected by various modes, viz., by a family settlement, by a registered instrument of partition, by oral arrangement by the parties, or by a decree of the court. When a suit for partition is filed in a court, a preliminary decree is passed determining shares of the members of the family. The final decree follows, thereafter, allotting specific properties and directing the partition of the immovable properties by metes and bounds. Unless and until the final decree is passed and the allottees of the shares are put in possession of the respective property, the partition is not complete. The preliminary decree which determines shares does not bring about the final partition. For, pending the final decree the shares themselves are liable to be varied on account of the intervening events. In the instant case, there is no dispute that only a preliminary decree had been passed and before the final decree could be passed the amending Act came into force as a result of which clause (*ii*) of Section 29-A of the Act became applicable. This intervening event which gave shares to respondents 2 to 5 had the effect of varying shares of the parties like any supervening development. Since the legislation is beneficial and placed on the statute book with the avowed object of benefitting women which is a vulnerable section of the society in all its stratas, it is necessary to give a liberal effect to it. For this reason also,

we cannot equate the concept of partition that the legislature has in mind in the present case with a mere severance of the status of the joint family which can be effected by an expression of a mere desire by a family member to do so. The partition that the legislature has in mind in the present case is undoubtedly a partition completed in all respects and which has brought about an irreversible situation. A preliminary decree which merely declares shares which are themselves liable to change does not bring about any irreversible situation. Hence, we are of the view that unless a partition of the property is effected by metes and bounds, the daughters cannot be deprived of the benefits conferred by the Act. Any other view is likely to deprive a vast section of the fair sex of the benefits conferred by the amendment. Spurious family settlements, instruments of partitions not to speak of oral partitions will spring up and nullify the beneficial effect of the legislation depriving a vast section of women of its benefits".

19. The above legal position is wholly and squarely applicable to the present case. It surprises us that the High Court was not apprised of the decisions of this Court in *Phoolchand*[1] and *S. Sai Reddy*[2]. High Court considered the matter as follows:

"In the recent past, the Parliament amended Section 6 of the Hindu Succession Act (for short 'the Act'), according status of coparceners to the female members of the family also. Basing their claim on amended Section 6 of the Act, the respondents 1 and 2 i.e., defendants 3 and 4 filed I.A. No. 564 of 2007 under Order XX Rule 18 of C.P.C., a provision, which applies only to preparation of final decree. It hardly needs an emphasis that a final decree is always required to be in conformity with the preliminary decree. If any party wants alteration or change of preliminary decree, the only course open to him or her

is to file an appeal or to seek other remedies vis-à-vis the preliminary decree. As long as the preliminary decree stands, the allotment of shares cannot be in a manner different from what is ordained in it."

20. The High Court was clearly in error in not properly appreciating the scope of Order XX Rule 18 of C.P.C. In a suit for partition of immovable property, if such property is not assessed to the payment of revenue to the government, ordinarily passing of a preliminary decree declaring the share of the parties may be required. The court would thereafter proceed for preparation of final decree. In *Phoolchand*[1], this Court has stated the legal position that C.P.C. creates no impediment for even more than one preliminary decree if after passing of the preliminary decree events have taken place necessitating the readjustment of shares as declared in the preliminary decree. The court has always power to revise the preliminary decree or pass another preliminary decree if the situation in the changed circumstances so demand. A suit for partition continues after the passing of the preliminary decree and the proceedings in the suit get extinguished only on passing of the final decree. It is not correct statement of law that once a preliminary decree has been passed, it is not capable of modification. It needs no emphasis that the rights of the parties in a partition suit should be settled once for all in that suit alone and no other proceedings.

21. Section 97 of C. P.C. that provides that where any party aggrieved by a preliminary decree passed after the commencement of the Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree does not create any hindrance or obstruction in the power of the court to modify, amend or alter the preliminary decree or pass another preliminary decree if the changed circumstances so require.

22. It is true that final decree is always required to be in

conformity with the preliminary decree but that does not mean that a preliminary decree, before the final decree is passed, cannot be altered or amended or modified by the trial court in the event of changed or supervening circumstances even if no appeal has been preferred from such preliminary decree.

23. The view of the High Court is against law and the decisions of this Court in *Phoolchand*[1] and *S.Sai Reddy*[2].

24. We accordingly allow this appeal; set aside the impugned judgment of the High Court and restore the order of the trial court dated June 15, 2009. The trial court shall now proceed for the preparation of the final decree in terms of its order dated June 15, 2009. No costs.

N.J. Appeal allowed.

RAIWAD MANOJKUMAR NIVRUTTIRAO
v.
STATE OF MAHARASHTRA & ANR.
(Civil Appeal No. 7857 of 2004)

OCTOBER 13, 2011

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

Social status certificate – Issuance of caste certificate to appellant certifying that he belongs to 'Koli Mahadeo', recognized as a Scheduled Tribe in the State of Maharashtra – Selection and appointment of appellant to a vacancy of clerk in Bank, reserved for Scheduled Tribe – Verification and scrutiny as to the caste status of the appellant – Order passed by the Caste Scrutiny Committee that appellant did not belong to 'Koli Mahadeo', Scheduled Tribe – Said order upheld by the High Court – On appeal, held: On facts, appellant belongs to Koli tribe which is not a Scheduled Tribe – However, since appellant had been appointed in the service of NABARD for nineteen years, his initial appointment in the service of NABARD not disturbed but he would not be granted any benefit as a member of the Scheduled Tribe – Constitution of India, 1950 – Article 142.

Appellant was issued a caste certificate by the Tehsildar and Executive Magistrate certifying that he belongs to 'Koli Mahadeo', which was recognized as a Scheduled Tribe in the State of Maharashtra. The appellant was selected and appointed to a vacancy of Clerk in the National Bank of Agricultural and Rural Development (NABARD) in a vacancy reserved for Scheduled Tribe in the year 1992. The General Manager of the Bank referred the claim of the appellant as Scheduled Tribe for verification and scrutiny. The report was submitted in the year 2000. Thereafter, the Scrutiny Committee passed an order that the appellant did not

belong to 'Koli Mahadeo', Scheduled Tribe. Aggrieved, the appellant filed a writ petition. The High Court dismissed the writ petition. Therefore, the appellant filed the instant appeal.

Partly allowing the appeal, the Court

HELD: In the facts of the instant case, the appellant belongs to 'Koli' tribe and it was in *_Kumari Madhuri Patil & Anr. v. Additional Commissioner, Tribal Development & Ors_. that it was held that 'Mahadeo Koli' and 'Koli' were not one or the same tribe and that 'Koli' tribe is not a Scheduled Tribe. Before the decision of this Court in *_Kumari Madhuri Patil & Anr. v. Additional Commissioner, Tribal Development & Ors_. the appellant had been appointed in the service of NABARD on 28.02.1992 and since 1992 for long nineteen years, he has been in service. Invoking the jurisdiction under Article 142 of the Constitution, the initial appointment of the appellant in the service of NABARD will not be disturbed, but the appellant will not be granted any benefit as a member of the Scheduled Tribe including any promotional benefit and promotional benefit, if any, granted to the appellant as a member of the Scheduled Tribe shall be cancelled. [Para 7] [990-E-H; 991-A]

Kumari Madhuri Patil and Anr. v. Additional Commissioner, TribalDevelopment and Ors*. **AIR 1995 SC 94: 1994 (3) Suppl. SCR 50 – relied on.

Raju Ramsing Vasave v. Mahesh Deorao Bhivapurkar and Ors. **(2008) 9 SCC 54: 2008 (12) SCR 992 – referred to.**

Case Law Reference:

2008 (12) SCR 992	**Referred to**	**Para 5**
1994 (3) Suppl. SCR 50	**Relied on**	**Para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7857 of 2004.

From the Judgment and Order dated 05.08.2003 of the High Court of Judicature at Bombay Bench at Aurangabad in Writ Petition No. 2146 of 2003.

M.S. Nargolkar, D.M. Nargolkar and Amey Nargolkar for the appellant.

Asha Gopalan Nair for the Respondents.

The following Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. This is an appeal against the order dated 05.082003 of the Bombay High Court in Writ Petition No.2146 of 2003.

2. The facts very briefly are that on 07.06.1990 the Tehsildar and Executive Magistrate issued a caste certificate to the appellant certifying that he belongs to 'Koli Mahadeo', which was recognized as a Scheduled Tribe in the State of Maharashtra. On 28.02.1992, the appellant was selected and appointed to a vacancy of Clerk Grade-II in the National Bank of Agricultural and Rural Development (NABARD) in a vacancy reserved for Scheduled Tribe. The General Manager of NABARD referred the claim of the appellant as Scheduled Tribe for verification and scrutiny. The Vigilance Cell submitted its report on 19.09.2000. The Scrutiny Committee then called the appellant for interview and when the appellant did not appear on several dates fixed for the interview, it finally submitted its order on 27.01.2003 that the appellant did not belong to 'Koli Mahadeo', Scheduled Tribe.

3. Aggrieved by the findings of the Caste Scrutiny Committee, the appellant filed Writ Petition No.2146 of 2003 in the High Court challenging the order of the Caste Scrutiny Committee. By the impugned order dated 05.08.2003, the High Court dismissed the Writ Petition. In the impugned order, the

High Court held that the Caste Scrutiny Committee had found from the documents on record that the father of the appellant belonged to caste 'Koli' and 'Koli' and 'Koli Mahadeo' are different tribes as has been decided by this Court in *Kumari Madhuri Patil & Anr. v. Additional Commissioner, Tribal Development & Ors*. [AIR 1995 SC 94]. The High Court also found that despite several notices issued to the appellant, he did not appear before the Caste Scrutiny Committee to attend the hearing and that the appellant had failed to discharge the burden to prove by producing cogent and reliable evidence that he belonged to the 'Koli Mahadeo' tribe and not to 'Koli' tribe.

4. Learned counsel for the appellant made efforts to persuade us to set aside the findings of the High Court and the Caste Scrutiny Committee, but on perusal of the order of the Caste Scrutiny Committee and the High Court, we are not inclined to do so as we find that there is no infirmity in the order of either the Caste Scrutiny Committee or the High Court.

5. Learned counsel for the appellant next submitted that the appellant had been in service since 1992, almost for nineteen years and if the appellant is removed from service on the basis of the order of the Caste Scrutiny Committee, he will suffer immense hardship. He cited the decision in *Raju Ramsing Vasave v. Mahesh Deorao Bhivapurkar & Ors*. [(2008) 9 SCC 54] in which this Court invoking its jurisdiction under Article 142 of the Constitution, directed that the appointment of the respondent no.1 in that case, who had put in a long years of service, should not be disturbed even though he was found not to be belong to the Scheduled Tribe. He submitted that a similar relief may be granted to the appellant under Article 142 of the Constitution.

6. We find on reading of the judgment of this Court in *Raju Ramsing Vasave v. Mahesh Deorao Bhivapurkar & Ors*. (supra) that the respondent no.1 in that case claimed to be a member of the Scheduled Tribe, namely, the 'Halba' tribe. The caste of his father in school record was shown as 'Koshti',

whereas the caste of his Uncle and his Cousins were shown as 'Halba'. After his MBBS course, he was appointed as a Field Officer in the Maharashtra Pollution Control Board against a vacancy meant for Scheduled Tribe subject to validity certificate. He filed a writ petition in the Bombay High Court and the Bombay High Court allowed the writ petition in 1988. The Division Bench of the Bombay High Court in its judgment dated 11.08.1988 held that the respondent no.1 should be declared as belonging to 'Halba' tribe as his other relatives have been declared as such. Thereafter, a co-employee of respondent no.1 questioned the caste certificate granted in favour of the respondent no.1 and this Court held that the respondent no.1 did not belong to 'Halba' tribe and was not a Scheduled Tribe. In Para 49 of the judgment, however, this Court held invoking the jurisdiction under Article 142 of the Constitution that it would not be proper to disturb the very appointment of the respondent no.1 in that case, but observed that he shall not be eligible for grant of any benefit as a member of Scheduled Tribe.

7. In the facts of the present case, we find that the appellant belongs to 'Koli' tribe and it was in *Kumari Madhuri Patil & Anr. v. Additional Commissioner, Tribal Development & Ors*. (supra) that it was held that 'Mahadeo Koli' and 'Koli' were not one or the same tribe and that 'Koli' tribe is not a Scheduled Tribe and the decision of this Court in *Kumari Madhuri Patil & Anr. v. Additional Commissioner, Tribal Development & Ors*. (supra) has been relied upon by the High Court in the impugned judgment in this case to hold that the appellant did not belong to 'Mahadeo Koli' tribe. Before the decision of this Court in *Kumari Madhuri Patil & Anr. v. Additional Commissioner, Tribal Development & Ors*. (supra), the appellant had been appointed in the service of NABARD on 28.02.1992 and since 1992 for long nineteen years, he has been in service. Invoking our jurisdiction under Article 142 of the Constitution, we order that the initial appointment of the appellant in the service of NABARD will not be disturbed, but the appellant will not be granted any benefit as a member of the Scheduled Tribe

including any promotional benefit and promotional benefit, if any, granted to the appellant as a member of the Scheduled Tribe shall be cancelled. We make it clear that the relief extended is not intended to be precedent and shall not be relied upon to grant similar relief.

8. The appeal is partly allowed with no order as to costs.

The application for impleadment is dismissed.

N.J. Appeal Partly allowed.

TRAMBAKESHWAR DEVASTHAN TRUST AND ANR.
v.
PRESIDENT, PUROHIT SANGH AND ORS.
(Civil Appeal No. 6639 of 2003)

OCTOBER 13, 2011

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

Bombay Public Trusts Act, 1950:

ss.2(10)(a), 47(3) – Religious public trust – Temple – Appointment of Board of Trustees – Relevant considerations for – Held: Charity Commissioner must have regard to the question whether the appointment of a particular person would promote or impede the execution of the trust and would be in the interest of the public or section of the public who have interest in the trust – In the instant case, while deciding the composition of trust, High Court considered the provisions of ss.2(10) and 47(3) and held that the Tungars, Purohits and Pujaris need to be represented in the Board of Trustees of the Temple – High Court not only kept in mind the interest of the public but also interest of the temple and took a view that the appointment of representatives of the Tungars, Purohits or Pujaris in the trust would not be in conflict with the interest of the trust just because they have interest in the cash offerings or the consideration for the pujas or performance of the official puja in the temple – The impugned order of the High Court insofar as it held that Tungars, Purohits and Pujaris need to be represented in the Board of Trustees by one member from each of these classes is upheld – However, to ensure that the interest of the public is protected and safeguarded in all the decisions of the Board of Trustees, it is directed that, instead of two persons, four persons would be appointed by the Charity Commissioner from amongst male/ female, adult Hindu devotees preferably residents of Trimbakeshwar, who would be representing the public in the

Board of Trustees – This would ensure that in a composition of maximum of nine members, four members at least would represent the public or the devotees of the temple and the decisions of the Board of Trustees would be in the larger interest of temple and the public or the devotees – The impugned judgment of the High Court is modified accordingly – Trust.

Appellant, a public trust under the Bombay Public Trusts Act, 1950 was registered in respect of the temple in 1952. The Charity Commissioner modified the existing scheme for management of the said trust and appointed 5 trustees, one from the Tungars, one from the Purohits and appointment of remaining 3 was to be done by the Charity Commissioner himself. The order of the Charity Commissioner was challenged before the Additional District Judge who set aside the appointment of the Tungars and the Purohits as trustees and directed that instead a Civil Judge would be nominated by the District Judge and the Chief Officer of the Trambakeshwar Municipality would be appointed as Ex-officio trustee and the Civil Judge so appointed by the District Judge would be the Chairman of the Board of Trustees. On appeals, the High Court modified the composition of the trust. It held that the trust would have a maximum of 7 members namely, one nominee of the District Judge who would be the *Ex-officio* Trustee and Chairman of the Board, the Chief Executive Officer of the Trimbakeshwar Municipal Council who would be the *Ex-officio* Trustee and in his absence, his immediate subordinate nominated by the Municipal Council, one representative to be nominated by the Tungar Public Trust, one representative to be nominated by the Purohit Sangh (registered society), one person to be nominated from amongst the three Pujari families; and two persons to be appointed by the Charity Commissioner from amongst male/female, adult Hindu devotees preferably residents of Trimbakeshwar.

In the instant appeals, it was contended for the appellants that the High Court was not justified in giving representation in the Board of Trustees to the Tungars, Purohits and Pujaris, particularly since Tungars and Purohits had direct pecuniary interest in the temple.

Disposing of the appeals, the Court

HELD: 1.1. It will be clear from a reading of Section 2(10)(a) of the Bombay Public Trusts Act, 1950 that in the case of a temple, person who is entitled to attend at or is in the habit of attending the performance of worship or service in the temple, or who is entitled to partake or is in the habit of partaking in the distribution of gifts of the temple is a person having interest. Section 47(3) of the Act provides that the Charity Commissioner shall have regard to the factors mentioned in clauses (a), (b), (c), (d) and (e) while appointing a trustee. The Charity Commissioner, therefore, must have regard to the question whether the appointment will promote or impede the execution of the trust as mentioned in clause (c) and to the interest of the public or section of the public who have interest in the trust as mentioned in clause (d). The High Court had considered the provisions of Sections 2(10) and 47(3) of the Act in the impugned judgment and had held that the Tungars, Purohits and Pujaris need to be represented in the Board of Trustees. A reading of the impugned judgment of the High Court would show that the High Court has not only kept in mind the interest of the public but also interest of the temple and had taken a view that the appointment of representatives of the Tungars, Purohits or Pujaris in the trust would not be in conflict with the interest of the trust only because they have interest in the cash offerings, the consideration for the pujas or performance of the official puja in the temple. The High Court rightly held that Tungars, Purohits and Pujaris have interest in the trust

but not necessarily an interest which is in conflict with the interest of the trust. In most of the decisions of the Board of Trustees, there would not be a conflict of interest between that of the trust and that of the Tungars, Purohits and Pujaris. Rather, representation of Tungars, Purohits and Pujaris in the Board of Trustees may be necessary to ensure the smooth functioning of the temple. The impugned order of the High Court in so far as it held that Tungars, Purohits and Pujaris need to be represented in the Board of Trustees by one member from each of these classes is upheld. [Para 8, 9] [1001-C-E-F; 1003-F-H; 1004-A-B]

Fakir Mohamed Abdul Razak v. The Charity Commissioner, Bombayand Ors. **AIR 1976 Bom.304 – approved.**

1.2. It is well settled law that the interest of the public is paramount in any religious public trust. To ensure that the interest of the public is protected and safeguarded in all the decisions of the Board of Trustees, it is directed that, instead of two persons, four persons would be appointed by the Charity Commissioner from amongst male/female, adult Hindu devotees preferably residents of Trimbakeshwar, who would be representing the public in the Board of Trustees. This would ensure that in a composition of maximum of nine members, four members at least would represent the public or the devotees of the temple and the decisions of the Board of Trustees will be in the larger interest of temple and the public or the devotees. The impugned judgment of the High Court is modified accordingly. [Para 10, 11] [1004-C-E-H]

Case Law Reference:

AIR 1976 Bom.304	**approved**	**Para 6**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6639 of 2003.

From the Judgment and Order dated 05.08.2002 of the High Court of Judicature at Bombay in First Appeal No. 1252 of 1996.

WITH

Civil Appeal Nos. 6640, 6641 and 6642 of 2003.

Jayant Bhushan, Shivaji M. Jadhav and S.K. Jain for the Appellants.

Shekhar Naphade, R.P. Bhatt, Ravindra Keshavrao Adsure, Shridhar Y. Chitale, Abhijat P. Medh, Aniruddha P. Mayee, Charudatta Mohindrakar, Rucha Mayee, Asha G. Nair and J.P. Dhanda for the Respondents.

The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. These are four appeals against the common judgment dated 5th of August, 2002 of the Bombay High Court in First Appeal Nos. 1252 of 1996, 1325 of 1996, 142 of 1997 and 1322 of 1996 and relate to the ancient Shiva temple situated at Trambakeshwar near Nashik (for short 'the temple').

2. The facts very briefly are that a public trust under the Bombay Public Trusts Act, 1950 (for short 'the Act') was registered in respect of the temple in 1952 and one Jogalekar was appointed as its sole trustee with hereditary succession. In 1965, some of the devotees of the temple filed an application under Section 50A(1) of the Act for settlement of a scheme for management of the trust. In 1967, a scheme for management of the trust was framed but the same was challenged by the sole trustee Jogalekar under Section 72 of the Act before the District Judge, Nashik. The District Judge, Nashik amended the scheme but the amendment was not to the liking of the sole trustee Jogalekar and Jogalekar resigned and none of his legal heirs were willing to be the trustee of the trust. In 1977, the Charity Commissioner modified the scheme and appointed one Gokhale as interim sole trustee and directed an inspection.

After inspection, the Deputy Charity Commissioner submitted the inspection report narrating the entire history and activities of the temple. The inspection report gave the details of the traditional role played by Tungars, Purohits and Pujaris in the temple for hundreds of years. The Charity Commissioner considered the report and by order dated 30.11.1981 modified the scheme and appointed 5 trustees, one from the Tungars, one from the Purohits and remaining 3 to be appointed by the Charity Commissioner.

3. The sole trustee Gokhale, however, challenged the order dated 30.11.1981 of the Charity Commissioner under Section 72 of the Act before the District Judge, Nashik. After hearing the parties the 5th Additional District Judge, Nashik in his order dated 28.12.1993, held that Tungars get offerings made by the devotees in the plate situated before the idol and Purohits earn income from the devotees who visit the temple and therefore they have financial interest in the offerings and the devotees and their respective participation in the management of the trust is likely to be in conflict with the interest of the trust. The Additional District Judge held that the apprehension of the appellant before him that Tungars and Purohits, if appointed as trustees, are bound to look after their well being first and divert the attention of the devotees was well-founded and accordingly allowed the appeal and set aside the appointment of one of the Tungars and one of the Purohits as trustees. The Additional District Judge directed that instead a Civil Judge, Senior Division, be nominated by the District Judge, Nashik and the Chief Officer of Trambakeshwar Municipality or in his absence the next subordinate be appointed as Ex-officio trustee and that the Civil Judge, Senior Division, so appointed by the District Judge, Nashik shall be the Chairman of the Board of Trustees.

4. Aggrieved by the judgment of the Additional District Judge, Nashik, the President, Purohit Sangh filed First Appeal No.1252 of 1996, the Tungars filed First Appeal No.1322 of 1996 and the Pujaris represented by Krushnaji Ramchandra Ruikar and three others filed First Appeal No.1325 of 1996.

After hearing the parties, the High Court in the impugned judgment dated 05.08.2002 has held that the Tungars, Purohits as well as Pujaris should get representation in the trust and allowed the appeal in part and modified the composition of the trust. The High Court held in the impugned order that the trust will have a maximum of 7 members namely, one nominee of the District Judge who would be the *Ex-officio* Trustee and Chairman of the Board, the Chief Executive Officer of the Trimbakeshwar Municipal Council who would be the *Ex-officio* Trustee and in his absence, his immediate subordinate nominated by the Municipal Council, one representative to be nominated by the Tungar Public Trust, one representative to be nominated by the Purohit Sangh (registered society), one person to be nominated from amongst the three Pujari families; and two persons to be appointed by the Charity Commissioner from amongst male/female, adult Hindu devotees preferably residents of Trimbakeshwar.

5. Learned counsel for the appellant in the three appeals submitted that the High Court was not right and justified in giving representation in the Board of Trustees to the Tungars, Purohits and Pujaris, particularly when Tungars and Purohits have direct pecuniary interest in the temple. He explained that Tungars collected the offerings made by the devotees to the idol and Purohits perform pujas for the devotees and earn money from the devotees. He submitted that the interest of Tungars and Purohits were in direct conflict with the interest of the trust and they should not have been given the representation in the Board of Trustees. By way of illustration, learned counsel for the appellant submitted that if the Board of Trustees was to decide to place a cash-box in which the devotees would contribute money for the benefit of the temple, the Tungars and Purohits or their representatives would not like this decision to come through because such a decision would affect their earnings. He submitted that in fact in 1997, the Tungars had opposed the installation of cash-box before the idol. He submitted that the Additional District Judge, Nashik was therefore right in coming

to the conclusion that Tungars and Purohits have financial interest in the offerings and the devotees and their appointment as trustees will not be in the interest of the trust. He referred to the provisions of Section 47(3) of the Act to show that the Charity Commissioner shall have regard to the question whether the appointment of a trustee will promote or impede the execution of the trust and to the interest of the public or the section of the public who have interest in the trust. He submitted that it is the devotees of the temple who have got maximum interest in the temple whereas Tungars and Purohits have their own interest as against the interest of the temple and should not have been appointed as trustees.

6. Learned counsel appearing for the respondents referred to the inspection report to show the important functions performed by the Tungars, Purohits and Pujaris at the temple for the last hundred of years. They also referred to the reasons given by the Joint-Charity Commissioner in his order dated 30.11.1981 for giving representations to the Tungars, Purohits and Pujaris in the Board of Trustees. They submitted that the High Court has given good reasons in the impugned judgment to show that there is no conflict between the interest of the Tungars, Purohits and Pujaris and the interest of the trust. Learned counsel for the respondents submitted that in the *Fakir Mohamed Abdul Razak vs. The Charity Commissioner, Bombay and Ors.* (AIR 1976 Bom.304) a Division Bench of the High Court while deciding a matter under the Act has held in paragraph 37 that the court has to consider while settling the Scheme the past history of the institution and the way in which the management of the trust has been carried on till the settlement of the scheme and the appointment of the trustees. They submitted that the Joint-Charity Commissioner and the High Court have taken into consideration the past history of the trust and in particular the role played by the Tungars, Purohits and Pujaris and held that they should be given representations in the Board of Trustees. They submitted that the appointment of representatives of the Tungars, Purohits and Pujaris does

not in any way impede the execution of the trust. They argued that Tungars, Purohits and Pujaris, all are persons who have interest in the trust within the meaning of Section 2(10) of the Act and they are entitled to be represented in the trust.

7. Section 2(10) of the Act and Section 47(3) of the Act which are relevant for deciding the issues raised before us are quoted hereinbelow:

"**Section 2(10)** "**Person having interest" includes** –

(a) in the case of a temple, person who is entitled to attend at or is in the habit of attending the performance of worship or service in the temple, or who is entitled to partake or is in the habit of partaking in the distribution of gifts thereof,

(b) in the case of a math, a disciple of the math or a person of the religious persuasion to which the math belongs,

(c) in the case of wakf, a person who is entitled to receive any pecuniary or other benefit from the wakf and includes a person who has right to worship or to perform any religious rite in a mosque, idgah, imambara, dargah, maqbara or other religious institution connected with the wakf or to participate in any religious or charitable institution under the wakf,

(d) in the case of a society registered under the Societies Registration Act, 1860, any member of such society, and

(e) in the case of any other public trust, any trustee or beneficiary;

47. Power of Charity Commissioner to appoint, suspend, remove or discharge trustees and invest property to new trustees : (3) In appointing a trustee under sub-section (2), the Charity Commissioner shall have regard

(a) to the wishes of the author of that trust;

(b) to the wishes of the persons, if any, empowered

to appoint a new trustee;

(c) to the question whether the appointment will promote or impede the execution of the trust;

(d) to the interest of the public or the section of the public who have interest in the trust; and

(e) to the custom and usage of the trust.

It will be clear from a reading of Section 2(10)(a) of the Act that in the case of a temple, person who is entitled to attend at or is in the habit of attending the performance of worship or service in the temple, or who is entitled to partake or is in the habit of partaking in the distribution of gifts of the temple is a person having interest. Section 47(3) of the Act quoted above provides that the Charity Commissioner shall have regard to the factors mentioned in clauses (a), (b), (c), (d) and (e) while appointing a trustee. The Charity Commissioner, therefore, must have regard to the question whether the appointment will promote or impede the execution of the trust as mentioned in clause (c) and to the interest of the public or section of the public who have interest in the trust as mentioned in clause (d).

8. We find that the High Court has considered the provisions of Sections 2(10) and 47(3) of the Act in the impugned judgment and has held that the Tungars, Purohits and Pujaris need to be represented in the Board of Trustees. Paragraphs 15 and 16 of the impugned judgment of the High Court are quoted hereinbelow:

"15. In a case of a religious public trust, undoubtedly, the Authority or the Court will have to keep in mind the requirements of Section 47(3) of the Act and the interest of or the proper management and administration of such trust. The persons to be appointed, by law, are required to be persons who have interest in the affairs of the trust which is real, substantive and an existing one, though not direct one. It is well settled that merely being resident of the area is not enough for being labeled as a suitable and

fit person. At the same time the legislative scheme would suggest that the management and administration of a public religious trust such as the Trimbakeshwar Devasthan should be entrusted to such person so as to preserve the interest of the public or the section of the public who have interest in the trust. Obviously, regard being had to the fact that the appointment will promote and not impede the execution of the trust or its policies. By the very nature of the activities in a place used as a place of public religious worship and dedicated to or for the benefit of or used as of right by the Hindu community or any Section thereof, it is antithesis to a private and closed door management of its affairs. On the other hand there has to be complete openness and transparency in its administration and above all by observing democratic values or principles. To put it differently, it is public trust "for the community, by the community and of the community" or any section thereof. If such is the purport of the Trust then diversified representation and involvement of all concerned or the section of the pubic who have interest in the Trust and in particular associated with the day to day activities of the temple of the devasthan is inevitable – and the most appropriate step to further and promote the objectives of such a Trust.

16. Once we reach at this position, the next question that needs to be examined is; whether persons belonging to a particular Section can be generally disqualified on the ground of "conflict of interest" with the affairs of the trust of fact attached to an individual? I have no hesitation to hold that disqualification is essentially of an individual and cannot be because of the fact that the person belongs to the family of "Tungar", "Pujari" or "Purohit" as such, as the case may be. A person can be said to be disqualified or would render himself unfit for being appointed as the trustees only when he has direct interest in the trust or the devasthan and is hostile to the affairs of the Trust and his

object is to see that the Trust is destroyed. To put it differently, there is a perceptible difference between "person having interest in the trust" and "person having conflict of interest". The former is the quintessence for being eligible to be considered or for being appointed as the trustee. This mandate flows from the provisions of Section 47 read with Section 2(1) of the Act. Therefore, merely because the "Tungars" have the right to take away the entire cash offerings in the form of notes or coins near the idol or the threshold of the Garbhagriha in a plate or that the "Purohits" entertain the Yajmans or offer their services for consideration or the "Pujaris" are engaged in the performance of the official puja in the temple, cannot be said to be hostile to the affairs of the Trust or having direct interest so as to conflict with the administration and management of the Trust. As observed earlier Section 2(10) of the Act would envelope even the beneficiary of the Trust. Understood thus, it is incomprehensible that the "Tungars", "Purohits" or the "Pujaris" in the devasthan can be singled out as a class from the administration and management of the Trust. This view would answer point number (iii) and (iv) above."

9. A reading of paragraphs 15 and 16 of the impugned judgment of the High Court quoted above shows that the High Court has not only kept in mind the interest of the public but also interest of the temple and has taken a view that the appointment of representatives of the Tungars, Purohits or Pujaris in the trust would not be in conflict with the interest of the trust only because they have interest in the cash offerings, the consideration for the pujas or performance of the official puja in the temple. The High Court has rightly held that Tungars, Purohits and Pujaris have interest in the trust and not necessarily an interest which is in conflict with the interest of the trust. We are also of the view that in most of the decisions of the Board of Trustees, there would not be a conflict of interest between that of the trust and that of the Tungars, Purohits and Pujaris. Rather, representation of Tungars, Purohits and Pujaris

in the Board of Trustees may be necessary to ensure the smooth functioning of the temple. We are, therefore, not inclined to set aside the impugned order of the High Court in so far as it has held that Tungars, Purohits and Pujaris need to be represented in the Board of Trustees by one member from each of these classes.

10. Law is however well settled that the interest of the public is paramount in any religious public trust. The Division Bench of the High Court in *Fakir Mohamed Abdul Razak vs. The Charity Commissioner, Bombay and Ors.* (supra) has held in para 35:

> "It is well settled that in suits like the suits for settling the Scheme, the Court has a duty once it is found that it is a Trust for public purposes, to consider what is best in the interests of public. Settling a scheme is one of the most important relieves relating to the administration of public trust. The primary duty of the Court is to consider the interest of the public for whose benefit the trust has been created……."

To ensure that the interest of the public is protected and safeguarded in all the decisions of the Board of Trustees, we hold that, instead of two persons, four persons will be appointed by the Charity Commissioner from amongst male/female, adult Hindu devotees preferably residents of Trimbakeshwar, who will represent the public in the Board of Trustees. This will ensure that in a composition of maximum of nine members, four members at least will represent the public or the devotees of the temple and the decisions of the Board of Trustees will be in the larger interest of temple and the public or the devotees.

11. The impugned judgment of the High Court is modified accordingly and the appeals stand disposed of. There shall be no order as to costs.

D.G. Appeals disposed of.

v.

THE TRANSMISSION CORPORATION OF A.P. LTD. & ORS.

(Civil Appeal No. 5159 of 2005)

OCTOBER 13, 2011

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

***Electricity**: Price and tariff of power – Fixation of – Power generated from bagasse, by-product of sugar industry run by appellant – Supply of power to respondent no.1 – Dispute between the appellant and respondent No.1 was whether or not during the period 13.01.2003 to 21.01.2004, when the sugar plant of the appellant had not commenced production of sugar, the unutilized power supplied by the appellant to respondent No.1 would have the same price as the price of power supplied by non-conventional energy projects in the State of Andhra Pradesh determined by the Andhra Pradesh Electricity Regulatory Commission (APERC) – Held: It would be more appropriate for the APERC, which is a regulatory commission with expertise in determination of price and tariff of power, to decide what would be the price for supply of power by the appellant to the respondent no.1 during the disputed period and thereafter – Matter remitted to APERC – APERC to consider all relevant materials and factors and finally determine the price of power supplied during the disputed period and thereafter.*

On 29.04.2000, the appellant entered into a Memorandum of Understanding with Non-Conventional Energy Development Corporation of Andhra Pradesh Limited (NEDCAP), a nodal agency for non-conventional projects up to 20 MW, for setting up of a power plant in which power was to be generated from bagasse, a by-product of sugar factory. On 25.01.2002, the Andhra Pradesh Electricity Regulatory Commission (APERC) set

up under the Andhra Pradesh Electricity Reforms Act, 1998, permitted the appellant-company to supply the power generated in its plant to the respondent no.1, which had taken over the functions of the erstwhile Andhra Pradesh Electricity Board. On 10.07.2002, a Power Purchase Agreement (PPA) was entered into between the appellant and respondent no.1 which inter alia provided that the power to the extent of 9.99 MW would be supplied during the season and the power to the extent of 16.94 MW would be supplied during the off season. On 11.01.2003, respondent no.1 permitted the appellant to synchronize its plant with the power grid and on 13.01.2003, the appellant started supplying electricity energy to the power grid. On 01.03.2003, the appellant wrote to the APERC to direct respondent no.1 to purchase unutilized power of the appellant as sugar plant of the appellant could not be commissioned due to some difficulties and power generated in its power plant remained unutilized. On 17.03.2003, APERC directed respondent no.1 to amend the PPA to provide for surplus/ additional quantity of power from the appellant. On 17.03.2003, the Chief Engineer of respondent No.1 wrote to Superintending Engineer directing him to stop evacuation of power from the power plant of the appellant and to cut off the supply on the ground that the plant of the appellant could not be classified as co-generation till the sugar plant of the appellant was commissioned.

In the instant appeals the dispute between the appellant and respondent No.1 was whether or not during the period 13.01.2003 to 21.01.2004, when the sugar plant of the appellant had not commenced production of sugar, the unutilized power supplied by the appellant to respondent No.1 would have the same price as the price of power supplied by non-conventional energy projects in the State of Andhra Pradesh determined by the

APERC.

Disposing of the appeals and remanding the matter to the APERC, the Court

HELD: It would be more appropriate for the APERC, which is a regulatory commission with expertise in determination of price and tariff of power, to decide what would be the price for supply of power by the appellant to the respondent no.1 during the disputed period 13.01.2003 to 21.01.2004 and thereafter. The APERC would have to consider all relevant materials and factors and finally determine the price of power supplied during the period 13.01.2003 to 21.01.2004 and thereafter and in accordance with the determination made by the APERC, balance payments, if any, will be made by the respondent no.1 to the appellant. [Paras 9-10] [1012-D-G-H]

Transmission Corporation of Andhra Pradesh Limited and Anr. etc.etc. v. Sai Renewable Power Private Limited and Others etc.etc. **(2010) 6 Scale 541: (2010) 8 SCR 636 – relied on.**

Case Law Reference:

(2010) 8 SCR 636	**Relied on**	**Para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5159 of 2005.

From the Judgment and Order dated 30.07.2004 of the High Court of Judicature of Andhra Pradesh at Hyderabad in C.M.A. No. 3613 of 2004.

WITH

Civil Appeal No. 5157 of 2005.

Dr. Rajeev Dhawan and R. Balasubramaniam, A.V. Rangam, Buddy A. Ranganadhan for the Appellant.

Rakesh K. Sharma, S. Ramsubramanian and Sangita Chauhan for the Respondents.

The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. These are the appeals against the common order dated 30.07.2004 passed by the Division Bench of the Andhra Pradesh High Court in Writ Appeal No. 191 of 2004 and C.M.A No. 3613 of 2003.

2. The facts relevant for deciding these appeals very briefly are that on 29.04.2000 the appellant entered into a Memorandum of Understanding with Non-Conventional Energy Development Corporation of Andhra Pradesh Limited (for short 'the NEDCAP'), a nodal agency for non-conventional projects up to 20 MW, for setting up of a power plant in which power was to be generated from bagasse, a by-product of sugar factory. On 25.01.2002, the Andhra Pradesh Electricity Regulatory Commission (for short 'the APERC') set up under the Andhra Pradesh Electricity Reforms Act, 1998, permitted the appellant-company to supply the power generated in its plant to the respondent no.1, which had taken over the functions of the erstwhile Andhra Pradesh Electricity Board. On 10.07.2002, a Power Purchase Agreement (for short 'the PPA') was entered into between the appellant and the respondent no.1 which *inter alia* provided that the power to the extent of 9.99 MW will be supplied during the season and power to the extent of 16.94 MW will be supplied during the off season. On 11.01.2003, respondent no.1 permitted the appellant to synchronize its plant with the power grid and on 13.01.2003, the appellant started supplying electricity energy to the power grid. On 01.03.2003, the appellant wrote to the APERC to direct the respondent no.1 to purchase unutilized power of the appellant as sugar plant of the appellant could not be commissioned due to some difficulties and power generated in its power plant remained unutilized and on 17.03.2003, APERC directed the respondent

no.1 to amend the PPA to provide for surplus/ additional quantity of power from the appellant. On 17.03.2003, the Chief Engineer of respondent No.1 wrote to Superintending Engineer directing him to stop evacuation of power from the power plant of the appellant and to cut off the supply on the ground that the plant of the appellant cannot be classified as co-generation till the sugar plant of the appellant was commissioned.

3. The appellant then filed Writ Petition No. 7395 of 2003 in the Andhra Pradesh High Court challenging the letter dated 17.03.2003 of the Chief Engineer of the respondent No.1 and the learned Single Judge passed the orders on 02.05.2003 directing issue of notice to the respondents and directing the respondents, as an interim measure, to purchase power from the appellant and to pay to the appellant Rs.2.00 per unit. The respondent No.1 then filed a review petition before the APERC for reconsideration of its earlier directions to amend the PPA issued on 17.03.2003 and on 01.10.2003 the APERC allowed the review petition and cancelled its directions issued on 17.03.2003. The appellant then challenged the order dated 01.10.2003 of the APERC before the Division Bench of the High Court in C.M.A. No. 3613 of 2003 and the Division Bench of the High Court granted interim stay of the order dated 01.10.2003 of the APERC.

4. On 15.12.2003, the learned Single Judge of the High Court allowed Writ Petition No. 7395 of 2003 of the appellant and quashed the letter dated 17.03.2003 of the Chief Engineer of the respondent No.1 and directed the respondent No.1 to evacuate the power as agreed under the PPA and as directed by the APERC by order dated 17.03.2002. Against the said order dated 15.12.2003 of the learned Single Judge, the respondent filed Writ Appeal No. 371 of 2004 and on 12.02.2004 the Division Bench passed an interim order that no further payment need to be made by respondent no.1 to the appellant. Thereafter, on 22.04.2004 the Division Bench modified its earlier interim order dated 12.02.2004 and directed

the respondent to pay the appellant at the rate of Rs.2.69 per unit instead of Rs.2.00 per unit and the said order was to continue till further orders in the Writ Petition.

5. Finally on 30.07.2004, the Division Bench of the High Court passed the impugned order in Writ Appeal No. 191 of 2004 as well as in C.M.A. No. 3613 of 2003 setting aside the order dated 15.12.2003 of the learned Single Judge in Writ Appeal No. 7395 of 2003 and directed the parties to approach the appropriate forum chosen by the parties under the PPA for resolving the dispute. By the impugned order the Division Bench also held that the appellant will be entitled to tariff as fixed by the Division Bench of the High Court in Writ Appeal No. 371 of 2004.

6. Dr. Rajeev Dhavan, learned senior counsel for the appellant, submitted that the sugar plant has, in the meanwhile, commenced the production on 21.01.2004 and the only dispute which has to be decided by this Court is with regard to the price of the power supplied by the appellant to the respondent during the period from 13.01.2003 to 21.01.2004.

7. Mr. Dhavan submitted that by the order dated 22.04.2004 of the Division Bench in Writ Appeal No. 371 of 2004, the respondent No.1 was to be paid at the revised rate of Rs.2.69 per unit and on 08.02.2006, this Court has by an interim order, directed that the appellant would be entitled to receive payment at the rate of Rs.3.11 per unit as an interim measure for the period from 13.01.2003 to 20.01.2004 and also at the same rate of Rs.3.11 per unit for the period 21.01.2004 onwards, as has been paid to other co-generating plants, excluding the money already paid. He submitted that in *Transmission Corporation of Andhra Pradesh Limited and Another etc. etc. v. Sai Renewable Power Private Limited and Others etc.etc.* [(2010) 6 SCALE 541= (2010) 8 SCR 636 = JT 2010 (7) SC 1] this Court has issued some directions relating to price payable for power supplied by non-conventional power projects. He referred to Para 4 of the judgment of this

Court in the aforesaid case to show that the APERC had approved the rate of Rs.2.25 per unit with 5% escalation per annum from 1994-1995, being the base year, for supply of power generated by the non-conventional power projects and this was also the price fixed in clause 2.2 of the P.P.A for supply of electricity by the appellant to the respondent no.1. He submitted that the benefit of the aforesaid judgment of this Court delivered on 08.07.2010 should therefore be granted to the appellant and directions be issued to respondent no.1 accordingly.

8. Learned counsel for respondent no.1, on the other hand, submitted that the judgment of this Court delivered on 08.07.2010 in *Transmission Corporation of Andhra Pradesh Limited and Another etc. etc. v. Sai Renewable Power Private Limited and Others etc.etc.* (supra) was on tariff and purchase price of power produced by co-generation non-conventional energy plants and the plant of the appellant was not a co-generation plant during the period from January, 2003 to January, 2004, as there was no production of sugar in the plant during the aforesaid period and therefore the judgment of this Court in *Transmission Corporation of Andhra Pradesh Limited and Another etc. etc. v. Sai Renewable Power Private Limited and Others etc.etc.* (supra) has no relevance to the price of power supplied by the appellant to the respondent No.1 during January, 2003 to January, 2004.

9. We have considered the submissions of the learned counsel for the parties and we find that clause 2.2 of P.P.A. between the appellant and respondent no.1 reads as follows:

> "2.2. The company shall be paid the tariff for the energy delivered at the interconnection point for sale to APTRANSCO at Rs.2.25 paise per unit with escalation at 5% per annum with 1994-95 as base year and to be revised on 1st April of every year up to the year 2003-2004. Beyond the year 2003-2004, the purchase price by APTRANSCO will be decided by Andhra Pradesh Electricity Regulatory Commission. There will be further review of purchase price on completion of ten years from the date of commissioning of the project, when the purchase price will be reworked on the basis of Return on Equity, O& M expenses and the Variable Cost.

The dispute between the appellant and respondent No.1 before us is whether or not during the period 13.01.2003 to 21.01.2004, when the sugar plant of the appellant had not commenced production of sugar, the unutilized power supplied by the appellant to the respondent No.1 will have the same price as the price of power supplied by non-conventional energy projects in the State of Andhra Pradesh determined by the APERC. It will be more appropriate for the APERC, which is a regulatory commission with expertise in determination of price and tariff of power, to decide what would be the price for supply of power by the appellant to the respondent no.1 during the disputed period 13.01.2003 to 21.01.2004 and thereafter. By the judgment dated 08.07.2010 of this Court in *Transmission Corporation of Andhra Pradesh Limited and Another etc. etc. v. Sai Renewable Power Private Limited and Others etc.etc.* (supra), this Court has also remanded the matters to APERC to decide the 'purchase price' for procurement of the electricity generated by non-conventional energy developers in the facts of the circumstances of the case.

10. We, therefore, dispose of these appeals by directing that the APERC will consider all relevant materials and factors and finally determine the price of power supplied during the period 13.01.2003 to 21.01.2004 and thereafter and in accordance with the determination made by the APERC, balance payments, if any, will be made by the respondent no.1 to the appellant. The appeals are disposed of accordingly. There shall be no order as to costs.

D.G. Appeals disposed of.

M/S. GRASIM INDUSTRIES LTD.

v.

UNION OF INDIA

(Civil Appeal No. 7453 of 2008)

OCTOBER 13, 2011

[H.L. DATTU AND CHANDRAMAULI KR. PRASAD, JJ.]

Central Excise Act, 1944:

s.2(f) – Repair and maintenance work of machinery used in manufacturing the end product – Metal scrap and waste arising out of such repair and maintenance work – Held: Such repair and maintenance work would not amount to manufacturing activity in relation to production of end product – Therefore, scrap and waste cannot be said to be a by-product of end product – No excise duty payable on generation of such scrap and waste.

ss.2(f), 3 – Excisability of goods – Held: The goods have to satisfy the test of being produced or manufactured in India – Simply because a particular item is mentioned in the First Schedule, it cannot become exigible to excise duty – The charging section s.3 of the Act comes into play only when the goods are excisable goods u/s.2(d) of the Act falling under any of the tariff entry in the Schedule to the Tariff Act and are manufactured goods in terms of s.2(f) of the Act – Therefore, the conditions contemplated u/s.2(d) and s.2(f) have to be satisfied conjunctively in order to entail imposition of excise duty u/s.3 of the Act – Central Excise Tariff Act, 1985.

s.2(f) – Manufacture – Held: Process of manufacture in terms of s.2(f) includes any process incidental or ancillary to the completion of the manufactured product – The process in manufacture must have the effect of bringing change or transformation in the raw material and this should also lead to creation of any new or distinct and excisable product.

***INTERPRETATION OF STATUTES**: Excise tariff – Section Note – Held: Has very limited purpose of extending coverage to particular items to the relevant tariff entry in the Schedule for determining the applicable rate of duty and it cannot be readily construed to have any deeming effect in relation to the process of manufacture as contemplated by s.2(f) of the Central Excise Act, 1944, unless expressly mentioned in the said Section Note – Central Excise Tariff Act, 1985.*

The assessee was the manufacturer of white cement. It undertook repair work on worn out machineries of the cement manufacturing plant at its workshop. During the process of repair work various types of metal scrap and waste were generated. The assessee cleared such metal scrap and waste without payment of excise duty for the period from 1.10.1995 to 16.07.1999. A show cause notice dated 05.10.2000 was issued to the assessee demanding a duty of Rs.10,81,736/- under Section 11A of the Central Excise Act, 1944 along with equal amount of penalty under Section 11AC of the Act and further penalty under Rule 173 Q of the Central Excise Rules, 1944 for non-payment of excise duty on clearance of said metal scrap and waste. The adjudicating authority confirmed the duty demanded and penalty imposed. The appellate authority set aside the demand of duty to the extent of Rs. 6,05,955/- and also set aside the demand of penalty under Rule 173 Q(1)(a) of the Central Excise Rules. The demand of duty and equal amount of penalty of Rs.4,75,781 under Section 11AC on metal scrap and waste generated during course of repair and maintenance of the machinery or parts of the plant was upheld on the ground that such metal scrap and waste was generated during mechanical working of metal in the workshop, as contemplated by the definition of the waste and scrap under Section Note 8(a) of Section XV of the Central Excise Tariff Act, 1985. The Tribunal allowed the appeal

of the assessee and set aside the demand of duty and penalty confirmed by the said portion of the order of the appellate authority on the ground that metal scrap and waste cleared by the assessee did not arise out of any manufacturing activity and, therefore, no excise duty was payable. The High Court set aside the order of the Tribunal and restored the order of the appellate authority on the ground that the generation of scrap amounted to manufacture as it was incidental or ancillary to the manufacture of spare or replaceable part; the spare or replaceable part came into existence as distinct product during the repairing of the parts of the cement plant; also, the generation of scrap need not be in the process of manufacture of the excisable end product such as cement. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1. In the instant case, the assessee undertook repair and maintenance work of his worn out old machinery or parts of the cement manufacturing plant for the period between 1995 to 1999. The assessee repaired machinery or capital goods such as damaged roller, shafts and coupling by using welding electrodes, mild steel, cutting tools, M.S. Angles, M.S. Channels, M.S. Beams etc. In this process of repair and maintenance, M.S. Scrap and Iron Scrap were generated in the workshop. It was not in dispute that these M.S. Scrap and Iron Scrap were excisable goods under Section 2(d) of the Central Excise Act falling under the Chapter heading 72.04 in the Schedule to the Tariff Act read with Note 8 (a) to Section XV of the Tariff Act as 'metal scrap and waste'. Section Note has very limited purpose of extending coverage to the particular items to the relevant tariff entry in the Schedule for determining the applicable rate of duty and it cannot be readily construed to have

any deeming effect in relation to the process of manufacture as contemplated by Section 2(f) of the Act, unless expressly mentioned in the said Section Note. [Para 7] [1023-H; 1024-A-D]

Shyam Oil Cake Ltd. v. CCE **(2005) 1 SCC 264: 2004 (6) Suppl. SCR 346 – relied on.**

2.1. The goods have to satisfy the test of being produced or manufactured in India. It is settled law that excise duty is a duty levied on manufacture of goods. Unless goods are manufactured in India, they cannot be subjected to payment of excise duty. Simply because a particular item is mentioned in the First Schedule, it cannot become exigible to excise duty. Therefore, both on authority and on principle, for being excisable to excise duty, goods must satisfy the test of being produced or manufactured in India. The charging Section 3 of the Act comes into play only when the goods are excisable goods under Section 2(d) of the Act falling under any of the tariff entry in the Schedule to the Tariff Act and are manufactured goods in the terms of Section 2(f) of the Act. Therefore, the conditions contemplated under Section 2(d) and Section 2(f) has to be satisfied conjunctively in order to entail imposition of excise duty under Section 3 of the Act. The manufacture in terms of Section 2(f) includes any process incidental or ancillary to the completion of the manufactured product. This 'any process' can be a process in manufacture or process in relation to manufacture of the end product, which involves bringing some kind of change to the raw material at various stages by different operations. The process in manufacture must have the effect of bringing change or transformation in the raw material and this should also lead to creation of any new or distinct and excisable product. The process in relation to manufacture

means a process which is so integrally connected to the manufacturing of the end product without which, the manufacture of the end product would be impossible or commercially inexpedient. [Para 8] [1025-G-H; 1026-A-E]

Hyderabad Industries Ltd. v. Union of India (1995) 5 SC 338; *MotiLaminates (P) Ltd. v. CCE* **(1995) 3 SCC 23: 1995 (2) SCR 81;** *CCE v. Wimco Ltd.* **(2007) 8 SCC 412: 2007 (10) SCR 560;** *TungabhadraIndustries v. CTO* **AIR 1961 SC 412: 1961 SCR 14;** *Union of India v. Delhi Cloth and General Mills Co. Ltd.* **AIR 1963 SC 791: 1963 Suppl. SCR 586;** *South Bihar Sugar Mills Ltd. v. Union of India* **AIR 1968 SC 922:1968 SCR 21;** *Ujagar Prints (II) v. Union of India* **(1989) 3 SCC 488: 1988 (3) Suppl. SCR 770;** *Hindustan Polymers v. CCE* **(1989) 4 SCC 323: 1989 (3) SCR 974;** *CCE v. Rajasthan State Chemical Works* **(1991) 4 SCC 473: 1991 (1) Suppl. SCR 124;** *Union of India v. Ahmedabad Electricity Co. Ltd.* **(2003) 11 SCC 129 :2003 (4) Suppl. SCR 1117;** *Commissioner of Central Excise, Chennai II Commissionerate v. Tarpaulin International* **(2010) 9 SCC 103: 2010 (9) SCR 620 – Relied on.**

2.2. In the instant case, it is clear that the process of repair and maintenance of the machinery of the cement manufacturing plant, in which M.S. scrap and Iron scrap arise, has no contribution or effect on the process of manufacturing of the cement, which is the excisable end product, since welding electrodes, mild steel, cutting tools, M.S. Angles, M.S. Channels, M.S. Beams etc. which are used in the process of repair and maintenance are not raw material used in the process of manufacturing of the cement, which is the end product. The repairing activity in any possible manner cannot be called as a part of manufacturing activity in relation to production of end product. Therefore, the M.S. scrap and Iron scrap cannot be said to be a by-product of the final product. At the best, it is the by-product of the repairing process which uses

welding electrodes, mild steel, cutting tools, M.S. Angles, M.S. Channels, M.S. Beams etc. The metal scrap and waste arising out of the repair and maintenance work of the machinery used in manufacturing of cement, by no stretch of imagination, can be treated as a subsidiary product to the cement which is the main product. The metal scrap and waste arise only when the assessee undertakes repairing and maintenance work of the capital goods and, therefore, do not arise regularly and continuously in the course of a manufacturing business of cement. In view of that the order of the High Court is not sustained. The order of the Tribunal is restored. [Paras 14-16] [1031-F-H; 1032-A-E-H]

CST v. Bharat Petroleum Corpn. Ltd. **(1992) 2 SCC 579: 1992 (1) SCR 807 – Distinguished.**

Budhewala Co-op. Sugar Mills Ltd. vs. CCE, Chandigarh-I **2002 (141) ELT 490 (Tri. Delhi);** *CCE v. Birla Corpn. Ltd.* **2005 (181) ELT 263;** *Union of India v. Delhi Cloth and General Mills Co. Ltd.* **AIR 1963 SC 791: 1963 Suppl. SCR 586 – Referred to.**

Case Law Reference:

(141) ELT 490 (Tri. Delhi)	**Referred to**	**Para 3**
2005 (181) ELT 263	**Referred to**	**Para 3**
1963 Suppl. SCR 586	**Referred to**	**Para 3**
1992 (1) SCR 807	**Distinguished**	**Para 6**
2004 (6) Suppl. SCR 346	**Relied on**	**Para 7**
(1995) 5 SC 338	**Relied on**	**Para 8**
1995 (2) SCR 81	**Relied on**	**Para 8**

2007 (10) SCR 560	**Relied on**	**Para 8**
1961 SCR 14	**Relied on**	**Para 8**
1963 Suppl. SCR 586	**Relied on**	**Para 8**
1968 SCR 21	**Relied on**	**Para 8**
1988 (3) Suppl. SCR 770	**Relied on**	**Para 9**
1989 (3) SCR 974	**Relied on**	**Para 10**
991 (1) Suppl. SCR 124	**Relied on**	**Para 11**
2003 (4) Suppl. SCR 1117	**Relied on**	**Para 12**
2010 (9) SCR 620	**Relied on**	**Para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7453 of 2008.

From the Judgment and Order dated 31.07.2008 of the High Court of Rajasthan, Jodhpur in Central Excise Appeal No. 60 of 2006.

B. Bhattacharya, ASG, Ajay Singh, Judy James, Nimisha Swarup, Rashmi Malhotra, B.K. Prasad and Anil Katiyar for the Appellant.

Alok Yadav, Krishna Menon and M.P. Devanath for the Respondent.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. This appeal is directed against the Judgment and Order dated 31.07.2008 of the High Court of Judicature of Rajasthan in Central Excise Appeal No. 60/2006. By the impugned Order, the High Court has set aside the Order dated 09.08.2005 of the Customs, Excise and Service Tax Appellate Tribunal [hereinafter referred to as "the Tribunal"] whereby the Tribunal had dropped the entire duty demand and penalty imposed on the assessee.

2. The issue before us is: Whether the metal scrap or waste generated whilst repairing of worn out machineries or parts of cement manufacturing plant amounts to manufacture, and thereby, is excisable to excise duty.

3. The assessee is the manufacturer of the white cement. The assessee repairs worn out machineries or parts of the cement manufacturing plant at its workshop such as damaged roller, shafts and coupling with the help of welding electrodes, mild steel, cutting tools, M.S. Angles, M.S. Channels, M.S. Beams, etc. In this process of repair certain metal scrap or waste is generated. In a surprise inspection conducted by the officials of the Central Range-II, Jodhpur, it was found that the assessee has cleared various types of metal scrap and waste without the payment of the excise duty for the period from 1.10.1995 to 16.07.1999. A show cause notice dated 05.10.2000 was issued to the assessee demanding a duty of Rs. 10,81,736/- under Section 11A of the Central Excise Act, 1944 [hereinafter referred to as "the Act"] along with equal amount of penalty under Section 11AC of the Act and further penalty under Rule 173 Q of the Central Excise Rules, 1944 [hereinafter referred to as "the Rules"] for non-payment of excise duty on clearance of said metal scrap and waste. On the request of the assessee on two occasions, the revenue has granted extension of time, first up to 31.12.2000 which was further extended till 22.01.2001, in order to reply to the said show cause notice. Thereafter, the assessee further made a request for some more time to file reply *vide* letter dated 20.01.2001, the same was rejected whilst confirming the duty demanded and penalty proposed in the show cause notice *vide* Order dated 08.02.2001 of the Additional Commissioner. The assessee filed appeal before the Commissioner (Appeals), Jaipur. The Commissioner (Appeals) *vide* its Order dated 30.04.2004, set aside the demand of duty along with equal amount of penalty pertaining to scrap and waste arising out of the dismantling of used capital goods and the packing materials to the extent of Rs. 6,05,955/-. The Commissioner (Appeals)

also set aside the demand of penalty under Rule 173Q(1)(a) of the Rules, whilst, upholding the demand of duty and equal amount of penalty of Rs. 4,75,781 under Section 11AC of the Act on metal scrap and waste generated during course of repair and maintenance of the machinery or parts of the plant on the ground that such metal scrap and waste has been generated during mechanical working of metal in the workshop, as contemplated by the definition of the waste and scrap under Section Note 8(a) of Section XV of the Central Excise Tariff Act, 1985 [hereinafter referred to as "the Tariff Act"] and, in view of the decision of the Tribunal in *Budhewala Co-op. Sugar Mills Ltd. vs. CCE, Chandigarh-I*, 2002 (141) ELT 490 (Tri. Delhi). Being aggrieved by the portion of the Order of the Commissioner (Appeals), pertaining to confirmation of demand of duty along with equal amount of penalty of Rs. 4,75,781 on the metal scrap and waste generated during repair of machinery, the assessee preferred an appeal before the Tribunal. The Tribunal, *vide* its Order dated 09.08.2005, allowed the appeal and set aside the demand of duty and penalty confirmed by the said portion of the Order of the Commissioner (Appeals) on the ground that metal scrap and waste cleared by the assessee does not arise out of any manufacturing activity and, thereby, not excisable to any excise duty in view of the decision of the Tribunal in *CCE v. Birla Corpn. Ltd.*, 2005 (181) ELT 263. The Revenue, aggrieved by this Order, filed an appeal under Section 35G of the Act before the High Court of Rajasthan. The High Court, *vide* its Judgment and Order dated 31.07.2008, allowed the appeal, set aside the Order of the Tribunal and restored the Order of the Commissioner (Appeals) on the ground that the generation of scrap amounts to manufacture as it is incidental or ancillary to the manufacture of spare or replaceable part. The spare or replaceable part comes into existence as distinct product during the repairing of the parts of the cement plant. Also, the generation of scrap need not be in the process of manufacture of the excisable end product such as cement. Being aggrieved, the assessee has filed this appeal under Section 35L of the Act against the

judgment and order of the High Court.

4. Shri. Alok Yadav, learned counsel has appeared for the assessee and the Revenue is represented by Shri. B. Bhattacharyya, learned Additional Solicitor of India. We will refer to their submissions while dealing with the issue canvassed before us.

5. Learned counsel Shri. Alok Yadav submits that the Revenue has wrongly relied on the definition of the metal waste and scrap under Note 8 (a) to Section XV of the Tariff Act which states- '*Metal waste and scrap from the manufacture or metal waste and scrap from mechanical working of metal*' in order to establish that metal scrap and waste arising out of the repairing and maintenance of the various machinery or parts of the cement manufacturing plant amounts to manufacture of such scrap and waste. He submits that nowhere the definition of waste and scrap in the said Note deems it to be manufacturing process. In other words, the definition of 'waste and scrap' only gives coverage of the entry 'waste and scrap' under Chapter 72.04 of the Schedule to the Tariff Act and does not i*pso facto* lead to a conclusion that waste and scrap arising by the mechanical working of metal amounts to a process of manufacture in terms of Section 2(f) of the Act in order to attract the charging Section. He further submits that unless the particular excisable product falling under the particular tariff entry is manufactured in the sense of Section 2 (f) of the Act, it does not entail or attract the operation of the charging Section under Section 3 of the Act. Learned counsel refers to the wordings of the definition of the manufacture under Section 2(f) of the Act and relies on the decision of this Court in *Union of India v. Delhi Cloth and General Mills Co. Ltd.*, AIR 1963 SC 791 in support of his submission that the High Court, *vide* its impugned judgment, has grossly erred in observing that any incidental or ancillary process to the completion of any manufactured product, which itself need not be end product or excisable goods, would amount to manufacture and is

excisable. In other words, such observation of the High Court creates very anomalous situation by conferring the status of manufacture on every process incidental and ancillary to any manufactured product which itself need not be excisable manufactured end product. Learned counsel submits, by placing reliance on several decisions of this Court in order to buttress his contention, that the excise duty mentioned under the tariff entry for the excisable goods cannot be levied in terms of charging Section 3 unless such excisable goods or items are produced and manufactured. In other words, the event of levying of excise duty under the charging Section 3 is the manufacture of the excisable goods. Learned counsel concludes that the manufacture of the excisable goods in terms of Section 2 (f) is the prerequisite to levy excise duty.

6. *Per Contra*, Shri. B. Bhattacharyya, learned ASG, submits that the metal scrap and waste are indisputably excisable goods under Section 2(d) of the Act falling under the Chapter heading 72.04 read with Note 8 (a) to the Section XV of the Tariff Act. He further submits that metal scrap and waste as excisable goods are generated during the repair and replacement of the old machinery or parts of the cement manufacturing plant, which is incidental and ancillary to the manufactured product, that is, cement. In other words the process of generation of scrap and waste amount to the manufacture in terms of Section 2(f) of the Act. In support of his contention, learned ASG has relied on the decision of this Court in *CST v. Bharat Petroleum Corpn. Ltd.,* (1992) 2 SCC 579. He further submits that once the conditions or requirements of excisable goods and manufacture as envisaged by Section 2(d) and Section 2(f), respectively, of the Act are satisfied, then only, such metal scrap and waste would attract the levy of excise duty under the charging Section 3 of the Act. Shri. B. Bhattacharyya has cited several decisions of this Court in support of his submission.

7. We have heard the learned counsel for the parties. In

the present case, the assessee had undertook repair and maintenance work of his worn out old machinery or parts of the cement manufacturing plant for the period between 1995 to 1999. The assessee repaired machinery or capital goods such as damaged roller, shafts and coupling by using welding electrodes, mild steel, cutting tools, M.S. Angles, M.S. Channels, M.S. Beams etc. In this process of repair and maintenance, M.S. Scrap and Iron Scrap were generated in the workshop. It is not in dispute that these M.S. Scrap and Iron Scrap are excisable goods under Section 2(d) of the Act falling under the Chapter heading 72.04 in the Schedule to the Tariff Act read with Note 8 (a) to Section XV of the Tariff Act as 'metal scrap and waste'. We are of the opinion that Section Note has very limited purpose of extending coverage to the particular items to the relevant tariff entry in the Schedule for determining the applicable rate of duty and it cannot be readily construed to have any deeming effect in relation to the process of manufacture as contemplated by Section 2(f) of the Act, unless expressly mentioned in the said Section Note. In *Shyam Oil Cake Ltd. v. CCE,* (2005) 1 SCC 264, this Court has held:

> **"16.** Thus, the amended definition enlarges the scope of manufacture by roping in processes which may or may not strictly amount to manufacture provided those processes are specified in the section or chapter notes of the tariff schedule as amounting to manufacture. It is clear that the legislature realised that it was not possible to put in an exhaustive list of various processes but that some methodology was required for declaring that a particular process amounted to manufacture. The language of the amended Section 2(f) indicates that what is required is not just specification of the goods but a specification of the process and a declaration that the same amounts to manufacture. Of course, the specification must be in relation to any goods.
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> …

23. We are in agreement with the submission that under the amended definition, which is an inclusive definition, it is not necessary that only in the section or chapter note it must be specified that a particular process amounts to manufacture. It may be open to so specify even in the tariff item. However, either in the section or chapter note or in the tariff entry it must be specified that the process amounts to manufacture. Merely setting out a process in the tariff entry would not be sufficient. If the process is indicated in the tariff entry, without specifying that the same amounts to manufacture, then the indication of the process is merely for the purposes of identifying the product and the rate which is applicable to that product. In other words, for a deeming provision to come into play it must be specifically stated that a particular process amounts to manufacture. In the absence of it being so specified the commodity would not become excisable merely because a separate tariff item exists in respect of that commodity.

24. In this case, neither in the section note nor in the chapter note nor in the tariff item do we find any indication that the process indicated is to amount to manufacture. To start with, the product was edible vegetable oil. Even after refining, it remains edible vegetable oil. As actual manufacture has not taken place, the deeming provision cannot be brought into play in the absence of it being specifically stated that the process amounts to manufacture."

8. The goods have to satisfy the test of being produced or manufactured in India. It is settled law that excise duty is a duty levied on manufacture of goods. Unless goods are manufactured in India, they cannot be subjected to payment of excise duty. Simply because a particular item is mentioned in the First Schedule, it cannot become exigible to excise duty. [See *Hyderabad Industries Ltd. v. Union of India,* (1995) 5 SC 338, *Moti Laminates (P) Ltd. v. CCE,* (1995) 3 SCC 23*, CCE*

v. Wimco Ltd., (2007) 8 SCC 412] Therefore, both on authority and on principle, for being excisable to excise duty, goods must satisfy the test of being produced or manufactured in India. In our opinion, the charging Section 3 of the Act comes into play only when the goods are excisable goods under Section 2(d) of the Act falling under any of the tariff entry in the Schedule to the Tariff Act and are manufactured goods in the terms of Section 2(f) of the Act. Therefore, the conditions contemplated under Section 2(d) and Section 2(f) has to be satisfied conjunctively in order to entail imposition of excise duty under Section 3 of the Act. The manufacture in terms of Section 2(f) includes any process incidental or ancillary to the completion of the manufactured product. This 'any process' can be a process in manufacture or process in relation to manufacture of the end product, which involves bringing some kind of change to the raw material at various stages by different operations. The process in manufacture must have the effect of bringing change or transformation in the raw material and this should also lead to creation of any new or distinct and excisable product. The process in relation to manufacture means a process which is so integrally connected to the manufacturing of the end product without which, the manufacture of the end product would be impossible or commercially inexpedient. This Court has in several decisions starting from *Tungabhadra Industries v. CTO,* AIR 1961 SC 412, *Union of India v. Delhi Cloth & General Mills Co. Ltd.,* AIR 1963 SC 791, *South Bihar Sugar Mills Ltd. v. Union of India,* AIR 1968 SC 922 *and in line of other decisions* has explained the meaning of the word 'manufacture' thus:

> "**14.** The Act charges duty on manufacture of goods. The word 'manufacture' implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use."

9. In *Ujagar Prints (II) v. Union of India*, (1989) 3 SCC 488,

this Court has laid down the test to ascertain whether particular process amounts to manufacture:

> "whether the change or the series of changes brought about by the application of processes take the commodity to the point where, commercially, it can no longer be regarded as the original commodity but is, instead, recognised as a distinct and new article that has emerged as a result of the processes"

10. In *Hindustan Polymers v. CCE*, (1989) 4 SCC 323, this Court has observed:

> "**11.** Excise duty is a duty on the act of manufacture. Manufacture under the excise law, is the process or activity which brings into being articles which are known in the market as goods and to be goods these must be different, identifiable and distinct articles known to the market as such. It is then and then only that manufacture takes place attracting duty. In order to be goods, it was essential that as a result of the activity, goods must come into existence. For articles to be goods, these must be known in the market as such and these must be capable of being sold or are being sold in the market as such. In order, therefore, to be manufacture, there must be activity which brings transformation to the article in such a manner that different and distinct article comes into being which is known as such in the market."

11. In *CCE v. Rajasthan State Chemical Works,* (1991) 4 SCC 473, this Court has considered the meaning of process in relation to manufacture as thus:

> "**12.** Manufacture implies a change but every change is not manufacture, yet every change of an article is the result of treatment, labour and manipulation. Naturally, manufacture is the end result of one or more processes through which the original commodities are made to pass. The nature and

> extent of processing may vary from one class to another. There may be several stages of processing, a different kind of processing at each stage. With each process suffered the original commodity experiences a change. Whenever a commodity undergoes a change as a result of some operation performed on it or in regard to it, such operation would amount to processing of the commodity. But it is only when the change or a series of changes takes the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct article that a manufacture can be said to take place.
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> **13.** Manufacture thus involves a series of processes. Process in manufacture or in relation to manufacture implies not only the production but the various stages through which the raw material is subjected to change by different operations. It is the cumulative effect of the various processes to which the raw material is subjected (sic that the) manufactured product emerges. Therefore, each step towards such production would be a process in relation to the manufacture. Where any particular process is so integrally connected with the ultimate production of goods that but for that process manufacture or processing of goods would be impossible or commercially inexpedient, that process is one in relation to the manufacture.
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> **14.** The natural meaning of the word 'process' is a mode of treatment of certain materials in order to produce a good result, a species of activity performed on the subject-matter in order to transform or reduce it to a certain stage. According to Oxford Dictionary one of the meanings of the word 'process' is a 'continuous and regular action or succession of actions taking place or carried on in a definite manner and leading to the accomplishment of some result'. The activity contemplated by the definition is

perfectly general requiring only the continuous or quick succession. It is not one of the requisites that the activity should involve some operation on some material in order to (sic effect) its conversion to some particular stage. There is nothing in the natural meaning of the word 'process' to exclude its application to handling. There may be a process which consists only in handling and there may be a process which involves no handling or not merely handling but use or also use. It may be a process involving the handling of the material and it need not be a process involving the use of material. The activity may be subordinate but one in relation to the further process of manufacture."

12. In *Union of India v. Ahmedabad Electricity Co. Ltd., (2003) 11 SCC 129*, the issue before this Court was that whether the process in which cinder is produced by burning of coal as a fuel for producing steam to run machines used in the factory to manufacture end product amounts to manufacture. This Court has held:

"**19.** What is the meaning of "manufacture" in the context of excise law? We have already quoted the definition of the word "manufacture" as contained in Section 2(f) of the Act. According to this definition, manufacture includes any process incidental or ancillary to the completion of a manufactured product. The word "manufacture" used as a verb is generally understood to mean as bringing into existence a new substance. It does not mean merely to produce some change in a substance. To quote from a passage in the Permanent Edition of Words and Phrases, Vol. XXVI

"manufacture implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation: a new and different article must emerge having a distinctive name, character or use".

"Manufacture" may involve various processes. The aim of any manufacturing activity is to achieve an end product. Depending on the nature of manufacturing activity involved, processes may be several or one. The natural meaning of the word "process" is a mode of treatment of some material in order to produce a good result. Every process which is incidental or ancillary to the completion of manufactured product is included within the meaning of manufacture. The word "process" has not been defined in the Act. In its ordinary meaning "process" is a mode of treatment of certain material in order to give a desired shape to the material. It is an activity performed on a given material in order to transform it into something."

This Court further observed thus:

"27. In the case in hand also, coal which leads to production of cinder is not used as a raw material for the end product. It is being used only for ancillary purpose, that is, as a fuel. Therefore, irrespective of the fact whether any manufacture is involved in the production of cinder it should be held to be out of the tax net for the reason that it is not a raw material for the end product.

28. In producing "cinder", there is no manufacturing process involved. Coal is simply burnt as fuel to produce steam. Coal is not tampered with, manipulated or transformed into the end product. For purposes of manufacture the raw material should ultimately get a new identity by virtue of the manufacturing process either on its own or in conjunction or combination with other raw materials. Since coal is not a raw material for the end product in all the cases before us, the question of getting a new identity as an end product due to manufacturing process does not arise."

13. In *Commissioner of Central Excise, Chennai II*

Commissionerate v. Tarpaulin International, (2010) 9 SCC 103, whilst addressing the issue whether the process of preparing tarpaulin made-ups by cutting and stitching the tarpaulin fabric and fixing the eyelets would amount to manufacture, this Court has held:

> "**25.** Is there any manufacture when tarpaulin sheets are stitched and eyelets are made? *In our view, it does not change the basic characteristic of the raw material and end product. The process does not bring into existence a new and distinct product with total transformation in the original commodity. The original material used i.e. the tarpaulin is still called tarpaulin made-ups even after undergoing the said process. Hence, it cannot be said that the process is a manufacturing process.* Therefore, there can be no levy of Central excise duty on the tarpaulin made-ups. The process of stitching and fixing eyelets would not amount to manufacturing process, since tarpaulin after stitching and eyeleting continues to be only cotton fabric. The purpose of fixing eyelets is not to change the fabric. Therefore, even if there is value addition the same is minimum. To attract duty there should be a manufacture to result in different goods and the goods sought to be subject to duty should be known in the market as such."

14. In the present case, it is clear that the process of repair and maintenance of the machinery of the cement manufacturing plant, in which M.S. scrap and Iron scrap arise, has no contribution or effect on the process of manufacturing of the cement, which is the excisable end product, as since welding electrodes, mild steel, cutting tools, M.S. Angles, M.S. Channels, M.S. Beams etc. which are used in the process of repair and maintenance are not raw material used in the process of manufacturing of the cement, which is the end product. The issue of getting a new identity as M.S. Scrap and Iron Scrap as an end product due to manufacturing process does not arise for our consideration. The repairing activity in any possible manner cannot be called as a part of manufacturing activity in

relation to production of end product. Therefore, the M.S. scrap and Iron scrap cannot be said to be a by-product of the final product. At the best, it is the by-product of the repairing process which uses welding electrodes, mild steel, cutting tools, M.S. Angles, M.S. Channels, M.S. Beams etc.

15. Learned ASG has placed reliance on the decision of this Court in *CST v. Bharat Petroleum Corpn. Ltd., (Supra)*. In that case, the assessee purchased sulphuric acid and cotton for the manufacturing of kerosene and yarn/cloth. In the manufacturing process, the acid sludge and cotton waste emerged as a distinct product having commercial identity. The issue before this Court was that whether the assessee can be said to manufacture acid sludge and cotton waste. This Court observed that where a subsidiary product is turned out regularly and continuously in the course of a manufacturing business and is also sold regularly from time to time, an intention can be attributed to the manufacturer to manufacture and sell not merely the main item manufactured but also the subsidiary products. We are afraid, the decision does not help the Revenue because the metal scrap and waste arising out of the repair and maintenance work of the machinery used in manufacturing of cement, by no stretch of imagination, can be treated as a subsidiary product to the cement which is the main product. The metal scrap and waste arise only when the assessee undertakes repairing and maintenance work of the capital goods and, therefore, do not arise regularly and continuously in the course of a manufacturing business of cement.

16. In view of the above, we cannot sustain the Judgment and Order of the High Court dated 31.07.2008.

17. In the result, the appeal is allowed and the impugned Judgment and the Order of the High Court is set aside and the Order dated 09.08.2005 of the Tribunal is restored. Costs are made easy.

D.G. Appeal allowed.

THE STATE OF WEST BENGAL AND OTHERS
v.
SK. NAZRUL ISLAM
(Civil Appeal No. 8638 of 2011)

OCTOBER 13, 2011

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

Service law: Appointment – Post of constable – Name of respondent found place in the provisional select list – He appeared before the Medical Board and was found medically fit – He was supplied verification roll for verification of his antecedents in which he was required to state whether he was ever arrested, detained or convicted which he answered in the negative – On enquiry, authorities found that he was involved in a criminal case involving offences u/ss.148/323/380/448/427/506, IPC and in that case, charge sheet was also filed in the court and he had surrendered there and was granted bail – Considering the same, the authorities did not appoint him as constable on the ground of concealment – OA filed by respondent dismissed – High Court allowed his writ petition and held that authorities were not entitled to withhold the offer of appointment to the respondent and directed the authorities to issue the letter of appointment – However High Court observed that the appointment would be subject to decision in the pending criminal case – On appeal, held: The High Court could not issue mandamus to the authorities to appoint the respondent as constable – Authorities entrusted with the responsibility of appointing constables were under duty to verify the antecedents of a candidate to find out whether he is suitable for the post of constable and so long as the candidate was not acquitted in a criminal case of the charges u/ss.148/323/380/448/427/506, IPC, he could not possibly be held to be suitable for appointment to the post of constable – Order of the High Court is set aside – Constitution of India, 1950 – Articles 226, 227.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8638 of 2011.

From the Judgment and Order dated 14.09.2010 of the High Court of Calcutta in WPST No. 1911 of 2008.

Chanchal K. Ganguly and Abhijit Sengupta for the Appellants.

Ranjan Mukherjee, Mangaljit Mukherjee and Sarla Chandra for the Respondent.

The Order of the Court was delivered by

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

2. This is an appeal against the order dated 14.09.2010 of the Division Bench of the Calcutta High Court in W.P.S.T. No.1911 of 2008.

3. The facts very briefly are that on 26.07.2007 the Police Directorate of West Bengal notified recruitment of Constables in the West Bengal Police from Howrah District. The name of the respondent was sponsored by the Employment Exchange, Uluberia, Howrah, for recruitment as Constable and on 17.09.2007 the provisional select list was notified in which the respondent's name found place at serial no.76. The respondent appeared before the Medical Board and was found medically fit. On 28.09.2007, the respondent was supplied a Verification Roll for verification of his antecedents and the respondent filled the Verification Roll and submitted the same to the Reserve Officer, Howrah, on 29.09.2007. The Verification Roll of the respondent was sent to the District Intelligence Branch, Howrah, on 08.10.2007. In the course of enquiry, it came to light that he was involved in a criminal case involving offences under Sections 148/323/380/448/427/506, IPC, in Bagnan PS Case No.97 of 2007 and after investigation, the charge-sheet had already been filed in the Court of the Additional Chief Judicial Magistrate, Uluberia, Howrah, and that the respondent had surrendered before the Court and had been granted bail. All these facts, however, had been concealed in column no.13 of the Verification Roll submitted by the respondent in which he

was required to state whether he was ever arrested, detained or convicted. The authorities, therefore, did not appoint the respondent as a Constable.

4. Aggrieved, the respondent filed O.A.No.2500 of 2008 before the West Bengal Administrative Tribunal for a direction upon the authorities to issue appointment letter in his favour, but by order dated 25.07.2008 the Tribunal declined to grant any relief to the respondent. The order of the Tribunal was challenged by the respondent before the High Court and in the impugned order, the High Court held that the authorities were not entitled to withhold the offer of appointment to the respondent and directed the authorities to issue the letter of appointment in favour of the respondent without any further delay. The High Court, however, observed in the impugned order that the appointment of the respondent to the post of Constable will abide by the final decision of the pending criminal case.

5. We have heard learned counsel for the parties and we fail to appreciate how when a criminal case under Sections 148/323/380/448/427/506, IPC, against the respondent was pending in the Court of the Additional Chief Judicial Magistrate, Uluberia, Howrah, any *mandamus* could have been issued by the High Court to the authorities to appoint the respondent as a Constable. Surely, the authorities entrusted with the responsibility of appointing constables were under duty to verify the antecedents of a candidate to find out whether he is suitable for the post of constable and so long as the candidate has not been acquitted in the criminal case of the charges under Sections 148/323/380/448/427/506, IPC, he cannot possibly be held to be suitable for appointment to the post of Constable.

6. We, therefore, allow the appeal, set aside the impugned order of the High Court and dismiss the Writ Petition under Articles 226/227 of the Constitution filed by the respondent in the High Court. There shall be no order as to costs.

B.B.B. Appeal allowed.

STATE BANK OF INDIA
v.
RAM LAL BHASKAR & ANR.
(Civil Appeal No. 2930 of 2009)

OCTOBER 13, 2011

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

Service Law:

State Bank of India Officers' Service Rules, 1992 – r. 19(3) – Disciplinary proceedings – Charge-sheet issued against a Bank Manager alleging various acts of misconduct – Initiation of enquiry – Bank Manager dismissed from service after he had already retired from service – Challenged by the Bank Manager – Order of dismissal upheld by the appellate authority – Writ Petition – Order of dismissal quashed by the High Court – On appeal, held: It cannot be said that the order of dismissal was illegal and without jurisdiction – Under r. 19(3) in case disciplinary proceedings were initiated against an officer before he ceased to be in the Bank's service, the disciplinary proceedings, at the discretion of the Managing Director, could be continued and concluded by the authority concerned as if the officer continued to be in service which is only for the purpose of the continuance and conclusion of such proceedings.

Constitution of India, 1950 – Article 226 – Proceedings under – Power of High Court – Held: High Court does not sit as an appellate authority over the findings of the disciplinary authority – Where the findings of the disciplinary authority are supported by some evidence, the High Court does not re-appreciate the evidence and come to a different and independent finding on the evidence – On facts, the High Court re-appreciated the evidence and arrived at the

conclusion that the Bank Manager was not guilty of any misconduct – Thus, the order of the High Court quashing the dismissal of the Bank Manager, set aside.

Respondent No.1-Branch Manager of the appellant-Bank was served with a charge-sheet dated 22.12.1999 alleging various acts of misconduct as the Branch Manager. An enquiry was conducted and the enquiry officer submitted a report dated 28.09.2000 holding that four out of the six charges were proved against the respondent No.1. On 31.01.2000, respondent No. 1 retired from service. Thereafter, the appointing authority on consideration of the enquiry report, the records of the enquiry and the submissions made by respondent No.1, dismissed respondent No. 1 from service by order dated 15.05.2001. The appellate authority also upheld the order of dismissal. Aggrieved, respondent No. 1 filed a writ petition. The High Court quashed the order of dismissal as the respondent No. 1 had already retired from service, and directed the appellant to release his arrears of salary as well as the post retirement benefits. Therefore, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 In the instant case, the charge-sheet was issued on 22.12.1999 when the respondent No.1 was in service and there were clear provisions in Rule 19(3) of the State Bank of India Officers' Service Rules, 1992, that in case disciplinary proceedings under the relevant rules of service have been initiated against an officer before he ceased to be in the Bank's service by the operation of, or by virtue of, any of the rules or the provisions of the rules, the disciplinary proceedings may, at the discretion of the Managing Director, be continued and concluded by the authority by which the proceedings were initiated in the manner provided for in the rules as if the officer

continues to be in service, so however, that he shall be deemed to be in service only for the purpose of the continuance and conclusion of such proceedings. There is no merit in the contention that the enquiry and the order of dismissal were illegal and without jurisdiction. [Para 6] [1042-E-H; 1043-A-B]

1.2 The enquiry officer found that charges no. 1, 2, 4 and 6 had been proved against the respondent No. 1. While arriving at these findings on the four charges proved against the respondent No. 1, the enquiry officer considered a number of documents and also considered the documents produced on behalf of the respondent No. 1. The findings of the enquiry officer were based on evidence and the appointing authority had agreed with the findings of the enquiry officer. [Para 7] [1043-C-D]

1.3 In a proceeding under Article 226 of the Constitution, the High Court does not sit as an appellate authority over the findings of the disciplinary authority and so long as the findings of the disciplinary authority are supported by some evidence, the High Court does not re-appreciate the evidence and come to a different and independent finding on the evidence. Yet by the impugned judgment the High Court re-appreciated the evidence and arrived at the conclusion that the findings recorded by the enquiry officer are not substantiated by any material on record and the allegations leveled against the respondent No.1 do not constitute any misconduct. Therefore, the impugned order of the High Court is set aside. [Paras 8 and 9] [1044-A-C]

UCO Bank and Anr. v. Rajinder Lal Capoor **(2007) 6 SCC 694: 2007(7) SCR 543;** *State of Andhra Pradesh and Ors. v. Sree Rama Rao* **AIR 1963 SC 1723: 1964 SCR 25 – referred to.**

Case Law Reference:

2007 (7) SCR 543	**Referred to**	**Para 6**
1964 SCR 25	**Referred to**	**Para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2930 of 2009.

From the Judgment and Order dated 12.04.2006 of the Division Bench of the High Court of Judicature at Allahabad in Civil Misc. Petition No. 8415 of 2003.

Amarendra Sharan, Anil Kumar Sangal and D.P. Mohanty for the Appellant.

M.A. Krishna Moorthy for the Respondents.

The Judgement of the Court was delivered by

A. K. PATNAIK, J. 1. This is an appeal against the order dated 12.04.2006 of the Division Bench of the Allahabad High Court in Civil Miscellaneous Writ Petition No. 8415 of 2003.

2. The facts very briefly are that the respondent no.1 worked as a Branch Manager of the appellant-Bank at Sirsaganj Branch. He was served with a charge-sheet dated 22.12.1999 alleging various acts of misconduct as the Branch Manager of Sirsaganj Branch. Thereafter, an enquiry was conducted and the enquiry officer submitted a report dated 28.09.2000 holding that four out of the six charges were proved against the respondent no.1. The charges No.1, 2, 4 and 6 which were proved against the respondent no.1 in the enquiry are as follows:

"Sl.No. CHARGES

1. He authorized opening of a Savings Bank Account No.18776 on 31st March 1999 in the name of "Trailokya Bauddha Mahasanga Sahayake Gane" a religious body at he Sirsaganj Branch without completing the formalities connected with opening of new accounts of such societies.

2. He debited Savings Bank Account No.18776 of "Trailokya Bauddha Mahasanga Sahayaka Gane" with Rs.one lac on 04.08.1999 on forged signatures of the depositor and credited the amount to his Savings Bank Account No.101/18360 at the Branch. The debit and credit vouchers have been passed by him.

4. Zonal Office vide S.L. No.P&C/483 dated 08.12.1998 advised the Branch regarding posting of Field Officer/Manager (Agri) at the Branch and handing over the relative charge to the concerned persons. He intentionally did not make arrangements for handing over the charge of Field Officer/Manager (Agri) to the concerned officers despite Zonal instructions.

Further, the loan applications received at the Branch were sanctioned by him without the recommendations of Field Officer/Manager (Agri).

6. He claimed false T.A. Bill viz. Rs.150/-for going to various villages on 15.05.1999 as included in his monthly Bill for Rs.1,275/- for the month of May 1999 and at the same time, also claimed Rs.275/- as TA Bill for 15.05.1999 for visiting Zonal Office, Agra thus he lodged false Bill for his official work."

A copy of the enquiry report was served on the respondent no.1 and the respondent no.1 was given an opportunity to submit his representation against the findings of the enquiry officer. The appointing authority then considered the enquiry report and the records of the enquiry and the submissions made by the respondent no.1 and imposed the penalty of dismissal from

service by order dated 15.05.2001. The respondent no.1 filed an appeal against the order of the appointing authority, but the appellate authority dismissed the appeal by order dated 09.03.2002. The respondent no.1 filed a Review Petition, but the reviewing committee also dismissed the Review Petition by order dated 20.12.2002.

3. Aggrieved, the respondent no.1 filed Civil Miscellaneous Writ Petition No. 8415 of 2003 and the High Court, after hearing the learned counsel for the parties, allowed the Writ Petition and quashed the order of dismissal passed by the appointing authority as well as the order passed by the appellate authority and, as the respondent no.1 had already retired from service, directed the appellant to release his arrears of salary as well as the post retirement benefits.

4. Learned counsel for the appellant submitted that there were charges of grave misconduct against the respondent no.1 and four of the six charges had been proved in the enquiry. He submitted that the findings of the enquiry officer on the four charges proved against the respondent no.1 were based on relevant material and these findings had also been confirmed by the appellate and reviewing authorities. He submitted that contrary to the settled position of law that the High Court, while exercising its powers of judicial review under Article 226 of the Constitution, should not interfere with the finding in the departmental enquiry so long as it is based on some evidence in the impugned order, the High Court has interfered with findings in the enquiry and has held that the respondent no.1 was not guilty of the charges. By the impugned order, the High Court has also quashed the order of dismissal and has directed release of the arrears of salary and post retirement benefits of the respondent no.1.

5. Learned counsel for the respondent no.1, on the other hand, supported the impugned order of the High Court and submitted that there is no infirmity in the impugned order of the High Court. He further submitted that in any case the

respondent no.1 had retired from service on 31.01.2000, and though the charge-sheet was served on him on 22.12.1999 when he was still in service, the enquiry report was served on him by letter dated 28.09.2000 and he was dismissed from service on 15.05.2001 after he had retired from service. He submitted that after the retirement of the respondent no.1, the appellant had no jurisdiction to continue with the enquiry against the respondent no.1. In support of this contention, he cited the decision of this Court in *UCO Bank and Another v. Rajinder Lal Capoor* [(2007) 6 SCC 694].

6. We have perused the decision of this Court in *UCO Bank and Another v. Rajinder Lal Capoor* (supra) and we find that in the facts of that case the delinquent officer had already superannuated on 01.11.1996 and the charge-sheet was issued after his superannuation on 13.11.1998 and this Court held that the delinquent officer having been allowed to superannuate, the charge-sheet, the enquiry report and the orders of the disciplinary authority and the appellate authority must be held to be illegal and without jurisdiction. In the facts of the present case, on the other hand, we find that the charge-sheet was issued on 22.12.1999 when the respondent no.1 was in service and there were clear provisions in Rule 19(3) of the State Bank of India Officers' Service Rules, 1992, that in case disciplinary proceedings under the relevant rules of service have been initiated against an officer before he ceased to be in the Bank's service by the operation of, or by virtue of, any of the rules or the provisions of the rules, the disciplinary proceedings may, at the discretion of the Managing Director, be continued and concluded by the authority by which the proceedings were initiated in the manner provided for in the rules as if the officer continues to be in service, so however, that he shall be deemed to be in service only for the purpose of the continuance and conclusion of such proceedings. We may mention here that a similar provision was also relied on behalf of UCO Bank in *UCO Bank and Another v. Rajinder Lal Capoor* (supra) in regulation 20(3)(iii) of the UCO Bank Officers

Employees Service Rules, 1979, but this Court held that the aforesaid regulation could be invoked only when the disciplinary proceedings had been initiated prior to the delinquent officer ceased to be in service. Thus, the aforesaid decision of this Court in *UCO Bank and Another v. Rajinder Lal Capoor* (supra) does not support the respondent no.1 and there is no merit in the contention of the counsel for the respondent no.1 that the enquiry and the order of dismissal were illegal and without jurisdiction.

7. Coming now to the contention of the appellant, we find that the enquiry officer has found that charges no. 1, 2, 4 and 6 had been proved against the respondent no.1. While arriving at these findings on the four charges proved against the respondent no.1, the enquiry officer has considered a number of documents marked as exhibits and has also considered the documents produced on behalf of the respondent no.1 and marked as exhibits. The findings of the enquiry officer were based on evidence and the appointing authority had agreed with the findings of the enquiry officer. This Court has held in *State of Andhra Pradesh and Others v. Sree Rama Rao* (AIR 1963 SC 1723) "The High Court is not constituted in a proceeding under Article 226 of the Constitution a Court of appeal over the decision of the authorities holding a departmental enquiry against a public servant: it is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Article 226 to review theevidence and to arrive at an independent finding on the evidence."

8. Thus, in a proceeding under Article 226 of the

Constitution, the High Court does not sit as an appellate authority over the findings of the disciplinary authority and so long as the findings of the disciplinary authority are supported by some evidence the High Court does not reappreciate the evidence and come to a different and independent finding on the evidence. This position of law has been reiterated in several decisions by this Court which we need not refer to, and yet by the impugned judgment the High Court has re-appreciated the evidence and arrived at the conclusion that the findings recorded by the enquiry officer are not substantiated by any material on record and the allegations leveled against the respondent no.1 do not constitute any misconduct and that the respondent no.1 was not guilty of any misconduct.

9. We, therefore, set aside the impugned order of the High Court and allow the appeal with no order as to costs.

N.J. Appeal allowed.

COLLECTOR, BILASPUR
v.
AJIT P. K. JOGI & ORS.
(Civil Appeal No. 4069 of 2008)

OCTOBER 13, 2011

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

Constitution of India, 1950:

Articles 338(5)(b) (as originally stood) and 338-A – National Commission for Scheduled Castes and Scheduled Tribes – Powers of – HELD: The power under clause (5)(b) of Article 338 did not entitle the Commission to hold an inquiry in regard to the caste status of any particular individual, summon documents, and record a finding that his caste certificate is bogus or false – If such a complaint was received about the deprivation of the rights and safeguards, it will have to refer the matter to the State Government or the authority concerned with verification of caste/tribal status, to take necessary action – The scope of the duties of the Commission did not involve inquiry or adjudication in regard to the rights of parties or caste status of the parties – The same is the position under Article 328-A providing for a separate commission for Scheduled Tribes with identical duties – In the instant case, though the Commission ultimately directed the State Government to conduct the verification of the genuineness of the Scheduled Tribe certificate, it categorically recorded a finding that the person concerned had secured a false certificate – The order of the Commission, therefore, cannot be sustained – High Court was justified in setting aside the said order – Social status certificate.

Article 226 read with Articles 338 and 338-A – Writ petitions alleging that the person complained against had obtained false certificates showing him as belonging to a Scheduled Tribe – Dismissed – Effect of – HELD: The fact that two writ petitions were filed at some point of time, challenging the claim of the person complained against that he belonged to a Scheduled Tribe may not be conclusive as the first writ petition was dismissed on the ground that it involved disputed questions of fact which could not be gone into in a writ proceeding and the second writ petition was dismissed on the ground that investigation into the allegations of forged certificates was in progress – Therefore, even though the Commission was not entitled to hold an inquiry and record a finding that the person complained against did not belong to a Scheduled Tribe, having regard to clauses (5)(b) and (f) of Article 338, it had the power and authority to require the State Government or the caste verification Committee constituted by the State Government, to examine the caste status of the person concerned – The High Court was, therefore, not justified in holding that in view of the disposal of earlier writ petitions, the dispute relating to tribal status of the person concerned, had attained some kind of finality.

Respondent no. 6 filed a compliant before the National Commission for Scheduled Castes and Scheduled Tribes (the Commission) in 2001, alleging that respondent no. 1 being a Christian and not belonging to a Scheduled Tribe, had obtained several false caste certificates showing him as belonging to 'Kanwar' Scheduled Tribe and had contested elections from a constituency reserved for Scheduled Tribes. The Commission issued a show cause notice to respondent no. 1 proposing to verify his caste certificate. The Commission instructed its branch at Bhopal to ascertain the correct position and verify the caste claim of respondent no. 1. The Bhopal office collected some material to show that respondent no. 1 belonged to Satnami caste (a backward class) and that he did not belong to Kanwar Scheduled Tribe and that he got elected as an MLA from a reserved constituency for

Scheduled Tribes, based on a false caste certificate. On the basis of the material so collected, the Commission called upon respondent no. 1 to offer his explanation and ultimately by its order dated 16.10.2001, held that respondent no. 1 fraudulently claimed to belong to Kanwar community for the purpose of getting ST certificate, and directed the State Government to conduct the verification of genuineness of the ST certificate obtained by respondent no. 1 and to initiate urgent necessary action for cancellation of his ST certificate and also criminal action as provided in the law and the rules. The writ petition filed by respondent no. 1 was allowed by the Chhattisgarh High Court holding that the social status of respondent no. 1 was challenged earlier before the Madhya Pradesh High Court in writ petitions which had been dismissed and as the decisions of the said High Court were judgments in rem, the Commission could not have ignored those judgments. Aggrieved, the State of Chhattisgarh filed CA No.4082 of 2008, the Collector, Bilaspur filed CA No.4069 of 2008, respondent no. 6 filed CA No. 4079 of 2008 and four interveners in the High Court filed CA No. 4074 of 2008.

The questions for consideration before the Court were: (i) Whether the Commission had the jurisdiction to entertain complaints about the genuineness of caste certificate of a particular individual and pronounce upon the validity of the caste certificate and the caste status of such person; (ii) Whether the High Court was justified in holding that in view of two earlier decisions of the High Court in WP No.1417 of 1988 decided on 24.7.1989 and WP No.1039 of 2001 decided on 24.7.2001, challenging the caste status of respondent no. 1, his caste status had attained some kind of finality; (iii) Whether there was any violation of principles of natural justice on the part of the Commission as held by the High Court; and (iv) Whether the High Court was justified in holding that the

proceedings before the Commission at the instance of respondent no. 6 were politically motivated?

Allowing the appeals in part, the Court

HELD:

Question (i):

1.1 It is evident from Article 338 of the Constitution of India as it originally stood, that the Commission was constituted to protect and safeguard the persons belonging to Scheduled Castes and Scheduled Tribes by ensuring: (i) anti-discrimination, (ii) affirmative action by way reservation and empowerment, and (iii) redressal of grievances. The duties under clause (5)(b) of Article 338 did not extend either to issue of caste/tribe certificate or to revoke or cancel a caste/tribe certificate or to decide upon the validity of the caste certificate. Having regard to the sub-clause (b) of clause (5) of Article 338, the Commission could no doubt entertain and enquire into any specific complaint about deprivation of any rights and safeguards of Scheduled Tribes. When such a complaint was received, the Commission could enquire into such complaint and give a report to the Central Government or State Government requiring effective implementation of the safeguards and measures for the protection and welfare and socio-economic development of scheduled tribes. This power to enquire into 'deprivation of rights and safeguards of the scheduled castes and scheduled tribes' did not include the power to enquire into and decide the caste/tribe status of any particular individual. In fact, as there was no effective mechanism to verify the caste/tribe certificates issued to individuals, this Court in *Madhuri Patil directed constitution of Scrutiny Committees, and formulated a scheme for verification of tribal status and held that any application for verification of tribal status as a Scheduled**

Tribe should be carried out by such Committees. The verification of the validity of caste certificates and determination of the caste status should, therefore, be done by the Scrutiny Committees constituted as per the directions in *Madhuri Patil* or in terms of any statute made by the appropriate government in that behalf. [para 13-14] [1061-H; 1063-E-F; 1062-A-E]

Madhuri Patil vs. Addl. Commissioner (Tribal Development)* **– 1994 (3) Suppl. SCR 50 = 1994 (6) SCC 241; *Bhabani Prasad Jena vs. Orissa State Commission for Women* **2010 (9) SCR 457 = 2010 (8) SCC 633; and** *State Bank of Patiala vs. Vinesh Kumar Bhasin* **2010 (2) SCR 6 = 2010 (4) SCC 368 – relied on.**

1.2 It is true that the Commission had ultimately directed the State Government to conduct the verification of the genuineness of the Scheduled Tribe certificate obtained by respondent no. 1, and to initiate action for cancellation of his Scheduled Tribe certificate as also criminal action as provided in law and submit an action taken report to the Commission. But this is preceded by a very lengthy order which categorically records a finding that respondent no. 1 had secured a false certificate. It is only after recording the said findings that the Commission directed the State government to verify the genuineness of the ST certificate obtained by respondent no. 1 and initiate action for cancellation of the certificate and also initiate criminal action. All these were unwarranted. [para 15-16] [1064-G-H; 1066-E-F]

1.4 The power under clause (5)(b) of Article 338 (or under any of the other sub-clauses of clause (5) of Article 338) did not entitle the Commission to hold an inquiry in regard to the caste status of any particular individual, summon documents, and record a finding that his caste certificate is bogus or false. If such a complaint was received about the deprivation of the rights and

safeguards, it will have to refer the matter to the State Government or the authority concerned with verification of caste/tribal status, to take necessary action. It can certainly follow up the matter with the State Government or such authority dealing with the matter to ensure that the complaint is inquired into and appropriate decision is taken. If the State Government or the authorities did not take action, the Commission could either itself or through the affected persons, initiate legal action to ensure that there is a proper verification of the caste certificate, but it cannot undertake the exercise itself, as has been done in the instant case. The plea that there was sufficient material to reach such a conclusion is not relevant. The scope of the duties of the Commission did not involve inquiry or adjudication in regard to the rights of parties or caste status of the parties. The same is the position even under Article 338A (which was subsequently inserted) providing for a separate Commission for Scheduled Tribes with identical duties. The order of the Commission cannot therefore be sustained. The High Court was justified in setting aside the said order dated 16.10.2001. [para 16] [1066-F-H; 1067-A-D]

Questions (ii) to (iv)

2.1 In the instant case, serious allegations were made in regard to the certificates obtained by respondent no.1 and the tribal status claimed by him. The certificates have never undergone a scrutiny by a properly constituted authority. The fact that two writ petitions were filed at some point of time, challenging the claim of respondent no.1 that he belonged to a scheduled tribe may not be conclusive as the first writ petition was dismissed on the ground that it involved disputed questions of fact which could not be gone into in a writ proceeding and the second writ petition was dismissed on the ground that investigation into the allegations of forged certificates was in progress. Therefore, even though the Commission

was not entitled to hold an inquiry and record a finding that respondent no. 1 did not belong to a scheduled tribe, having regard to clauses (5)(b) and (f) of Article 338, it had the power and authority to require the State Government or the caste verification Committee constituted by the State Government, to examine the caste status claimed by respondent no.1. The correspondence initiated by the Commission clearly showed that a request/direction for verification of the caste of respondent no.1 was made by the Commission and the State Government responded by stating that the claim of respondent no. 1 that he belonged to a scheduled tribe and the validity of social status certificates would be verified by the Scrutiny Committee. The High Court was, therefore, not justified in holding that in view of the disposal of earlier writ petitions by the High Court, the dispute relating to tribal status of the first respondent had attained some kind of finality. [para 17-18] [1068-B-H]

2.2 On the facts and circumstances, there was also no justification for the High Court to either term the application given by respondent no. 6 to the Commission as politically motivated or direct the State Government and the Commission to calculate the actual expenses incurred in regard to the inquiry and recover the same from respondent no. 6. [para 18] [1069-A-B]

3.1 The order of the High Court dated 15.12.2006 to the extent it quashes the order dated 16.10.2001 of the Commission, is upheld. [para 19] [1069-C]

3.2 The adverse observations by the High Court about the complaint by respondent no. 6, the inquiry by the Commission, and the stand of the State Government and the Collector before the High Court, being politically motivated, are set aside. [para 19] [1069-D]

3.3 The direction to the State Government and the Commission to calculate the actual cost incurred in prosecuting the writ petition and directing respondent no. 6 to pay the actual costs plus Rs.10,000 is set aside. [para 19] [1069-E]

3.4 In terms of the direction of the Commission, the State Government through a duly constituted Scrutiny Committee shall now undertake the verification/scrutiny of the social status (tribal) certificates issued to respondent no.1 showing him as belonging to 'Kanwar' Scheduled Tribe and decide the matter after giving due opportunity to respondent no.1, uninfluenced by any observations by the Commission, High Court or this Court. The State Government/concerned authorities shall be entitled to take consequential action on the basis of the order/report of the Scrutiny Committee. [para 19] [1069-E-G]

Case Law Reference:

2010 (9) SCR 457	**relied on**	**para 11**
2010 (2) SCR 6	**relied on**	**para 12**
1994 (3) Suppl. SCR 50	**relied on**	**para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4069 of 2008.

From the Judgment and Order dated 15.12.2006 of the High Court of Judicature at Bilaspur, Chattisgarh in Writ Petition No. 2080 of 2001.

WITH

Civil Appeal Nos. 4047, 4079 and 4082 of 2008.

Rajiv Dhavan and V.A. Mohta, Jugal Kishore Gilda, AAG, Ashok Mathur, Aniruddha P. Mayee, Rucha A. Mayee, Nilkanta Nayak, Gagan Sanghi, Rajesh Srivastava and Rameshwar Prasad Goyal for the appellant.

T.S. Doabia, K.K. Venugopal, Sanjeev Dubey, Sadhna Sandhu, C.K. Sharma, M.S. Doabia, D.S. Mahra, Rahul Sharma, Prerna Deosha, Anbar Talwar, P.N. Puri, S.K. Dubey, Jamal Akhtar and Akshay Singh for the Respondents.

The Judgment of the Court was delivered by

R. V. RAVEENDRAN J. 1. These four appeals by special leave are filed against the judgment dated 15.12.2006 of the Chhattisgarh High Court in WP No.2080 of 2011. As the ranks of parties differ, they are referred to by their ranks in CA No.4069/2008.

2. The first respondent (Ajit P.K. Jogi) claimed that he belonged to a tribal community known as 'Kanwar', a notified Scheduled Tribe. He obtained social status/caste certificates from time to time, showing him as belonging to Kanwar-Scheduled Tribe, that is, certificate dated 6.6.1967 from the Naib Tehsildar, Pendra Road, Bilaspur, certificate dated 27.2.1984 by the Naib Tehsildar, Pendra Road, Bilaspur, certificate dated 6.3.1986 by the Tehsildar, Pendra Road, certificate dated 12.1.1993 by the Naib Tehsildar, Pendra Road, Bilaspur, certificate dated 11.8.1999 by Naib Tehsildar, Indore, certificate dated 8.1.2001 from the Addl. Collector, Bilaspur and certificate dated 30.9.2003 by Addl. Collector, Bilaspur. The first respondent was elected twice to Rajya Sabha and contested two parliamentary elections from Raigarh and Shahdol constituencies. He successfully contested from Marwahi Vidhan Sabha constituency reserved for Scheduled Tribes in 1991. On 1.11.2000, when the State of Chhattisgarh came into existence, the first respondent became its first Chief Minister and served in that capacity till December, 2002.

3. In the year 2001, the sixth respondent filed a complaint before the National Commission for Scheduled Castes and Scheduled Tribes (the third respondent herein, for short 'Commission') alleging that the first respondent was a Christian and that he did not belong to a Scheduled Tribe; and that he

had obtained several false caste certificates showing him as belonging to 'Kanwar' Scheduled Tribe and had contested elections from a constituency reserved for Scheduled Tribes. He requested that appropriate action be taken in that behalf.

4. The Commission issued a show cause notice to the first respondent proposing to verify his caste certificate. The Commission referred the complaint received from the sixth respondent to the Chief Secretary, Government of Chhattisgarh on 29.1.2001. The state government (fourth respondent) responded to the Commission stating that it had constituted a committee dated 27.2.2001 for verification of caste certificates and the reference received from the Commission had been transmitted to the Principal Secretary, Department for Welfare of SCs, STs, OBCs and Minorities Welfare (fifth respondent) for necessary verification through the said Committee. The Commission thereafter summoned the Chief Secretary of Chhattisgarh to appear before the Commission on 24.1.2001 with all documents relating to the caste status of the Chief Minister (first respondent). The Commission summoned the Principal Secretary, Scheduled Castes and Scheduled Tribes Welfare Department to appear on 18.5.2011 with the records. He responded and made available the instructions issued by the state government relating to verification of caste certificates. He submitted that having regard to the provision made by the state government for verification of caste certificate by a scrutiny committee, the Commission did not have jurisdiction to verify the caste certificate issued to the first respondent. The Commission felt that there was want of co-operation from the Government of Chhattisgarh and instructed its branch at Bhopal to ascertain the correct position and verify the caste claim of the first respondent. Apparently, the Bhopal office collected some material to show that the first respondent belonged to Satnami caste (a backward class) and that he did not belong to Kanwar Scheduled Tribe and that he got elected as a MLA from a reserved constituency for Scheduled Tribes, based on a false caste certificate. On the basis of alleged material so

collected, the Commission called upon the first respondent, vide notice dated 26.5.2001 to offer his explanation and also appear before the Commission on 30.9.2001 with necessary documents. One Mr. R. N. Sharma, Chief Legal Adviser to the Chief Minister of Chhattisgarh appeared on behalf of the first respondent and submitted a reply dated 12.9.2001 to the notice dated 26.5.2001. Several documents were furnished and written submissions were also filed.

5. The Commission made an order dated 16.10.2001. We extract below the preamble and operative portion of the said order :

"In the matter of : Verification of community certificate of Shri Ajit P.K. Jogi, S/o Shri K.P. Jogi, Village Sarbahra, Tehsil Pendra Road, District Bilaspur.

xxxxx xxxxxx

Taking into consideration the available evidence as discussed above, the commission is of the considered view that Shri Ajit P.K. Jogi has been fraudulently claiming to belong to Kanwar community for the purpose of getting ST certificate, although he and his ancestors belong to Satnami caste, which is included in the SC list of the State. However, as Shri Ajit P.K. Jogi's grandfather appears to have got converted to Christianity, he was not eligible for concessions/benefits available to SCs also. The state government is, therefore, called upon to conduct the verification of genuineness of the ST certificate obtained by Shri APK Jogi and to initiate urgent necessary action for cancellation of his ST certificate and also criminal action as provided in the law and the rules. A report on the action taken may be submitted to the Commission within 30 days."

6. The said order was challenged by the first respondent by filing WP No.2080 of 2001 in the Chhattisgarh High Court.

A Division Bench of the High Court by the impugned order dated 15.12.2006 allowed the writ petition. It held that the complaint of the sixth respondent before the Commission questioning the social status of first respondent was politically motivated, that the first respondent had been openly claiming the status of a person belonging to a scheduled tribe, at least from the year 1967 and had obtained several certificates certifying his status and had contested several elections as a person belonging to a scheduled tribe, that his status was challenged before the Madhya Pradesh High Court in WP No.1417 of 1988 and WP No.1039 of 2001 and the said petitions had been dismissed and as the decisions of the High Court were judgments in rem, the Commission could not have ignored those judgments. The High Court also held that the Commission had violated the principles of natural justice as it had collected material behind the back of the first respondent and recorded adverse findings without disclosing the material collected by it to the first respondent and without giving an opportunity to the first respondent, to have his say on such material. The court also passed strong observations against the sixth respondent stating that the entire exercise was politically motivated. Consequently, it allowed the writ petition, quashed the entire proceedings of the Commission as also the findings in the order dated 16.10.2001 as being void and inoperative.

7. The High Court also directed the first respondent to pay cost of Rs.10,000/- to the first respondent. Further, it directed the State of Chhattisgarh and the Commission to file memo of calculations giving full details of the actual cost incurred by them in resisting the said writ petition and directed the sixth respondent to pay the said cost incurred by the State of Chhattisgarh and the Commission.

8. Feeling aggrieved by the said judgment, the State of Chhattisgarh has filed CA No.4082 of 2008, the Collector, Bilaspur has filed CA No.4069 of 2008, the sixth respondent filed CA No. 4079 of 2008 and four interveners in the High Court

filed CA No. 4074 of 2008. On the contentions raised, the following questions arise for our consideration :

(i) Whether the Commission had the jurisdiction to entertain complaints about the genuineness of caste certificate of a particular individual and pronounce upon the validity of the caste certificate and the caste status of such person?

(ii) Whether the High Court was justified in holding that in view of two earlier decisions of the High Court in WP No.1417 of 1988 decided on 24.7.1989 and WP No.1039 of 2001 decided on 24.7.2001, challenging the caste status of the first respondent, his caste status had attained some kind of finality.

(iii) Whether there was any violation of principles of natural justice on the part of the Commission as held by the High Court?

(iv) Whether the High Court was justified in holding that the proceedings before the Commission at the instance of sixth respondent were politically motivated?

Re : Question (i)

8. Article 338 of the Constitution of India mandates the constitution of a National Commission for Scheduled Castes and Article 338A mandates the constitution of a National Commission for Scheduled Tribes. At the relevant point of time, that is in the year 2001, Article 338A was not in existence and the unamended Article 338 provided for a National Commission for Scheduled Castes and Scheduled Tribes. Clause (5) of unamended Article 338 enumerated the duties of the Commission, relevant portions of which are extracted below :

"(5) It shall be the duty of the Commission—-

(a) To investigate and monitor all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under the Constitution or under any other law for the time being in force or under any order of the Government and to evaluate the working of such safeguards;

(b) To inquire into specific complaints with respect to the deprivation of rights and safeguards of the Scheduled Castes and Scheduled Tribes;

(c) To participate and advise on the planning process of socio-economic development of the Scheduled Castes and Scheduled Tribes and to evaluate the progress of their development under the Union and any State;

(d) To present to the President, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards;

(e) To make in such reports recommendations as to the measures that should be taken by the Union or any State for the effective implementation of those safeguards and other measures for the protection, welfare and socio-economic development of the Scheduled Castes and Scheduled Tribes and;

(f) To discharge such other functions in relation to the protection, welfare and development and advancement of the Scheduled Castes and Scheduled Tribes as the President may, subject to the provisions of any law made by Parliament, by rule specify.

(6) The President shall cause all such reports to be laid before each House of Parliament along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the Union and the reasons for the non-acceptance, if any, of any of such recommendations.

(7) Where any such report, or any part thereof, relates to any matter with which any State Government is concerned, a copy of such report shall be forwarded to the Governor of the State who shall cause it to be laid before the Legislature of the State along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the State and the reasons for the non-acceptance, if any, of any of such recommendations.

(8) The Commission shall, while investigating the matters referred to in sub-clause (a) or inquiring into any complaint referred to in sub-clause (b) of clause 5, have all the powers of a Civil Court trying a suit and in particular in respect of the following matters, namely :—

(a) summoning and enforcing the attendance of any person from any part of India and examining him on oath;

(b) requiring the discovery and production of any documents;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any court or office;

(e) issuing summons/communications for the examination of witnesses and documents;

(f) any other matter which the President may by rule determine.

(9) The Union and every State Government shall consult the Commission on all major policy matters affecting and Scheduled Castes and Scheduled Tribes.

xxxxxx xxxxxxx"

(emphasis supplied)

10. The appellants and the Commission relied upon sub-clause (b) of clause (5) of Article 338 which provided that it shall be the duty of the Commission to enquire into specific complaints with respect to deprivation of rights and safeguards to scheduled castes and scheduled tribes, as the source of power to the Commission to enquire into and decide upon the caste status of any individual claiming to belong to a scheduled tribe. It was submitted that if persons not belonging to scheduled tribes falsely claim the status of scheduled tribes, they would thereby be depriving the rights and benefits available to genuine scheduled tribes and consequently, when a specific complaint is received alleging that any particular person had made a false claim of being a person belonging to a scheduled tribe, the Commission was duty bond to enquire into the such specific complaint as it related to deprivation of rights and safeguards of scheduled tribes. It was further argued that it had examined and decided upon the caste status of the first respondent, after examining the material collected by it and after giving an opportunity to the first respondent to prove that he belonged to a scheduled tribe, and it had come to a conclusion that the first respondent had fraudulently claimed that he belonged to the scheduled tribe of Kanwar and had obtained false certificate to that effect; and that the first respondent was a Christian, who did not belong to a scheduled tribe and therefore, not eligible to enjoy the reservation and other benefits extended to scheduled tribes. It was also pointed out that the Commission had ultimately directed the State Government to conduct the verification of the genuineness of the ST certificate obtained by the first respondent and initiate action for cancellation of his ST certificate and consequently, initiate criminal action in accordance with law.

11. Dealing with the powers of a similar (State) Commission for Women, this Court in *Bhabani Prasad Jena vs. Orissa State Commission for Women* [2010 (8) SCC 633], held as under :

"Mr. Ranjan Mukherjee, learned Counsel for Respondent 2 submitted that once a power has been given to the State Commission to receive complaints including the matter concerning deprivation of women of their rights, it is implied that the State Commission is authorized to decide these complaints. We are afraid, no such implied power can be read into Section 10(1)(d) as suggested by the learned Counsel. The provision contained in Section 10(1)(d) is expressly clear that the State Commission may receive complaints in relation to the matters specified therein and on receipt of such complaints take up the matter with the authorities concerned for appropriate remedial measures. The 1993 Act has not entrusted the State Commission with the power to take up the role of a court or an adjudicatory tribunal and determine the rights of the parties. The State Commission is not a tribunal discharging the functions of a judicial character or a court."

12. Dealing with the powers of the Chief Commissioner and Commissioners under the persons with Disabilities (Equal Opportunity, Protection of Rights and Full Participation) Act and the Rules thereunder, this Court in *State Bank of Patiala vs. Vinesh Kumar Bhasin* – 2010 (4) SCC 368, held as follows:

"It is evident from the said provisions, that neither the Chief Commissioner nor any Commissioner functioning under the Disabilities Act has power to issue any mandatory or prohibitory injunction or other interim directions. The fact that the Disabilities Act clothes them with certain powers of a civil court for discharge of their functions (which include power to look into complaints), does not enable them to assume the other powers of a civil court which are not vested in them by the provisions of the Disabilities Act."

13. It is evident from Article 338 as it originally stood, that the Commission was constituted to protect and safeguard the persons belonging to scheduled castes and scheduled tribes by ensuring : (i) anti-discrimination, (ii) affirmative action by way

reservation and empowerment, and (iii) redressal of grievances. The duties under clause 5(b) of Article 338 did not extend to either issue of caste/tribe certificate or to revoke or cancel a caste/tribe certificate or to decide upon the validity of the caste certificate. Having regard to the sub-clause (b) of clause (5) of Article 338, the Commission could no doubt entertain and enquire into any specific complaint about deprivation of any rights and safeguards of Scheduled Tribes. When such a complaint was received, the Commission could enquire into such complaint and give a report to the Central Government or State Government requiring effective implementation of the safeguards and measures for the protection and welfare and socio-economic development of scheduled tribes. This power to enquire into 'deprivation of rights and safeguards of the scheduled castes and scheduled tribes' did not include the power to enquire into and decide the caste/tribe status of any particular individual. In fact, as there was no effective mechanism to verify the caste/tribe certificates issued to individuals, this Court in *Madhuri Patil vs. Addl. Commissioner (Tribal Development)* – 1994 (6) SCC 241 directed constitution of scrutiny committees.

14. In *Madhuri Patil*, this Court held that on account of false social status certificates being obtained by unscrupulous individuals, and cornering the benefits meant for SCs and STs, persons who genuinely belonged to scheduled castes/ scheduled tribes were denied the benefit of reservation in posts/ seats and other benefits extended to SCs and STs. It therefore, felt that there was a need to streamline the procedure for issuance of social status certificate, their scrutiny and approval and issued the following directions :

"1. The application for grant of social status certificate shall be made to the Revenue-Sub-Divisional Officer and Deputy Collector or Deputy Commissioner and the certificate shall be issued by such Officer rather than at the Officer, Taluk or Mandal level.

4. All the State Governments shall constitute a Committee of three officers, namely, (I) an Additional or Joint Secretary or any officer higher in rank of the Director of the concerned department, (II) the Director, Social Welfare/ Tribal Welfare/Backward Class Welfare, as the case may, and (III) in the case of Scheduled Castes another officer who has intimate knowledge in the verification and issuance of the social status certificates. In the case the Scheduled Tribes, the Research Officer who has intimate knowledge in identifying the tribes, tribal communities, parts of or groups of tribes or tribal communities.

5. Each Directorate should constitute a vigilance cell consisting of Senior Deputy Superintendent of Police in over all charge and such number of Police Inspectors to investigate into the social status claims. The Inspector would go to the local place of residence and original place from which the candidate hails and usually resides or in case of migration to the town or city, the place from which he originally hailed from. The vigilance officer should personally verify and collect all the facts of the social status claimed by the candidate or the parent or guardian, as the case may be. He also should examine the school records, birth registration, if any. He should also examine the parent, guardian or the candidate in relation to their caste etc. or such other persons who have knowledge of the social status of the candidate and then submit a report to the Directorate together with all particulars as envisaged in the proforma, in particular, of the Scheduled Tribes relating to their peculiar anthropological and ethnological traits, deities, rituals, customs, mode of marriage, death ceremonies, method of burial of dead bodies etc. by the concerned castes or tribes or tribal communities etc.

6. The Director concerned, on receipt of the report from the vigilance officer if he found the claim for social status to be "not genuine" or "doubtful" or spurious or falsely or

wrongly claimed, the Director concerned should issue show cause notice supplying a copy of the report of the vigilance officer to the candidate by a registered post with acknowledgement due or through the head of the concerned educational institution in which the candidate is studying or employed…….

9. The inquiry should be completed as expeditiously as possible preferably by day-to-day proceedings within such period not exceeding two months. If after inquiry, the caste Scrutiny Committee finds the claim to be false or spurious, they should pass an order cancelling the certificate issued and confiscate the same. It should communicate within one month from the date of the conclusion of the proceedings the result of enquiry to the parent/guardian and the applicant.

xxxx xxxx"

This Court thus formulated a scheme for verification of tribal status and held that any application for verification of tribal status as a scheduled tribe should be carried out by such Committees. The verification of the validity of caste certificates and determination of the caste status should therefore be done by the Scrutiny Committees constituted as per the directions in *Madhuri Patil* or in terms of any statute made by the appropriate government in that behalf.

15. It is true that the Commission had ultimately directed the state government to conduct the verification of the genuineness of the scheduled tribe certificate obtained by the first respondent and to initiate action for cancellation of his scheduled tribe certificate and also criminal action as provided in law and submit an action taken report to the Commission within 30 days. But this is preceded by a very lengthy order which categorically records a finding that first respondent had secured a false certificate. The order starts with the following caption: "Verification of community certificate of Shri Ajit

P.K.Jogi". The order discloses that it had summoned various senior officers of the State Government and the first respondent to produce the documents in regard to his caste status. The order further states that it had held independent inquiry through its State office to collect evidence to show that the first respondent belonged to Satnami caste and not to Kanwar community. The Commission has dealt with the objection that it had no jurisdiction to determine the caste status of an individual, referred to its duties and functions in detail and concluded thus :

> "Thus the Commission is fully empowered to enquire into any complaint relating to bogus community certificate which would otherwise have the effect of depriving the genuine ST candidates from getting admissions to professional courses etc. or appointments to posts reserved for them or from election to the elected bodies from the constituencies reserved for them. Since its inception, the Commission has taken up enquiries in thousands of cases of complaints of false caste certificates, either directly or through its State Offices or the concerned agencies of the State Governments and about 800 such cases are still pending with the Commission which are being pursued.
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> x x x x x
>
> It is therefore clear that the objections raised by the Respondent is not sustainable and the Commission is well within its rights to enquire into the matter to fine the genuineness of the ST certificate in possession of Shri APK Jogi, which enabled him to become an MLA from a constituency reserved for the STs."

The order then considers the material in great detail and records clear finding that the first respondent had obtained a false certificate, vide para 24 which is extracted below :

> "Based on the evidence available before the Commission,

> it is clearly established that Late Shri Girdhari Jogi, while Shri Sinati Jogi and his progeny continued to claim the benefit of being SCs as Satnami caste, the grandfather of Shri A.P.K Jogi, Shri Dulare Jogi and his progeny converted to Christianity and thus became ineligible for the benefits available to the Scheduled Castes. (The genealogical tree of the family is enclosed for ready reference). However, Shri Ajit P. K. Jogi, by fraudulently claiming to belong to 'Kanwar' community managed to get a ST certificate in 1967 from Additional Tehsildar, Pendra Road. This certificate was not registered in the Revenue records and was thus a legally invalid document Shri Ajit P. K. Jogi, who had subsequently joined Indian Police Service and Indian Administrative Service, used his influence to get the community certificate as ST and on his own admission, contented for parliamentary elections and Assembly elections from constituencies reserved for STs."

16. It is only after recording the said findings, the Commission directed the State government to verify the genuineness of the ST certificate obtained by first respondent and initiate action for cancellation of the certificate and also initiate criminal action. All these were unwarranted. As noticed above, the power under clause 5(b) of Article 338 (or under any of the other sub-clauses of clause 5 of Article 338) did not entitle the Commission to hold an inquiry in regard to the caste status of any particular individual, summon documents, and record a finding that his caste certificate is bogus or false. If such a complaint was received about the deprivation of the rights and safeguards, it will have to refer the matter to the State Government or the authority concerned with verification of caste/tribal status, to take necessary action. It can certainly follow up the matter with the State Government or such authority dealing with the matter to ensure that the complaint is inquired into and appropriate decision is taken. If the State Government or the authorities did not take action, the Commission could either itself or through the affected persons, initiate legal action

to ensure that there is a proper verification of the caste certificate, but it cannot undertake the exercise itself, as has been done in this case. The contention that there was sufficient material to reach such a conclusion is not relevant. The scope of the duties of the Commission as noticed above, did not involve inquiry or adjudication in regard to the rights of parties or caste status of the parties. The same is the position even under Article 338A (which was subsequently inserted) providing for a separate Commission for Scheduled Tribes with identical duties. The order of the Commission cannot therefore be sustained. The High Court was justified in setting aside the said order dated 16.10.2001.

Re : Questions (ii) to (iv)

17. This does not mean that the caste certificates of the first respondent are not to be verified. The appellants allege that among the certificates obtained by the first respondent, the certificates dated 6.6.1967 and 27.2.1984 were issued by the Naib Tehsildar, who at the relevant point of time did not have the authority to issue such certificates. With reference to the certificate dated 27.2.1984, it is also contended that the case number mentioned pertains to grant of an explosive licence to one Gokul Prasad. In regard to certificates dated 6.3.1986 and 12.1.1993, it is pointed out that no case number had been mentioned. In regard to the certificate dated 11.8.1999, it is pointed out that Naib Tehsildar at Indore, was not competent to issue such a certificate in regard to a resident of Pendra Road, Bilaspur. In regard to certificates dated 8.1.2001 and 20.9.2003 issued by the Additional Collector, Bilaspur, it is pointed out that the certificates are not in the required form and not in accordance with the relevant guidelines for issuance of certificates. It is also alleged that on 8.4.1977, the Addl. Tehsildar, Pendra Road had rejected the application of first respondent for issue of a certificate showing that he belonged to 'kanwar' Scheduled Tribe. It is also alleged that father and mother of first respondent had entered into sale transactions on 12.8.1964, 21.9.1967 and 25.7.1979 describing themselves

as Christians and had not sought permission under section 165(6) of MPLR Code which was mandatory, if they were tribals. We have referred to these averments only to point out that serious allegations were made in regard to the certificates obtained by the first respondent and the tribal status claimed by him. The certificates have never undergone a scrutiny by a properly constituted authority. The fact that two writ petitions were filed at some point of time, challenging the claim of first respondent that he belongs to a scheduled tribe may not be conclusive as the first writ petition was dismissed on the ground that it involved disputed questions of fact which could not be gone into in a writ proceeding and the second writ petition was dismissed on the ground that investigation into the allegations of forged certificates was in progress. Therefore even though the Commission was not entitled to hold an inquiry and record a finding that first respondent did not belong to a scheduled tribe, having regard to clause 5(b) and (f) of Article 338, it had the power and authority to require the State Government or the caste verification Committee constituted by the State Government, to examine the caste status claimed by the first respondent. The correspondence initiated by the Commission clearly showed a request/direction for verification of the caste of the first respondent was made by the Commission and the state government had responded by stating that the claim of first respondent that he belonged to a scheduled tribe and the validity of social status certificates would be verified by the Scrutiny Committee.

18. The High Court was therefore not justified in holding that in view of the disposal of earlier writ petitions by the High Court, the dispute relating to tribal status of the first respondent had attained some kind of finality. On the facts and circumstances, there was also no justification for the High Court to either term the application given by the sixth respondent to the Commission as politically motivated or direct the State Government and the Commission to calculate the actual

expenses incurred in regard to the inquiry and recover the same from the sixth respondent.

Conclusion

19. We therefore allow these appeals in part as under :

(i) The order of the High Court dated 15.12.2006 to the extent it quashes the order dated 16.10.2001 of the Commission, is upheld.

(ii) The adverse observations by the High Court about the complaint by the sixth respondent, the inquiry by the Commission, and the stand of the State Government and the Collector before the High Court, being politically motivated, are set aside.

(iii) The direction to the State Government and the Commission to calculate the actual cost incurred in prosecuting the writ petition and directing the sixth respondent to pay the actual costs plus Rs.10,000 is set aside.

(iv) In terms of the direction of the Commission, the State Government through a duly constituted Scrutiny Committee shall now undertake the verification/scrutiny of the social status (tribal) certificates issued to the first respondent showing him as belonging to 'Kanwar' Scheduled Tribe and decide the matter after giving due opportunity to the first respondent, uninfluenced by any observations by the Commission, High Court or this Court. The State Government/concerned authorities shall be entitled to take consequential action on the basis of the order/ report of the Scrutiny Committee.

R.P. Appeals partly allowed.

DR. T. VARGHESE GEORGE
v.
KORA K. GEORGE & ORS.
(Civil Appeal No. 6786 of 2003)

OCTOBER 13, 2011

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

CODE OF CIVIL PROCEDURE, 1908:

s. 92(1)(g) – Public charities – Trust created for public purpose of a charitable nature i.e. running the school – Allegations of mis-management – Suit for settling a scheme – Maintainability of – Held: As per s.92, two or more persons having interest in the Trust may institute such a suit where such persons make out a case of breach of any Trust created for public purpose – One of the purpose set out in sub-s.(1)(g) is settling a scheme – Out of the three persons who filed the suit one was a member of the Board of Trustees, the other was the person who had raised funds for buying land for the Institution and for constructing the building of the school and the third was a parent of a student of the school – None of these persons can be said to be as lacking good intention for the trust – The Division Bench of the High Court realized that a proper scheme for administration of Trust was necessary and, therefore, rightly framed the scheme considering the object of the Trust.

Trust for public purpose – A person belonging to a minority, created a Trust for the public purpose of running a school – HELD: The finding of the single Judge of the High Court that the Trust was not a minority Trust was left undisturbed by the Division Bench of the High Court in appeal and reaffirmed by a Bench of three Judges of the Supreme Court – This being the position, the issue with respect to the character of the Trust as a secular education trust cannot be

permitted to be reopened – Even otherwise, the secular character of the institution was set out in Clause 10 of the declaration made by the founder – There is nothing in the initial declaration made by the founder that the institution was to be a minority institution – All the trustees nominated were on ex-officio basis or on the basis of their qualifications and not on the basis of religion – The funds and income was to be utilized for encouraging poor and deserving students irrespective of caste, creed or religion – It is nowhere stated in that declaration that the trust was being created for the benefit of the Christian community – Constitution of India, 1950 – Article 30.

One T. Thomas who started a school by name 'St. Mary's School', executed a deed of declaration of a trust by name 'T. Thomas Educational Trust' for the purpose of running of the said school. On his death, the Trust and the school came under the management of his wife, namely, Smt. 'ET'. There being allegation of mis-management of the funds of the Trust by her, three persons including respondent no.1, filed a suit u/s 92 of the Code of Civil Procedure, 1908 before the High Court for framing a scheme for the Trust. The plea of Smt. 'ET' that the Trust was a private trust and a Minority Institution, was rejected and it was held that it was a Public Charitable Trust. It was found that the Trust was running several schools and a College also. The High Court, ultimately, framed the scheme and appointed a Board of Trustees consisting eight persons including one former Judge of the High Court as its Chairman and one retired IAS as Executive Trustee. The SLP filed by Smt. 'ET' challenging the judgment of the High Court was withdrawn by her. The appellant, who claimed to have raised some good funds for the Trust, but was not a party before the High Court, filed the instant appeal. The appellant also filed CMP No. 20476/2003 which was

allowed by the High Court in 2005 and he was joined as a respondent in OSA No. 49 of 1995 before the High Court. The appellant filed CMP No. 5660/2005 and CMP No. 9402 of 2006 for appointment of a receiver and seeking modification of the scheme decree passed in OSA No.49 of 1995. Meanwhile Smt. 'ET' died in 2006. The High Court dismissed all the three CMPs by a common order dated 21.9.2007. It further declined to entertain the CMPs filed by two more persons to be impleaded as additional applicants. The said two persons filed SLP Nos. 22590 and 22591 of 2007. The appellant had also filed contempt petition No. 435 of 2004.

The appellant in the instant appeal once again raised the issue that T. Thomas Educational Trust was a minority institution and could not be considered as a public trust and, as such, the High Court erred in exercising jurisdiction and framing the scheme for administration of the Trust u/s 92, CPC.

Dismissing the appeal and the petitions, the Court

HELD: 1.1 As per s.92, CPC two or more persons having interest in the trust may institute a suit in the principal civil court of original jurisdiction to obtain a decree concerning a public charity for various purposes mentioned therein. Such suit will lie where these persons make out a case of alleged breach of any trust created for public purposes or for directions of the court for administration of the trust. One of the purposes set out in sub-s. (1) (g) is settling a scheme. Out of the three persons who filed Civil Suit No.601 of 1987, one was a member of the Board of Trustees nominated by the founder himself. The other was the brother-in-law of the founder. He has raised funds for buying lands for the institution, and for constructing the buildings of the school. The third was a parent of a student of the

institution. None of these persons can be criticized as persons lacking good intention for the trust. [para 25] [1099-F-H; 1100-A-B]

1.2 Sub-s. (2) of s.92 lays down that a suit claiming any of the reliefs specified in sub-s. (1) has to be instituted in conformity with that sub-section. Such suit having been filed, the trial court gave a finding that it was a public trust and not a minority institution. That finding has been left undisturbed by the High Court, and confirmed by a bench of three judges of this Court. Although, the trial court declined to accept the principal prayer, the Division Bench in appeal realised that an appropriate scheme for the administration of the trust was necessary. The High Court, therefore, framed the scheme considering the objects of the trust by its order dated 4.12.1995. [para 26] [1100-C-E]

1.3 It is material to note that the Division Bench had framed the scheme by its order dated 4.12.1995, after calling upon Smt. 'ET', the wife of the founder to give her proposals which she had declined. Still, with a view only to give one more opportunity to her, this Court remanded the matter once again to the High Court. The Division Bench of the High Court which heard the matter after remand appointed a retired Judge of the High Court as the interim Chairman, and a retired IAS Officer as the Executive Trustee and Correspondent in April 2002. The Chairman so appointed, made the necessary reports to the Division Bench and pointed out that Smt. 'ET' was mis-managing the trust. The Division Bench considered all the aspects and proposals including that of Smt. 'ET' for framing the scheme and framed an appropriate scheme by its order dated 5.12.2002. Apart from the appellant, and Smt. 'ET', hardly anybody has raised any grievance with respect to the functioning of the Chairman or the Correspondent. The appellant did not choose to initiate any proceedings with respect to the functioning

of the trust as required u/s 92. After the scheme was finalized, although Smt. 'ET' filed an appeal, she withdrew the same. It was at this stage that the appellant filed the instant appeal. The correct course of action for him ought to have been to file a suit u/s. 92, if he deemed it fit. [para 27] [1100-F-H; 1101-A-C]

2.1 As far as the character of the trust as a secular public trust is concerned, that view was taken initially by the Single Judge. Subsequently, it was confirmed by a Division Bench of the High Court as well as by a bench of three judges of this Court. The fact that the trust was set up by the founder who belongs to a religious minority was very much there before the courts all throughout. The fact that three schools of this trust had obtained a certificate of minority character was canvassed before the single Judge, and in spite of that submission the single Judge gave a finding that the trust was not a minority trust. He recognised the secular character of the institution, particularly, by referring to Clause 10 of the declaration made by the founder. The specific finding on issues No. 6 and 7 was left undisturbed by the Division Bench of the High Court in appeal and reaffirmed by a bench of three judges of this Court. Smt. 'ET' did not file any appeal on this finding of the single Judge to the Division Bench of the High Court. This Court has already confirmed that finding. This being the position, the issue with respect to the character of the trust as a Secular Education Trust cannot be permitted to be reopened. [para 28] [1101-C-F; 1102-E]

2.2 Explanation IV to s.11 of the Code clearly lays down that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such latter suit, and a civil court cannot try the same issue once again between the same

parties or between the parties under whom they were litigating. The same proposition applies to issue estoppel. [para 28] [1101-G-H; 1102-A]

Shiromani Gurdwara Parbandhak Committee Vs. Mahant Harnam Singh **2003 (3) Suppl. SCR 805 = 2003 (11) SCC 377 and** *Mahant Harnam Vs. Gurdial Singh* **1967 SCR 739 = AIR 1967 SC 1415 – relied on.**

3.1 As regards the orders obtained under the Tamil Nadu Act by three schools belonging to the trust, it is necessary to note in this connection that these orders were obtained from a civil court and were confirmed in appeal. However, it must be noted that a recognition of a school as a minority school is to be obtained from a competent authority u/s 11 of that Act, and not from any civil court, and any party aggrieved by non-grant thereof has a right of appeal u/s 41 of that Act to the prescribed Authority. Section 53 of the Act clearly lays down that no civil court shall have jurisdiction to decide or deal with any question which is by or under this Act required to be decided or dealt with by an authority or officer mentioned in this Act. Thus, *prima facie*, it would appear that the orders were obtained from a forum non-juris. The reliance on the judgments of the civil court though pressed into service before the single Judge were not taken as a relevant factor for deciding the minority character of the trust. [para 29] [1102-F-H; 1103-A]

3.2 The statement of objects and reasons of the Act states that the act was passed to regulate the service conditions of the teaching and non-teaching staff in private schools and in that context some separate provisions were made for the minority schools. In the instant case, though the declaration was claimed under the Tamil Nadu Act, it was not obtained from an authority specifically created for that purpose under the Act to give

such a status declaration. Therefore, these orders cannot be used for determining the character of the trust. It is also relevant to note that these orders were obtained after the demise of the founder and not during his life time. [para 29] [1103-C-D]

4.1 With respect to an outsider coming in the management, it is to be seen that the founder had not designated any of the persons on the board by their religion. Thus, he nominated all the persons in their ex-officio capacity as: (a) Principal of the school (ex-officio), (b) Headmaster/Headmistress, (c) Warden of the Hostel (ex-officio), (d) Member elected by the parent association, (e) Member elected from the staff council, and (f) Three persons having high standard in the education field nominated by the first five. When one sees the formation of this board, one just cannot say that persons other than Christians cannot be in the management of the institution. Incidentally, it may be noted that the nominated Chairman is a Christian. The objection of the appellant appears to be only on the basis of the religion of the Executive Trustee and Correspondent of the trust. [para 30] [1103-E-H]

4.2 In the case of Very Rev. Mother Provincial* **two tests were laid down. The negative test is that a contribution from other communities to a minority institution and conferring of benefits of the institution to the majority community are not the factors which matter in deciding the minority character of the institution. The positive test is that the intention in founding the institution must be to found an institution for the benefit of a minority community. As far as, these negative tests are concerned, they can be said to be satisfied in the instant case. But the positive test which is more significant, namely, the intention must be to found an institution for the benefit of a minority community, is not satisfied. There is nothing**

in the initial declaration made by the founder that the institution was to be a minority institution. All the trustees nominated were on ex-officio basis or on the basis of their qualifications and not on the basis of religion. The funds and income was to be utilized for encouraging poor and deserving students irrespective of caste, creed or religion. It is nowhere stated in that declaration that the trust was being created for the benefit of the Christian community. The approach of the founder is clearly seen to be a secular approach and he did not create the trust with any restricted benefits for a religious community. Merely because he belongs to a particular faith, the persons belonging to that faith cannot claim exclusive right to administer the trust. The establishment and administration must be both by and for a minority which is not so in the instant case. [para 31-32] [1104-A-D-H; 1105-A]

State of Kerala Vs. Very Rev. Mother Provincial* **1971 (1) SCR 734 = 1970 (2) SCC 417; *S. Azeez Basha Vs. Union of India* **1968 SCR 833 = AIR 1968 SC 662;** *Secretary, Malankara Syrian Catholic College Vs. T. Jose and others* **2006 (9) Suppl. SCR 644 = 2007 (1) SCC 386;** *Commissioner Hindu Religious Endowments, Madras Vs. Shri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* **1954 (5) SCR 1005 – referred to.**

All Saints' High School, Hyderabad and others Vs. Government of Andhra Pradesh **1980 (2) SCR 924 = 1980 (2) SCC 478 – held in applicable.**

Md. Ismail Ariff and others Vs. Ahmed Moolla Dawood and another **AIR 1916 P.C. 132** – **referred to.**

4.4 In the facts and circumstances of the case, there was no error in the impugned judgment of the Division Bench of High Court dated 5.12.2002 on O.S.A 49 of 1995 in holding that T. Thomas Educational Trust is a secular

public charitable trust and not a minority institution. The High Court was accordingly justified in framing the scheme u/s 92 of CPC to see to it that the trust is administered in a better way. The scheme is in the interest of the trust. By the common order of the Division Bench dated 21.9.2007 in CMP Nos. 5673 of 2003, 5560 of 2005, 9402 of 2006 and CMP No. 10340 and 10341 of 2005, the High Court has held on merits that the appellant had failed to make out any case of mis-management against the Chairman or the Correspondent, and there is no error in the High Court order in that behalf. [para 33] [1105-D-F]

Bishwanath Vs. Shri Thakur Radha Ballabhji **1967 SCR 618 = AIR 1967 SC 1044;** *T.M.A. Pai Foundation and others Vs. State of Karnataka and others* **2002 (3) Suppl. SCR 587 = 2002 (8) SCC 481;** *Ahmedabad St. Xavier's College Society Vs. State of Gujarat* **1975 (1) SCR 173 = 1974 (1) SCC 717; and Kerala Education Bill 1959 SCR 995 = AIR 1958 SC 956 – cited.**

Case Law Reference:

1967 SCR 618	**cited**	**para 8**
1971 (1) SCR 734	**referred to**	**para 19**
2006 (9) Suppl. SCR 644	**relied on**	**para 20**
1980 (2) SCR 924	**held inapplicable**	**para 20**
AIR 1916 P.C. 132	**referred to**	**para 20**
1968 SCR 833	**relied on**	**para 23**
2002 (3) Suppl. SCR 587	**cited**	**para 23**
1975 (1) SCR 173	**cited**	**para 23**
1959 SCR 995	**cited**	**para 23**
1954 (5) SCR 1005	**referred to**	**para 23**

2003 (3) Suppl. SCR 805 relied on para 28

1967 SCR 739 relied on para 28

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6786 of 2003.

From the Judgment and Order dated 05.12.2002 of the High Court of Judicature at Madras in O.S.A. No. 49 of 1995.

WITH

SLP (C) No. 22590-22591 of 2007.

And

Contepmt Petition (C) No. 435 of 2004 in C.A. No. 6786 of 2003.

K. Subramanian, E.C. Agrawala, Mahesh Agarwal and Rishi Agrawala for the Appellant.

M.S. Ganesh, V. Giri, R. Ayyam Perumal, K. Seshachary, Shomana Khanna, G. Natarajan, Subramanium Prasad, V.N. Raghupathy, S. Nanda Kumar, Achin Goel, R. Satish Kumar, Deepak Prakash, Usha Nandini, Biju Raman, Mohammed Sadique, Jogy Scaria and Purnima Bhat for the Respondents.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. Civil Appeal No. 6786 of 2003 raises the question as to whether T. Thomas Educational Trust, Perambur, Chennai, is in any way a Minority Educational Trust? And if so, whether the Division Bench of the Madras High Court was justified in framing a scheme for the administration of this trust under Section 92 of Code of Civil Procedure, 1908 ('CPC' for short) by treating it as a Public Charitable Trust?

Facts leading to Civil Appeal No. 6786 of 2003 are this wise –

2. One Shri T. Thomas son of Shri Thomas Pappy, of

Perambur, Chennai, started a school in Chennai by name 'St. Mary's School' sometime in the year 1970. On 4.4.1975, he executed a deed of declaration of a trust by name 'T. Thomas Educational Trust' for the purpose of running of the school on the terms and conditions mentioned therein. In para 2 of this deed he declared the objects of the trust as follows:-

"*2. The said Trust shall have the following objects namely* –

a. to run the said St. Mary's School,

b. to run other Educational Institutions and Institutions allied to Educational Institutions like Research Institutions.

c. to accept donations in any manner from any person or Institutions whether Governmental or quasi Governmental or otherwise, for carrying out the purpose of the Trust.

d. to borrow moneys from banks and/or other credit Institutions and/or individuals and/or public bodies and/or other Governmental or quasi-Governmental bodies, on the security of its properties or otherwise, for the purpose of the Trust.

e. to lease out or sell or mortgage or otherwise deal with any of the properties of the Trust whether moveable or immovable for the purpose of the Trust."

3. In para 3 he declared that the entire control and management of the Trust including appointment of the Correspondent of the School shall rest in a 'Board of Trustee' who shall consist of the following persons namely:-

(a) The Principal of the School (ex-officio)

(b) Headmaster or Headmistress

(c) Warden of the St. Mary's School Hostel (ex-officio)

(d) A member elected from the Parents Association of the School.

(e) A member elected from the Staff Council of the School.

(f) Three members nominated by the above five members, having high standing in the Educational field.

He nominated the First Board of Trustees in para 4. The members thereof were as follows: -

(a) Rev. Fr. G.M. Thomas, B.Sc., L.T., acting Principal of the School.

(b) Mr. Joseph Ebenezer, B.Sc., L.T. Headmaster

(c) Mrs. Elizabeth Saraswathi, Warden of the St. Mary's English School Hostel

(d) Mrs. Molly Thayil, 37, Vyasa Nagar, Madras-39

(e) Mr. J. Devaraj, B.A. (Staff Member)

(f) Mrs. Mary Joshna Thomas, M.A.B.D., Prof. of History, St. Stephen'sCollege, Pathanapuram, Kerela

(g) Mr. D.V. DeMonte, M.L.C., President, Anglo Indian Association, Madras

(h) Pandit M.C. Chandy, Teaching Assistant (Retd.) Madras ChristianCollege School, Madras

4. What Shri T. Thomas declared in para 10 with respect

to the income of the School and utilisation of its funds is very crucial for our purpose. This para reads as follows:-

"*10. The income from the School or any income or funds pertaining to the Trust shall be exclusively used for the purpose of the Trust including financial assistance to poor and deserving pupils or students* ***irrespective of caste, creed or religion****."*

(emphasis supplied)

5. Shri Thomas died on 16.1.1984, and the trust and the school fell under the management of his wife Smt. Elizabeth Thomas. There were allegations with respect to mis-management of the funds of the institution by her. This led three persons taking interest in the activities of the trust to institute a suit in the Madras High Court under Section 92 of the CPC for framing of a scheme for this trust. They were:-

(i) Shri D.V. DeMonte, a member of the First Board of Trustee,

(ii) Dr. K.P. Natrajan, a parent of a student of the institution, and

(iii) Shri Kora K. George, respondent No. 1 herein, who is husband of the sister of Late T. Thomas.

6. This suit was numbered as Civil Suit No. 601/1987, wherein

(i) T. Thomas Educational Trust, (ii) Smt. Elizabeth Thomas, (iii) Smt. Molly Thayil and (iv) Rev. Thomas Mar Osthatheos, were joined as the defendants. The learned Single Judge framed the necessary issues and then after recording evidence decided the suit. Issue Nos. 6 and 7 from amongst them were as follows:-

"6. Whether the suit falls outside the purview of

section 92 of the Code of Civil Procedure as contended by the second defendant?

7. Whether this court has no jurisdiction to interfere with the management and with administration of the first administration of the first defendant Trust under section 92 C.P.C."

7. It was canvassed by Smt. Elizabeth Thomas before the learned single Judge that the concerned trust was a private trust and a Minority Institution. She pointed out that three schools of the institution had obtained declaration of being minority educational institutions. Therefore, it was submitted that the single Judge did not have jurisdiction to entertain the suit under Section 92 of CPC. That submission was not accepted by the learned single Judge. The learned Judge looked into the original trust deed and noted that in para 3 of the founder's declaration, one of the objects was to accept donation in any manner from any person or institutions whether governmental or otherwise for carrying out the purpose of the Trust, which was the educational purpose. He also referred to the above referred clause 10 which stated that the income and funds of the institution were to be exclusively used for the purposes of the trust, including financial assistance to the poor and deserving students irrespective of caste, creed or religion. He referred to the prospectus of St. Mary's group of schools. He also noted that no benefit whatsoever was to be retained by any member of the family, and the beneficiaries were only public. At the end of para 29 he held that the above factors would show that it is a Public Charitable Trust. This para reads as follows:-

"29. Issue 6 and 7:-

Ex. P-1 is the Trust deed. I shall refer to the clauses in it, which are relevant for considering whether it is a public charitable trust. In the first page he has stated that this declaration of trust is made by T. Thomas, herein after called the declarant which expression shall whenever it is

not repugnant to the context mean and include the heirs, successors, executors, administrators and legal representatives of the Declarant. In para 3, it is stated that the said trust shall have the following objects, viz.,

(a) to run the said St. Mary's School;

(b) to run other educational institutions, and institution like research institution;

(c) to accept donation in any manner from any person or institutions whether governmental or otherwise for carrying out the purpose of the Trust etc.

In page 5, as per clause 8, a sum of Rs.2,000/- has been deposited with Indian Overseas Bank, Perambur in the name of the trust, which sum along with further donation etc., shall be utilized for the purposes for which the trust is created. As per clause 10, which is found at page 6, the income form the school or any income or funds pertaining to the trust shall be exclusively used for the purpose of the trust, including financial assistance to poor and deserving pupils or students irrespective of caste, creed or religion. IN Ex. P-2, which is prospectus of St. Mary's group of Schools under T. Thomas educational trust, in para 1, it is stated as follows:-

"T. Thomas educational trust was founded by chevalier t. Thomas M.A., Dip in Econ. (London), to promote quality education in North Madras." The above would show that the trust was created wholly for the purpose of imparting education. It is also seen that there is provision for donations from the public. It is further seen that no benefit whatsoever was retained by any member of the family and the beneficiaries are only public. The above would show that it is a public Charitable Trust."

8. The learned Judge however was of the view that the

three conditions as laid down by this Court in *Bishwanath Vs. Shri Thakur Radha Ballabhji* reported in [AIR 1967 SC 1044], had to be satisfied for invoking Section 92 of CPC viz. that (i) the trust is created for public purpose of a charitable or religious nature. (ii) there was breach of trust as directions of court is necessary in the administration of such a trust; and (iii) the relief claimed is one of the reliefs enumerated therein. The single Judge took the view that a case of breach of trust had not been made out, and the prayer for direction was vague, and therefore although he found the trust to be a charitable trust, he gave a finding in the affirmative on issue Nos. 6 and 7. Issue No.8 was as to whether the plaintiffs could be considered as interested persons to maintain the suit and ask for settlement of a scheme. The learned single Judge held that they could not be said to be interested persons. He therefore, dismissed the suit. At the end of para 30 he held as follows:-

> "30……..But, if after evidence is taken, it is found breach of trust alleged has not been made out and that the prayer for direction of the Court is vague and is not based on any solid foundation in facts of reasons but is made only with a view to brig the suit under section then a suit purporting to be brought under section 92 must be dismissed. In this case, after evidence is taken it is found that the breach of trust alleged has not been made out and the allegations in the plaint and the grievances made are not based on any fact or basis. The ratio of this ruling squarely applies to the facts of this case. Though I have found that this trust is a Public Charitable Trust, in view of my findings under Issues 1 to 3, 5 and 8 it follows that Issues 6 and 7 are to be decided in the affirmative."

9. The respondent No. 1 herein carried the matter in appeal by filling O.S.A. No. 49 of 1995. Smt. Elizabeth did not file any cross appeal or objection on the finding rendered by the single Judge that the institution was a public trust. The Division Bench noted with approval that on Issues No.6 and 7,

the single Judge had held that the institution was a public trust. With respect to the finding of the single Judge on above Issue No.8, the Division Bench noted that Shri Kora K. George was instrumental in buying vast lands which are in possession and ownership of T. Thomas Educational Trust. He was also incharge of constructing buildings for Marian School and St. Mary's Girls School, Sembium at Madras. The Division Bench held that he was a person who was very much interested in the trust and the view taken by the learned single Judge to the contrary was not correct. In the facts and circumstances of the case the Division Bench formed the opinion that having held the institution to be a public trust, it was necessary to frame an appropriate scheme. It noted that initially there was only one school run by the trust, but now it was running a college also, and a representation to the Principal of the college on the board of trustees was necessary. The Court was of the view that it was absolutely necessary to fill up the lacunae in the deed of trust which could be done only be framing a scheme therefor. The Court, therefore, passed an order on 20.11.1995 calling upon both the parties to file draft schemes for the consideration of the Court. Smt. Elizabeth Thomas did not file any draft scheme in spite of this specific order. The Court, thereafter, considered the draft scheme filed by Shri Kora K. George, and modified it appropriately and accordingly allowed the appeal by its judgment and order dated 4.12.1995.

10. Smt. Elizabeth Thomas and T. Thomas Educational Trust filed a Civil Appeal before this Court against that judgment and order, which was numbered as Civil Appeal 16578 of 1996. A bench of three Judges of this Court disposed of the said appeal on 27.10.1999 by passing the following order:-

> "***We are of the opinion that the judgment of the High Court on the legal issues which were raised does not call for any interference but considering the fact that the appellants had been the managing trustees ever since the inception, one further***

opportunity should be granted to them to file a draft scheme *which should be considered along with the draft scheme which was filed by the respondent herein. It will be more appropriate, in our opinion, that the exercise of consideration the draft schemes should be undertaken by the High Court rather than by this Court.* ***We, therefore, while affirming the judgment of the High Court in all other aspects remand the case to the High Court for considering afresh the draft schemes.*** *The appellants herein will file the draft scheme within eight weeks from today. The High Court will decide the question thereafter after giving reasonable opportunity to both the sides……..."*

(emphasis added)

As can be seen from this order, this Court specifically affirmed the judgment of the High Court on all aspects. It remanded the matter only with a view to give an opportunity to Smt. Elizabeth Thomas who had filed the appeal. It is also material to note that pending the decision on the scheme, this Court continued the status-quo with regard to the operation of the approved scheme.

11. After the matter was remanded, a Division Bench of the Madras High Court went into the issue of framing of the scheme. It looked into the history of the proceeding as stated above. The High Court noted that although initially the trust was running only one school, by the time the appeal was being decided in December 2002, it was running eight schools and colleges. The Court noticed that there were allegations of financial mis-management against Smt. Thomas, and therefore appointed Mr. Justice Kanakaraj, a retired Judge of Madras High Court as an interim Chairman of the trust. He gave two reports on 3.6.2002 and 7.10.2002, wherein he reported that Smt. Elizabeth Thomas was trying to sell the land of the institution situated at Madhavaram which was purchased for its

engineering college.

12. The Court examined the draft scheme presented by Smt. Elizabeth Thomas, Shri Kora K. George and also by the interim Chairman. Smt. Thomas once again tried to raise the issue that it was a minority institution, but the Division Bench declined to accept that submission in view of the finding of the single Judge on that issue being left undisturbed by this Court. Smt. Thomas wanted to be appointed as a trustee for life. Division Bench noted that there were serious allegations with respect to mis-appropriation of funds against her. While looking into these allegations, the High Court noted that she had created one trust of her own by name Elizabeth Thomas Trust in October 1997. She had obtained a loan of Rs.2.50 crores on the security of T. Thomas Education Trust, and diverted that amount to her own trust. The Division Bench had therefore, by an earlier order dated 27.3.2002 held that the assets of the Elizabeth Thomas Trust shall be treated as belonging to the T. Thomas Trust. Smt. Thomas sought the appointment of a religious leader of the Christian community as a trustee for life and as Chairman of the trust. The Division Bench observed in para 16 of its judgment, that such a request cannot be acceded to, and a public trust cannot be by a backdoor method converted into a religious trust. It therefore framed the scheme in its judgment and order dated 5.12.2002. In paragraph 25 it appointed a Board of Trustees consisting of eight persons. This para 25 reads as follows:-

"25. The first Board of Trustees shall comprise of Justice J. Kanakaraj, former Judge of the Madras High Court, as Chairman, Shri S. Palamalai, I.A.S. (Retd.), as Executive Trustee and Mrs. Elizabeth Thomas, as trustee, Dr. V.A. Vasantha, the Principal/Headmaster of St. Mary's Matriculation Boys High Secondary School, Perambur, Chennai 11, the Principal/Headmistress of St. Mary's Matriculation Girls Higher Secondary School, Sembium, Chennai-11, the Principal/Headmaster of Chevalier T.

Thomas Elizabeth Matriculation Higher Secondary School, Perambur, Chennai 11, the Principal of Chevalier T. Thomas Elizabeth College for Women, Perambur, Chennai 11, as trustees. They shall within two months from the date of their first meeting nominate a trustee to represent the non teaching staff employed in the institution."

13. Smt. Elizabeth Thomas filed SLP No.24352 of 2002, to challenge the said judgment and order, but later on she withdrew the same on 20.01.2003. (She has subsequently passed away on 5.9.2006.) In the present Civil Appeal No. 6786/2003, this judgment and order is challenged by the appellant herein who is a medical practitioner from Chennai, and who admittedly was not a party before the High Court as stated by himself in para 1.1 of the SLP. He claims to have arranged some good funds for the trust. He has once again sought to raise the issue in this Court that T. Thomas Educational Trust cannot be considered as a public trust. According to him it is a minority institution and therefore, the High Court erred in exercising the jurisdiction under Section 92 of CPC.

14. The appellant thereafter filed Civil Miscellaneous Petition (CMP) No. 20476 of 2003 to implead himself in disposed of O.S.A No. 49 of 1995. He filed another CMP No. 5673 of 2003 on 10.12.2003 for removal of the Chairman and the managing trustee before the Madras High Court in O.S.A No. 49 of 1995. The appellant made a grievance that the executive trustee and the Chairman were alienating the properties and assets to the prejudice of the trust. He however, did not move that CMP, and filed I.A. No.4 in Civil Appeal No. 6786 of 2003, to restrain the trustees from alienating any of those estates or properties and sought appointment of a receiver. This Court rejected the said I.A. by passing the following order on 16.4.2004"-

"We are not inclined to appoint a receiver as prayed for in this application at this stage. However, we restrain

the trustees from alieniating any of the estates or the property without the permission of this Court. IA is rejected."

15. The appellant thereafter moved a Contempt Petition bearing No. 435 of 2004 and pointed out that in breach of this order dated 16.4.2004, the above executive trustee and Chairman were disposing of a few vehicles and furniture of the institution. Thereupon, this Court passed the following order on 6.9.2004:-

"List the Contempt Petition along with the main appeal. The application filed by the applicant for the appointment of Receiver shall be moved before the High Court. We grant permission to the applicant to make such application before the High Court."

16. (i) CMP No. 20476/2003 was allowed by the High Court on 9.3.2005 and the appellant was joined as a respondent in O.S.A No. 49 of 1995. Thereafter, the appellant moved CMP No. 5660/2005 in O.S.A No. 49 of 1995 for appointment of a receiver. He also filed CMP No. 9402 of 2006 seeking modification of the scheme decree passed in O.S.A No. 49 of 1995. The appellant made various grievances including that some five acres of land of the trust at Madhavaram had been sold at a much lesser price to the prejudice of the trust. The executive trustee and the Chairman denied these allegations, and pointed out that all the decisions were taken by the entire board of trustees and not only by these two persons. On the other hand they alleged that the appellant was acting at the instance of Smt. Elizabeth Thomas. The Division Bench of the High Court examined all these issues, and accepted the submissions of the executive trustee and the Chairman, and dismissed these three CMPs on merits by a detailed order dated 21.9.2007. The Court held that the appellant had not substantiated his allegations against the Chairman and the Executive Trustee that they had acted against the interest of the trust or had mis-managed its affairs.

Therefore, there was no justification for appointing a receiver for the trust. The High Court held that even assuming that there was any irregularity in the sale of 5 acres of land and that the price fetched was less, it was open to the appellant to seek appropriate remedy before the appropriate forum.

(ii) CMP No.10340 and 10341 of 2005 were filed by one Shri V.G. Panneerselvam and Shri C.V.W Davidson to join in the proceeding as additional applicants. However, since CMP Nos. 5673 of 2003, 5560 of 2005 and 9402 of 2006 were being dismissed on merits, the Court did not entertain these two CMPs also. These two CMPs for impleadment were therefore disposed of alongwith the said common order. This common order dated 21.9.2007 has led to SLP Nos.22590 and 22591 of 2007. They are being heard and decided along with Civil Appeal No. 6786 of 2003.

Submissions by the rival parties -

17. Shri K. Subramanian, Senior Advocate, appeared for the appellant. Respondent No. 9 and 10 i.e. T. Thomas Educational Trust as represented by its Executive Trustee, Shri. S. Palamalai and its Chairman Justice J. Kanakaraj, have been joined in this matter vide this Court's order dated 22.8.2003. Shri M.S. Ganesh, Senior Advocate has represented them.

18. The principle submission on behalf of the appellant has been that the T. Thomas Educational Trust is a minority institution and the High Court has erred in appointing Shri S. Palamalai, a non-christian as the Executive Trustee and Correspondent of the Trust. In support of his submission that it is a minority institution, Shri Subramanian, learned senior counsel appearing for the appellant submitted that the trust was found by Late Shri T. Thomas who was a Christian. The school started by him was named as St. Mary's School. Subsequently, three schools belonging to this trust obtained a certificate of being minority schools under the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973 (Tamil Nadu Act) from

a Civil Court which had been left undisturbed in appeal also. All these factors were ignored by the High Court in passing the impugned order. In his submission the High Court should not have accepted the scheme proposed by Justice J. Kankaraj.

19. Shri Subramanian submitted that Article 30 (1) of the Constitution of India gives a fundamental right to the minorities to establish and administer educational institutions of their choice, and this right should not be allowed to be diluted. He relied upon a judgment of a Constitution Bench of this Court in *State of Kerala Vs. Very Rev. Mother Provincial* reported in [1970 (2) SCC 417], and particularly paragraph 8 thereof. This paragraph reads as follows:-

> "8. Article 30(1) has been construed before by this Court. Without referring to those cases it is sufficient to say that the clause contemplates two rights which are separated in point of time. The first right is the initial right to establish institutions of the minority's choice. Establishment here means the bringing into being of an institution and it must be by a minority community. It matters not if a single philanthropic individual with his own means, founds the institution or the community at large contributes the funds. The position in law is the same and the intention in either case must be to found an institution for the benefit of a minority community by a member of that community. It is equally irrelevant that in addition to the minority community others from other minority communities or even from the majority community can take advantage of these institutions. Such other communities bring in income and they do not have to be turned away to enjoy the protection."

20. Thereafter, he referred to the judgment in the case of *Secretary, Malankara Syrian Catholic College Vs. T. Jose and others* reported in [2007 (1) SCC 386], wherein one of us (R.V. Raveendran, J.) was a member of the Bench. The Counsel submitted that in paragraph 19, this Court had summarised the

general principles relating to establishment and administration of educational institutions by minorities. The principle (i) (a) laid down therein reads as follows:-

> "(i) The right of minorities to establish and administer educational institutions of their choice comprises the following rights:
>
> (a) to choose its governing body in whom the founders of the institution have faith and confidence to conduct and manage the affairs of the institution;"

He submitted that the correspondent appointed under the impugned order could not be said to be person in whom the founders would have had confidence. In any case, Smt. Elizabeth wife of the founder did not have confidence in him. He drew our attention to the observations of this Court in paragraph 63 (6) of the judgment in *All Saints' High School, Hyderabad and others Vs. Government of Andhra Pradesh* reported in [1980 (2) SCC 478] to submit that introduction of an outside authority however high in the governing body would be destructive of the fundamental right guaranteed by Article 30 (1) of the Constitution. In his submission, the proper course must be to consider the past history of the institution and the way in which the management has been carried out herein before as was laid down by the Privy Council in *MD. Ismail Ariff and others Vs. Ahmed Moolla Dawood and another* reported in [AIR 1916 P.C. 132]. This being the position, in his submission the order of appointment of the Executive Trustee was vitiated. The High Court had not discharged its function under Section 92 of CPC correctly, and therefore, this Court ought to interfere and set-aside the impugned judgment and order, and if necessary, remand the matter to the High Court for re-consideration. He also drew our attention to some of the allegations of mis-management against the Chairman and correspondent.

21. Shri M.S. Ganesh, learned senior counsel appearing

for the Chairman and the correspondent of the trust on the other hand submitted that the appellant was working at cross purposes with the trust, and this fact should not be lost sight of. The appellant claims to have arranged contributions of lakhs of rupees to the trust when Smt. Elizabeth Thomas was in the management, and has subsequently started claiming those amounts from the present management. On 24.2.2003, he sent a fax message demanding lakhs of rupees from the trust, and when Shri S. Palamalai visited Kottayam, the appellant threatened him to return the amounts which led the correspondent to lodge a complaint with the police on 26.2.2003. Smt. Elizabeth Thomas and the appellant were hand in gloves, and, therefore although she withdrew her appeal to this Court, she recommended the appellant for being taken in the formal meetings of the board by her letter dated 22.1.2003, and in spite of the above referred incident on 26.2.2003 she once again wrote to the Chairman of trust that his moneys be returned.

22. Apart from this aspect, Shri Ganesh pointed out the fact that this trust is a secular public trust for the purposes of education, is writ large in the document of the trust as well as its activities. He pointed out that the trust deed permits receiving of funds from anybody, it does not anywhere state that it is set up in the interest of any minority community having a separate culture of its own. On the other hand para 10 of the trust document specifically states that its funds will be utilized for encouraging the deserving and poor students, irrespective of caste, creed or religion. All throughout the findings on this aspect have been very clear. The single Judge has held that it was a public charitable trust and not a minority institution. That view was accepted by a Division Bench, and reaffirmed by a bench of three judges of this Court. That being so there was no occasion to reopen the issue any more.

23. With respect to the orders of being minority institutions

obtained by three schools of the trust under the Tamil Nadu Act, Shri Ganesh submitted that at the highest those orders will have to be read as obtained for the purposes of that statute, though in his submission the orders were obtained from an authority viz. the Civil Court which did not have the jurisdiction to issue such orders. In any case, the orders could not be used for the purposes of restricting the objective of the trust, and for making a submission that the trust is a minority institution. The intention of the founder of the trust must be correctly understood and given utmost importance, which is what the Court had done in this matter all throughout. He relied upon the judgment of a Constitution Bench in *S. Azeez Basha Vs. Union of India* reported in [AIR 1968 SC 662] where in the context of Article 30(1) this Court observed in paragraph 19 as follows:-

> **"19.** …… The Article in our opinion clearly shows that the minority will have the right to administer educational institutions of their choice *provided they have established them, but not otherwise. The article cannot be read, to mean that even if the educational institution has been established by somebody else, any religious minority would have the right to administer it because, for some reason or other, it might have been administering it before the Constitution came into force.* The words "establish and administer" in the article must be read conjunctively and so read it gives the right to the minority to administer an educational institution provided it has been established by it. …… We are of opinion that nothing in that case justifies the contention raised of behalf of the petitioners that the minorities would have the right to administer an educational institution even though the institution may not have been established by them. The two words in Article 30(1) must be read together and so read the Article gives this right to the minority to administer institutions established by it. If the educational institution has not been established by a minority it cannot claim the

> right to administer it under Article 30(1). …."
>
> (emphasis supplied)

Shri Ganesh submitted that as the proposition states, if an educational institution is established by somebody else, a religious minority does not acquire the right to administer it only on the ground that for some reason or the other, it might be administering it. In the instant case, though the trust is constituted by a person belonging to a religious minority, he created a secular trust. He has specifically stated that its income is not to be utilized for the benefit of students belonging to any particular community. The objects of the trust in no way state that the trust is set up in the interest of any minority having a distinct culture within the meaning of Article 29(1) of the Constitution.

23. He referred to a recent judgment of this Court in *T.M.A. Pai Foundation and others Vs. State of Karnataka and others* reported in [2002 (8) SCC 481], and particularly paragraph 117 thereof where this Court referred to the judgment in *Ahmedabad St. Xavier's College Society Vs. State of Gujarat* reported in [1974 (1) SCC 717] which reiterated the observations of Das, CJ in *Kerala Education Bill* [AIR 1958 SC 956] to the effect that right to administer is to be tempered with regulatory measures to facilitate smooth administration. The right to manage a minority institution does not mean a right to mismanage the same. He also made a wider submission based on the observations of a Constitution Bench of this Court in *Commissioner Hindu Religious Endowments, Madras Vs. Shri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* reported in [1954 (5) SCR 1005], where in the context of Article 26 (b) of the Constitution, it is observed at page 1023 that "*it is clear therefore that questions merely relating to administration of properties belonging to a religious group or institutions are not matter of religion to which clause (b) of the Article applies."* In his submission administration of an educational trust is a secular activity and the appointment of a person belonging to

another religion cannot amount to any infringement of the right of a minority under Article 30 (1) of the Constitution.

Consideration of the rival submissions -

24. We have noted the submissions of both the counsel. To begin with, we would like to refer to the provision of Section 92 of CPC whereunder the proceedings leading to these appeals were initiated. This Section reads as follows:-

"**92. Public charities** – (1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the [leave of the Court] may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree-

(a) removing any trustee;

(b) appointing a new trustee;

(c) vesting any property in a trustee;

[(cc) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property;]

(d) directing accounts and inquiries;

(e) declaring what proportion of the trust property or of the interest therein shall be allocated to any

particular object of the trust;

(f) authorizing the whole or any part of the trust property to be let, sold, mortgaged or exchanged;

(g) settling a scheme; or

(h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863 (20 of 1863), [or by any corresponding law in force in [the territories which, immediately before the 1st specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

(3) The Court may alter the original purposes of an express or constructive trust created for public purposes of a charitable or religious nature and allow the property or income of such trust or any portion thereof to be applied cypres in one or more of the following, circumstances, namely:-

(a) where the original purposes of the trust, in whole or in part,-

(i) have been, as far as may be, fulfilled; or

(ii) cannot be carried out at all, or cannot be carried out according to the directions given in the instrument creating the trust or, where there is no such instrument, according to the spirit of the trust; or

(b) where the original purposes of the trust provide a use for a part only of the property available by virtue of the trust; or

(c) where the property available by virtue of the trust and

other property applicable for similar purposes can be more effectively used in conjunction with, an to that end can suitably be made applicable to any other purpose, regard being had to the spirit of the trust and its applicability to common purposes; or

(d) where the original purposes, in whole or in part, were laid down by reference to an area which then was, but has since ceased to be, a unit for such purposes; or

(e) where the original purposes, in whole or in part, have, since they were laid down,-

(i) been adequately provided for by other means, or

(ii) ceased, as being useless or harmful to the community, or

(iii) ceased to be, in law, charitable, or

(iv) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the trust, regard being had to the spirit of the trust]."

25. As can be seen from this Section two or more persons having interest in the trust may institute a suit in the principle civil court of original jurisdiction to obtain a decree concerning a public charity for various purposes mentioned therein. Such suit will lie where these persons make out a case of alleged breach of any trust created for public purposes or for directions of the Court for administration of the trust. One of the purposes set out in sub-section (1) (g) is settling a scheme, sub-section (b) speaks about a new trustee being appointed, and sub-section (a) speaks about removing a trustee. Out of the three persons who filed the Civil Suit No.601 of 1987, Shri D.V.D. Monte was a member of the Board of Trustees nominated by

the founder Shri T. Thomas himself. Shri Kora K. George is a brother-in-law of Shri T. Thomas. He has raised funds for buying lands for the institution, and for constructing the buildings of the school. Therefore, although the single Judge held that he could not be said to be a person having interest in the trust, that finding was reversed by the Division Bench in OSA No.49 of 1995. Dr. Natrajan is a parent of a student of the institution. None of these persons can be criticized as persons lacking good intention for the trust.

26. Sub-section (2) of Section 92 lays down that a suit claiming any of the reliefs specified in sub-section (1) has to be instituted in conformity with that sub-section. Such suit having been filed, the Trial Court gave a finding that it was a public trust and not a minority institution. That finding has been left undisturbed by the High Court, and confirmed by a bench of three judges of this Court. Although, the Trial Court declined to accept the principle prayer of Shri Kora K. George and others, the Division Bench in appeal realised that an appropriate scheme for the administration of the trust was necessary. The Court, therefore, framed the scheme considering the objects of the trust by its order dated 4.12.1995.

27. It is material to note that the Division Bench had framed the scheme by its order dated 4.12.1995, after calling upon Smt. Elizabeth Thomas to give her proposals which she had declined to do so. Still, with a view only to give one more opportunity to her, this Court remanded the matter once again to the High Court. The Division Bench of the High Court which heard the matter after remand appointed Justice J. Kankaraj, a retired Judge of Madras High Court as the interim Chairman, and a retired IAS Office Shri Palamalai as the Executive Trustee and Correspondent in April 2002. Hon'ble Justice J. Kankaraj made the necessary reports to the Division Bench and pointed out that Smt. Elizabeth was mis-managing the trust. The Division Bench considered all the aspects and proposals including that of Smt. Elizabeth Thomas for framing the scheme

and framed an appropriate scheme by its order dated 5.12.2002. Apart from the appellant, and Smt. Elizabeth hardly anybody has raised any grievance with respect to the functioning of the Chairman or the Correspondent. The appellant did not choose to initiate any proceedings with respect to the functioning of the trust as required under Section 92. After the scheme was finalized, although Smt. Elizabeth filed an appeal, she withdrew the same. It was at this stage that the appellant filed the present appeal raising the issues that he has raised. The correct course of action for him ought to have been to file his suit under Section 92, if he deemed it fit.

28. As can be seen from the narration above, as far as the character of the trust as a secular public trust is concerned, that view was taken initially by a learned Single Judge. Subsequently, it was confirmed by a Division Bench as well as by a bench of three judges of this Court. The fact that the trust was set up by Late Shri T. Thomas who belongs to a religious minority was very much there before the Courts all throughout. The fact that three schools of this trust had obtained a certificate of minority character was canvassed before the single Judge, and in spite of that submission the single judge gave a finding that the trust was not a minority trust. He recognised the secular character of the institution, particularly by referring to Clause 10 of the declaration made by the founder. The specific finding on concerned issues No. 6 and 7 was left undisturbed by a Division Bench of the High Court in appeal and reaffirmed by a bench of three judges of this Court. Smt. Elizabeth did not file any appeal on this finding of the single Judge to the Division Bench of the High Court. This Court has already confirmed that finding. Explanation IV to Section 11 of Code of CPC clearly lays down that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such latter suit, and a Civil Court cannot try the same issue once again between the same parties or between the parties under whom they were litigating. The same proposition applies

to issue estoppel. Such a view has been taken by this Court in *Shiromani Gurdwara Parbandhak Committee Vs. Mahant Harnam Singh* reported in [2003 (11) SCC 377]. In that matter this Court was concerned with the issue as to whether a particular sect could be regarded as a sect belonging to the Sikh religion. That issue had already been decided in *Mahant Harnam Vs. Gurdial Singh* reported in [AIR 1967 SC 1415]. At the end of para 17, of its Judgment this Court, therefore, held as follows:-

> "*The factual findings relating to the nature and character of the institutions, specifically, found on an elaborate review of the governing legal principles as well, and which have reached finality cannot be reagitated and the same is precluded on the principle of "issue estoppel" also. As has been rightly contended by the learned counsel for the respondents, decisions rendered on the peculiar fact situation specifically found to exist therein cannot have any irreversible application."*

This being the position, the issue with respect to the character of the trust as a Secular Education Trust cannot be permitted to be reopened.

29. Then comes the question as to whether the orders obtained under the above referred Tamil Nadu Act by three schools belonging to the trust can make any difference. It is necessary to note in this connection that these orders were obtained from a Civil Court and were confirmed in appeal. However, we must note that a recognition of a school as a minority school is to be obtained from a competent authority under Section 11 of that Act, and not from any Civil Court, and any party aggrieved by non-grant thereof has a right of appeal under Section 41 of that Act to the prescribed Authority. Section 53 of the Act clearly lays down that no Civil Court shall have jurisdiction to decide or deal with any question which is by or under this Act required to be decided or dealt with by an authority or officer mentioned in this Act. Thus, *prima facie*, it

would appear that the orders were obtained from a forum non-juris. The reliance on the judgments of the Civil Court though pressed into service before the single Judge were not taken as a relevant factor for deciding the minority character of the trust. Now, that this submission is being reiterated, Shri Ganesh has submitted with some force that these orders are from a Court without any jurisdiction. We must note in this connection, that the statement of objects and reasons of the Act states that the act was passed to regulate the service conditions of the teaching and non-teaching staff in private schools and in that context some separate provisions were made for the minority schools. In the present case, though the declaration was claimed under the Tamil Nadu Act, it was not obtained from an authority specifically created for that purpose under the act to give such a status declaration. Therefore, in our understanding these orders cannot be used for determining the character of the trust. It is also relevant to note that these orders were obtained after the demise of the founder and not during his life time.

30. With respect to an outsider coming in the management, it is to be seen that the founder had not designated any of the persons on the board by their religion. Thus, he nominated all the persons in their ex-officio capacity as follows:- (a) Principal of the school (ex-officio), (b) Headmaster/Headmistress, (c) Warden of the Hostel (ex-officio), (d) Member elected by the parent association, (e) Member elected from the staff council, and (f) Three persons having high standard in the education field nominated by the first five. When one sees the formation of this board, one just cannot say that persons other than Christians cannot be in the management of the institution. Incidentally, we may note that the nominated Chairman Justice J. Kanakraj, son of Late P. Jacob is a Christian. The objection of the appellant appears to be only on the basis of the religion of S. Palamalai, the Executive Trustee and Correspondent of the trust.

31. Paragraph 8 of *Very Rev. Mother Provincial* quoted above lays down two tests. The negative test is that a contribution from other communities to a minority institution and conferring of benefits of the institution to the majority community are not the factors which matter in deciding the minority character of the institution. The positive test is that the intention in founding the institution must be to found an institution for the benefit of a minority community. As far as, these negative testes are concerned, they can be said to be satisfied in the present case. But the positive test which is more significant namely that the intention must be to found an institution for the benefit of a minority community, is not satisfied. We do not find anywhere in the initial declaration made by the founder that the institution was to be a minority institution. All the trustees nominated were on ex-officio basis or on the basis of their qualifications and not on the basis of religion. The funds and income was to be utilized for encouraging poor and deserving students irrespective of caste, creed or religion. It is nowhere stated in that declaration that the trust was being created for the benefit of the Christian community. Thus the proposition in *Very Rev. Mother Provincial* in fact goes against the appellant.

32. In the facts of the present case, we may not be required to go to the extreme as canvassed by Shri Ganesh based on the quotation from judgment in the case of *Shirur Mutt* (supra). But, we cannot ignore the proposition laid down in *S. Azeez Basha* (supra) namely that if an institution is established by somebody else, meaning thereby a person belonging to another religion or a secular person, a religious minority can not claim the right to administer it on the basis of Article 30(1) merely because he belongs to a minority or for some reason or the other people of a minority might have been administering it. In the instant case the approach of the founder is clearly seen to be a secular approach and he did not create the trust with any restricted benefits for a religious community. Merely because he belongs to a particular faith, the persons belonging to that faith cannot claim exclusive right to administer the trust.

The establishment and administration must be both by and for a minority which is not so in the present case. Similarly, it is material to note as observed in sub para (ii) and (iii) of para 19 in *Malankara Syrian Catholic College* (supra), the right conferred on minorities under Article 30 is only to ensure equality with the majority and not intended to place the minorities in a more advantageous position vis-à-vis the majority. The right to establish and administer educational institution does not include the right to maladminister. This being the position in the present case, there is no occasion for us to apply the propositions in para 63 (6) of *All Saints' High School* judgment (supra) or the one in the case of *MD. Ismael* (supra).

33. Having seen the scenario and the legal position, in the facts and circumstances of the present case, in our view there was no error in the impugned judgment of the Division Bench of Madras High Court dated 5.12.2002 on O.S.A 49 of 1995 in holding that T. Thomas Educational Trust is a secular public charitable trust and not a minority institution. The High Court was accordingly justified in framing the scheme under Section 92 of CPC to see to it that the trust is administered in a better way. We find the scheme to be in the interest of the trust. We have perused the common order of the Division Bench dated 21.9.2007 in CMP Nos. 5673 of 2003, 5560 of 2005, 9402 of 2006 and CMP No. 10340 and 10341 of 2005. The High Court has held on merits that the appellant had failed to make out any case of mis-management against the Chairman or the correspondent, and we do not find any error in the High Court order in that behalf. We do not find any merit in the Contempt Petition No. 435 of 2004 either. In the circumstances, Civil Appeal No. 6786 of 2003, Special Leave Petition (C) Nos. 22590-22591 OF 2007 and Contempt Petition (C) No. 435 of 2004 are all dismissed. There will however be no order as to costs.

R.P. Matters dismissed.

TRILOK SUDHIRBHAI PANDYA
v.
UNION OF INDIA & ORS.
(Civil Appeal No. 8629 of 2011)

OCTOBER 13, 2011.

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

Administrative Law:

Bias – Appointment of Competent Authority for determination of compensation to land owners for laying pipelines by a company for transportation of natural gas – Challenged by land owners on the ground that there was likelihood of bias as the salary, allowances and perquisite of Competent Authority were being borne by the company, rent free accommodation and vehicle were provided to it by company and it was holding sitting in the premises of the company – HELD: The test of likelihood of bias is whether there is a reasonable apprehension in the mind of the party before the court or the tribunal that the court or the tribunal will not act with fairness and without bias on account of certain objective circumstances – There is no dispute in the instant case that the salary, allowances, accommodation and transport were being borne by the respondent-company directly – Thus, the Competent Authority was virtually an employee of the company and there were grounds for the appellants to entertain a reasonable apprehension in their mind that the Competent Authority will not act fairly and is likely to act with bias – Thus, the entire proceedings for determination of compensation before the Competent Authority concerned in the instant case would be a nullity – The impugned orders of the High Court as well as the proceedings for determination of compensation in the case of the appellants only are set aside – However, it is made clear that the judgment will not affect any of the orders passed

by the competent authority concerned with regard to acquisition of the right of user as the appellants challenged the appointment only after the proceedings for determination of compensation were started – The Union of India is directed to appoint another unbiased person for determination of compensation payable to the appellants – Petroleum and Minerals, Pipelines (Acquisition of Right of User in Land) Act, 1962 – ss. 2(a), 6,10,11 and 12.

The Government of Gujarat by its letter dated 31.01.2006 requested the Government of India for approval of the nomination of one 'VIG', Retired Deputy Collector to be appointed as Competent Authority for acquisition of right of user under the Petroleum and Minersal Pipelines (Acquisition of Right of User in Land) Act, 1962(the Act). In the letter, it was stated that the expenses of pay and allowances and any other incidentals of the official shall be borne by the company for which the pipelines were to be laid for transportation of natural gas. The Government of India approved the nomination and issued a notification u/s. 2(a) of the Act authorizing the said 'VIG' to act as the Competent Authority under the Act. The Competent Authority then issued notices u/s 6(1) of the Act to the landowners for the acquisition of the right of user of their properties and although the latter filed objections to the proposed acquisition, the same were decided against them. They then filed claims for compensation u/s. 10 of the Act before the Competent Authority and the claim for compensation was taken up for hearing at the office of respondent no.4-Company. The landowners raised preliminary objection to the sitting of the Competent Authority at the premises of respondent no. 4 in view of the fact that the claim for compensation was in respect of the acquisition of right of user for the project of respondent no.4, but to no avail. The landowners then challenged before the High Court the notification dated

07.03.2006 of the Government of India appointing the Competent Authority on the ground that the Competent Authority was likely to act with bias. The High Court dismissed the writ petitions. Aggrieved, the landowners filed the appeals.

Allowing the appeals, the Court

HELD: 1.1 The test of likelihood of bias is whether there is a reasonable apprehension in the mind of the party before the court or the tribunal that the court or the tribunal will not act with fairness and without bias on account of certain objective circumstances. [para 12]

Ranjit Thakur v. Union of India and Others **1988 (1) SCR 512 = (1987) 4 SCC 611 – relied on.**

1.2 The 'Competent Authority' as defined u/s 2(a) of the Petroleum and Minerals, Pipelines (Acquisition of Right of User in Land) Act, 1962, is to hear objections of persons interested in the land to the laying of the pipelines under the land and the order passed by it u/s 5 is final. On the basis of the report of the Competent Authority, the Central Government, may declare u/s 6 of the Act that the right of user in the land for laying the pipelines should be acquired and on the publication of such declaration, the right of user in the land specified in the declaration shall vest absolutely in the Central Government free from all encumbrances. The Competent Authority is to determine the compensation payable to a person interested in the land under which the pipeline is proposed to be, or is being, or has been laid for any damage, loss or injury sustained by him [s.10], and the amount of the compensation is to be deposited with the Competent Authority within such time and in such manner as may be prescribed and the Competent Authority is to pay on behalf of the Central Government, the State Government or the Corporation, as the case

may be, the compensation to the persons entitled thereto and where several persons claim to be interested in the amount of the compensation, the Competent Authority is to determine the persons who in its opinion are entitled to receive the compensation and the amount payable to each of them [s.11]. The Competent Authority has all the powers of a Civil Court while trying a suit under the Code of Civil Procedure, 1908 for the purposes mentioned in s.12 of the Act. [para 8] [1122-C-H; 1123-A-C]

1.3 The various provisions of the Act show that the Competent Authority has got vast powers, which affect the rights of persons interested in the land over which the pipeline is to be laid and on the reports of the Competent Authority, the Central Government and the State Government are to take decisions affecting the rights of persons interested in the land. Under the provisions of the Act, therefore, the Competent Authority does not merely determine the compensation at the first instance in accordance with the statutory rules, but has to perform various other quasi-judicial functions which are normally performed by public servants whose pay, allowances and other incidentals of service are met out of the public exchequer. [para 9] [1123-D-F]

1.4 If instead of public servants, a person is appointed whose pay, allowances and other incidentals are not paid out of the public exchequer but directly paid by a private employer such as respondent no.4, for whom the right of user is being acquired and by whom the compensation is payable, persons interested in the land will have reasonable grounds for assuming that such a Competent Authority, who is dependent on a private corporation for his salary, allowances, accommodation and transport allowances, will have a bias in favour of the private corporation. [para 9] [1123-F-H]

Manak Lal, Advocate v. Dr. Prem Chand Singhvi and Others **AIR 1957 SC 425 – relied on.**

Frome United Breweries Co. v. Bath Jusstiees (1926 Appeal Cases 586 **– referred to.**

1.5 There is no dispute in the instant case that the salary, allowances, accommodation and transport were being borne by the respondent-company directly. Thus, the Competent Authority was virtually an employee of respondent no.4-company and there were grounds for the appellants to entertain a reasonable apprehension in their mind that the Competent Authority will not act fairly and is likely to act with bias. Thus, the entire proceedings for determination of compensation before the Competent Authority concerned in the instant case would be a nullity. [para 12] [1125-D-F]

Hindustan Petroleum Corporation Ltd. v. Yashwant Gajanan Joshi and Others **1990 (3) Suppl. SCR 434 = 1991 Supp (2) SCC 592 – relied on.**

1.6 The impugned orders of the High Court as well as the proceedings for determination of compensation in the case of the appellants only are set aside. However, it is made clear that this judgment will not affect any of the orders passed by the Competent Authority concerned with regard to acquisition of the right of user, as the appellants challenged the appointment in the writ petitions before the High Court in the instant case only after the incumbent started the proceedings for determination of compensation. The Union of India is directed to appoint another unbiased person for determination of compensation payable to the appellants. [para 14] [1126-B-D]

Rattan Lal Sharma v. Managing Committee, Dr. Hari Ram (Co-Education) Higher Secondary School, and Others

1993 (3) SCR 863 = (1993) 4 SCC 10; *Indian Oil Corporation and Others v. Raja Transport Private Limited* **2009 (13) SCR 510 = (2009) 8 SCC 520;** *State Bank of Patiala v. S.K. Sharma* **1996 (3) SCR 972 =(1996) 3 SCC 364;** *P.D. Agrawal v. State Bank of India* **2006 (1) Suppl. SCR 454 = (2006) 8 SCC 776 and** *Ashok Kumar Sonkar v. Union of India* **2007 (3) SCR 95 = (2007) 4 SCC 54;** *Union Carbide Corporation v. Union of India* **1991 (1) Suppl. SCR 251 = (1991) 4 SCC 584 – cited.**

Case Law Reference:

1990 (3) Suppl. SCR 434	**relied on**	**para 4**
1988 (1) SCR 512	**relied on**	**para 5**
1993 (3) SCR 863	**cited**	**para 5**
2009 (13) SCR 510	**cited**	**para 5**
1996 (3) SCR 972	**cited**	**para 6**
2006 (1) Suppl. SCR 454	**cited**	**para 6**
2007 (3) SCR 95	**cited**	**para 6**
1991 (1) Suppl. SCR 251	**cited**	**para 6**
AIR 1957 SC 425	**relied on**	**para 10**
1926 Appeal Cases 586	**referred to**	**para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8629 of 2011.

From the Judgment and Order dated 06.12.2007 of the High Court of Gujarat at Ahmedabad in SCA No. 9015 of 2007.

WITH

Civil Appeal No. 8630 and 8631 of 2011.

P.S. Sudheer, Saroj Raichura and Haresh Raichura for the Appellant.

R.F. Nariman, K.R. Sasiprabhu, R. Chandrachud, Pretesh Kapur, Hemantika Wahi, Ashwini Kumar, S. Udaya Kumar Sagar, Bina Madhavan, Vinita Sashidharan (for Lawyer's Knit & Co.) and Khaitan & Co. for the Respondents.

The Judgment of the Court was delivered by

A. K. PATNAIK, J.

Civil Appeals arising out of SLP (C) Nos.17022 of 2008 and 17021 of 2008:

1. Leave granted.

2. These are appeals against the common order dated 06.12.2007 of the Division Bench of the High Court of Gujarat in Special Civil Application Nos.9015 of 2007 and 9016 of 2007.

3. The facts very briefly are that the Government of Gujarat by its letter dated 31.01.2006 requested the Government of India for approval of the nomination of persons to be appointed as Competent Authority for acquisition of right of user under the Petroleum and Minerals, Pipelines (Acquisition of Right of User in Land) Act, 1962 (for short 'the Act') and one of the persons was Shri V.I. Gohil, Retired Deputy Collector. In the letter dated 31.01.2006 of the Government of Gujarat making the aforesaid request to the Government of India, it was stated that the expenses of pay and allowances and any other incidentals of the officials shall be borne by the respondent no.4-company from the date of their joining in the respondent no.4-company. The Government of India approved the appointment of Shri V.I. Gohil and issued a notification under Section 2(a) of the Act authorizing Shri V.I. Gohil to act as the Competent Authority under the Act for laying of the pipelines by respondent no.4 for transportation of natural gas in the State of Gujarat from the LNG terminals at Jamnagar and Hazira in Gujarat for distribution to various consumers located in the State of Gujarat

and in the adjoining States of Rajasthan and Madhya Pradesh in respect of all the districts of Gujarat. The Competent Authority under the Act then issued notices under Section 6(1) of the Act to the appellants for the acquisition of the right of user of their properties and although the appellants filed objections to the proposed acquisition, the same was decided against the appellants. The appellants then filed claims for compensation under Section 10 of the Act before the Competent Authority and the claim for compensation was taken up for hearing at the office of the respondent no.4. The appellants raised preliminary objections to the sitting of the Competent Authority at the premises of the respondent no.4 in view of the fact that the claim for compensation was in respect of the acquisition of right of user for the project of the respondent no.4.

4. When such preliminary objections were of no avail, the appellants filed writ petitions (Special Civil Application Nos.9015 of 2007 and 9016 of 2007) before the High Court of Gujarat challenging the notification dated 07.03.2006 of the Government of India appointing Shri V.I. Gohil as the Competent Authority for determination of compensation payable to the appellants under the Act for acquisition of the right of user in respect of their properties on the ground that the Competent Authority is likely to act with bias considering the fact that his pay and allowances and all other incidentals are being borne by the respondent no.4-company and the Competent Authority is virtually an employee of the respondent no.4. By the impugned order dated 06.12.2007, the High Court held that simply because the Competent Authority was discharging the function from the premises of the respondent no.4 and was getting pay and allowances and perquisites directly from RGTIL and was provided rent free accommodation and use of the vehicle of the respondent no.4, the appointment of the Competent Authority cannot be held to be as one vitiated by the bias. The High Court relied on the decision of this Court in *Hindustan Petroleum Corporation Ltd. v. Yashwant Gajanan Joshi and Others* [1991 Supp (2) SCC 592] wherein a similar

challenge to the appointment of an employee of Hindustan Petroleum Corporation Limited as Competent Authority under the Act on the ground of bias was rejected by this Court. The High Court also held that the Competent Authority was not adjudicating any rights of the landowners against the respondent no.4 and his primary duty was to determine the compensation as provided under Section 10 of the Act, which also has in-built guidelines for such determination and if the owner of the land is aggrieved with the determination of compensation, he has a remedy by way of filing an application before the District Judge for determination of the compensation. The High Court accordingly dismissed the writ petitions.

5. The learned counsel for the appellants submitted that the High Court wrongly relied on the decision of this Court in *Hindustan Petroleum Corporation Ltd. v. Yashwant Gajanan Joshi and Others* (supra) because the acquisition of the right of user in that case was for a public sector company and an employee of a public sector company had been appointed as the Competent Authority, but in the present case the acquisition of right of user was in favour of the respondent no.4, which is a private sector company and this private sector company was paying the salary, allowances and all other incidentals of the Competent Authority. They submitted that in the aforesaid case of *Hindustan Petroleum Corporation Ltd. v. Yashwant Gajanan Joshi and Others* (supra) this Court has observed that it would altogether be a different case if it was a case of a private employer and his employee was appointed as a Competent Authority and had further observed that a case of person in private employment cannot be equated with that of a person in public employment. They submitted that the law is well-settled that not only actual bias but also the apparent likelihood of a bias vitiates the appointment of an adjudicating authority. In support of this submission, they relied on the decisions of this Court in *Ranjit Thakur v. Union of India and Others* [(1987) 4 SCC 611], *Rattan Lal Sharma v. Managing Committee, Dr. Hari Ram (Co-Education) Higher Secondary School, and*

Others [(1993) 4 SCC 10] and *Indian Oil Corporation and Others v. Raja Transport Private Limited* [(2009) 8 SCC 520]. They submitted that the very fact that the expenses of pay and allowances and all other incidentals of the Competent Authority are directly borne by the respondent no.4 is enough to establish that the Competent Authority is an employee of the respondent no.4 and there were sufficient circumstances to create a reasonable apprehension in the mind of the appellants that the Competent Authority was likely to act with bias while determining the compensation payable to the appellants.

6. In reply, learned counsel for the respondents submitted that the respondent no.4 had no role in the appointment of the Competent Authority and it was the State Government which made the recommendation and the Central Government which made the appointment by a notification under Section 2(a) of the Act. He further submitted that under Section 10 of the Act the Competent Authority determines the compensation payable to the landowners but it does not exercise a judicial function. He submitted that the compensation determined by the Competent Authority is only in the first instance and if the amount so determined is not acceptable to either of the parties then the compensation shall, on an application by either of the parties, be determined by the District Judge within the limits of whose jurisdiction the land is situated. He further submitted that the determination of the compensation by the Competent Authority is also in accordance with the statutory rules, and in particular Rules 4 and 4(a) of the Petroleum and Minerals, Pipelines (Acquisition of Right of User in Land) Act, 1962 and a perusal of these rules would show that they contained in-built guidelines to be followed by the Competent Authority while determining the compensation payable to the landowners. He submitted that this Court had in *Hindustan Petroleum Corporation Ltd. v. Yashwant Gajanan Joshi and Others* (supra) rejected a similar challenge to appointment of an employee of the company in whose favour the right of user is being acquired as the Competent Authority. He finally submitted

that it is well-settled that violation of principles of natural justice will be a ground for the Court to interfere only if actual prejudice is shown by the person aggrieved. In support of this proposition, he relied on *State Bank of Patiala v. S.K. Sharma* [(1996) 3 SCC 364], *P.D. Agrawal v. State Bank of India* [(2006) 8 SCC 776] and *Ashok Kumar Sonkar v. Union of India* [(2007) 4 SCC 54]. He also cited the decision of this Court in *Union Carbide Corporation v. Union of India* [(1991) 4 SCC 584] in support this submission that an appeal to a neutral District Judge as provided in Section 10 of the Act would wash away bias, if any, at the original stage.

7. For deciding the questions raised in these appeals, we have to refer to the relevant provisions of Sections 2(a), 5, 6, 10, 11 and 12 of the Act:

> **2(a) "Competent Authority**" means any person or authority authorised by the Central Government, by notification in the Official Gazette, to perform the functions of the Competent Authority under this Act and different persons or authorities may be authorised to perform all or any of the functions of the competent authority under this Act in the same area or different areas specified in the notification."
>
> **5**. **Hearing of objections**:-
>
> (1) Any person interested in the land may, within twenty-one days from the date of the notification under sub-section (1) of section 3, object to the laying of the pipelines under the land.
>
> (2) Every objection under sub-section (1) shall be made to the Competent Authority in writing and shall set out the grounds thereof and the Competent Authority shall give the objector an opportunity of being heard either in person or by a legal practitioner and may, after hearing all such

objections and after making such further inquiry, if any, as that authority thinks necessary, by order either allow or disallow the objections.

(3) Any order made by the Competent Authority under sub-section (2) shall be final.

6. Declaration of acquisition of right of user:-

(1) Where no objections under sub-section (1) of section 5 have been made to the Competent Authority within the period specified therein or where the Competent Authority has disallowed the objections under sub-section (2) of that section, that authority shall, as soon as may be, either make a report in respect of the land described in the notification under sub-section (1) of section 3, or make different reports in respect of different parcels of such land, to the Central Government containing his recommendations on the objections, together with the record of the proceedings held by him, for the decision of that Government and upon receipt of such report the Central Government shall, if satisfied that such land is required for laying any pipeline for the transport of petroleum or any mineral, declare, by notification in the Official Gazette, that the right of user in the land for laying the pipelines should be acquired and different declarations may be made from time to time in respect of different parcels of the land described in the notification issued under sub-section (1) of section 3, irrespective of whether one report or different reports have been made by the Competent Authority under this section.

(2) On the publication of the declaration under sub-section (1), the right of user [in the land specified

therein shall vest absolutely in the Central Government free from all encumbrances.

(3) Where in respect of any land, a notification has been issued under sub-section (1) of section 3 but [no declaration in respect of any parcel of land covered by that notification has been published under this section] within a period of one year from the date of that notification, that notification shall cease to have effect on the expiration of that period.

(3-A) No declaration in respect of any land covered by a notification issued under sub-section (1) of section 3, published after the commencement of the Petroleum Pipelines (Acquisition of Right of User in Land) Amendment Act, 1977 (13 of 1977), shall be made after the expiry of three years from the date of such publication.

(4) Notwithstanding anything contained in sub-section (2), the Central Government may, on such terms and conditions as it may think fit to impose, direct by order in writing, that the right of user in the land for laying the pipelines shall, instead of vesting in the Central Government vest, either on the date of publication of the declaration or, on such other date as may be specified in the direction, in the State Government or the corporation proposing to lay the pipelines and thereupon the right of such user in the land shall, subject to the terms and conditions so imposed, vest in that State Government or corporation, as the case may be, free from all encumbrances.

10. Compensation.

(1) Where in the exercise of the powers conferred by section 4, section 7 or section 8 by any person, any

damage, loss or injury is sustained by any person interested in the land under which the pipeline is proposed to be, or is being, or has been laid, the Central Government, the State Government or the corporation, as the case may be, shall be liable to pay compensation to such person for such damage, loss or injury, the amount of which shall be determined by the Competent Authority in the first instance.

(2) If the amount of compensation determined by the Competent Authority under sub-section (1) is not acceptable to either of the parties, the amount of compensation shall, on application by either of the parties to the District Judge within the limits of whose jurisdiction the land or any part thereof is situated, be determined by that District Judge.

(3) The Competent Authority or the District Judge while determining the compensation under sub-section (1) or sub-section (2), as the case may be, shall have due regard to the damage or loss sustained by any person interested in the land by reason of–

(i) the removal of trees or standing crops, if any, on the land while exercising the powers under section 4, section 7 or section 8;

(ii) the temporary severance of the land under which the pipeline has been laid from other lands belonging to, or in the occupation of, such person; or

(iii) any injury to any other property, whether movable or immovable, or the earnings of such persons caused in any other manner:

Provided that in determining the compensation no account

shall be taken of any structure or other improvement made in the land after the date of the notification under sub-section (1) of section 3.

(4) Where the right of user of any land has vested in the Central Government, the State Government or the corporation, the Central Government, the State Government or the corporation, as the case may be, shall, in addition to the compensation, if any, payable under sub-section (1), be liable to pay to the owner and to any other person whose right of enjoyment in that land has been affected in any manner whatsoever by reason of such vesting, compensation calculated at ten per cent. of the market value of that land on the date of the notification under sub-section (1) of section 3.

(5) The market value of the land on the said date shall be determined by the Competent Authority and if the value so determined by that authority is not acceptable to either of the parties, it shall, on application by either of the parties to the District Judge referred to in sub-section (2), be determined by that District Judge.

(6) The decision of the District Judge under sub-section (2) or sub-section (5) shall be final.

11. Deposit and payment of compensation.

(1) The amount of compensation determined under section 10 shall be deposited by the Central Government, the State Government or the corporation, as the case may be, with the Competent Authority within such time and in such manner as may be prescribed.

(2) If the amount of compensation is not deposited within the time prescribed under sub-section (1), the

Central Government, the State Government or the corporation, as the case may be, shall be liable to pay interest thereon at the rate of six per cent. per annum from the date on which the compensation had to be deposited till the date of the actual deposit.

(3) As soon as may be after the compensation has been deposited under sub-section (1) the Competent Authority shall, on behalf of the Central Government, the State Government or the corporation, as the case may be, pay the compensation to the persons entitled thereto.

(4) Where several persons claim to be interested in the amount of compensation deposited under sub-section (1), the Competent Authority shall determine the persons who in its opinion are entitled to receive the compensation and the amount payable to each of them.

(5) If any dispute arises as to the apportionment of the compensation or any part thereof or as to the persons to whom the same or any part thereof is payable, the Competent Authority shall refer the dispute to the decision of the District Judge within the limits of whose jurisdiction the land or any part thereof is situated and the decision of the District Judge thereon shall be final.

12. Competent Authority to have certain powers of civil courts.

The Competent Authority shall have, for the purposes of this Act, all the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908 (5 of 1908), in respect of the following matters, namely:–

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of any document;

(c) reception of evidence on affidavits;

(d) requisitioning any public record from any court or office;

(e) issuing commission for examination of witnesses.

8. A reading of the Section 2(a) of the Act shows that the person to be appointed as Competent Authority is to perform all or any of the functions of the Competent Authority under the Act in the same area or different areas specified in the notification. Accordingly, the Competent Authority is to hear objections of persons interested in the land to the laying of the pipelines under the land and the order passed by the Competent Authority under Section 5 is final. On the basis of the report of the Competent Authority, the Central Government, if satisfied that the land is required for laying any pipelines for the transport of petroleum or any mineral, may declare under Section 6 of the Act that the right of user in the land for laying the pipelines should be acquired and on the publication of such declaration, the right of user in the land specified in the declaration shall vest absolutely in the Central Government free from all encumbrances. Under Section 10 of the Act, the Competent Authority in the first instance is to determine the compensation payable to a person interested in the land under which the pipeline is proposed to be, or is being, or has been laid for any damage, loss or injury sustained by him. Under Section 11, the amount of compensation determined under Section 10 is to be deposited with the Competent Authority within such time and in such manner as may be prescribed and the Competent Authority is to pay on behalf of the Central Government, the State Government or the Corporation, as the

case may be, the compensation to the persons entitled thereto and where several persons claim to be interested in the amount of the compensation, the Competent Authority is to determine the persons who in its opinion are entitled to receive the compensation and the amount payable to each of them. Under Section 12, the Competent Authority has all the powers of a Civil Court while trying a suit under the Code of Civil Procedure, 1908 for summoning and enforcing the attendance of any person and examining him on oath, requiring the discovery and production of any document, reception of evidence on affidavits, requisitioning any public record from any court or office and issuing commission for examination of witnesses.

9. The aforesaid reference to the various provisions of the Act show that the Competent Authority has got vast powers, which affects the rights of persons interested in the land over which the pipeline is to be laid and on the reports of the Competent Authority, the Central Government and the State Government are to take decisions affecting the rights of persons interested in the land. Under the provisions of the Act, therefore, the Competent Authority does not merely determine the compensation at the first instance in accordance with the statutory rules as has been contended by learned counsel for the respondent no.4, but has to perform various other quasi-judicial functions which are normally performed by public servants whose pay, allowances and other incidentals of service are met out of the public exchequer. If instead of public servants, a person is appointed whose pay, allowances and other incidentals are not paid out of the public exchequer but directly paid by a private employer such as the respondent no.4, for whom the right of user is being acquired and by whom the compensation is payable, persons interested in the land will have reasonable grounds for assuming that such a Competent Authority, who is dependent on a private corporation for his salary, allowances, accommodation and transport allowances, will have a bias in favour of the private corporation.

10. This Court as early as in 1957 held in *Manak Lal, Advocate v. Dr. Prem Chand Singhvi and Others* [AIR 1957 SC 425] that every member of a Tribunal that is called upon to try issues in judicial or quasi-judicial proceedings must be able to act judicially and it is of the essence of judicial decisions and judicial administration that judges should be able to act impartially, objectively and without any bias. In the aforesaid decision, this Court also held:

> "But where pecuniary interest is not attributed but instead a bias is suggested, it often becomes necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the litigant or the public at large a reasonable doubt about the fairness of the administration of justice. It would always be a question of fact to be decided in each case."

In the aforesaid decision, the observations of Viscount Cave L.C. in *Frome United Breweries Co. v. Bath Jusstiees* (1926 Appeal Cases 586 at p.590) that the rule that every member of a Tribunal must be able to act judicially and without bias applies not only to judicial Tribunals but also in the case of authorities which have to act as Judges of the rights of others. In aforesaid decision, this Court also held that it would always be a question of fact to be decided in each case whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the litigants or the public at large a reasonable doubt about the fairness of the administration of justice.

11. In *Ranjit Thakur v. Union of India and Others* (supra), M.N. Venkatachaliah, J. writing the judgment for the Court held in Paras 16 and 17 of the judgment:

> "16. It is the essence of a judgment that it is made after due observance of the judicial process; that the court or tribunal passing it observes, at least the minimal

requirements of natural justice; is composed of impartial persons acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial '*coram non-judice'*.

17. As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the judge is not to look at his own mind and ask himself, however, honestly, "Am I biased?" but to look at the mind of the party before him."

12. Thus, as per the judgment of this Court the test of likelihood of bias is whether there is a reasonable apprehension in the mind of the party before the Court or the Tribunal that the Court or the Tribunal will not act with fairness and without bias on account of certain objective circumstances. There is no dispute in the present case that the salary, allowances, accommodation and transport were being borne by the respondent-company directly. Thus, the Competent Authority was virtually an employee of the respondent no.4-company and there were grounds for the appellants to entertain a reasonable apprehension in their mind that the Competent Authority will not act fairly and is likely to act with bias. In the judgment of this Court in *Ranjit Thakur v. Union of India and Others* (supra) it has been held that a judgment which is the result of bias or want of impartiality is a nullity and the trial *coram non-judice*. Thus, the entire proceedings for determination of compensation before Shri V.I. Gohil would be a nullity.

13. In *Hindustan Petroleum Corporation Ltd. v. Yashwant Gajanan Joshi and Others* (supra), relied on by the High Court as well as learned counsel for the respondent no.4, this Court has clearly made a distinction between a public corporation and private employer. In para 13 of the judgment, this Court has held:

"…. It would be to broad a proposition to extend the theory

of bias to exclude persons only because such person draws the salary from the bodies like public corporation, State Government. It would altogether be a different case if it was a case of a private employer and his employee. We cannot equate the case of a person in private employment with that of a person in public employment. …"

14. For the aforesaid reasons, we allow these appeals, set aside the impugned orders of the High Court as well as the proceedings for determination of compensation in the case of the appellants only. We, however, make it clear that this judgment will not affect any of the orders passed by Shri V.I. Gohil with regard to acquisition of the right of user as the appellants challenged the appointment of Shri Gohil in the Writ Petitions before the High Court in the present case only after he started the proceedings for determination of compensation. We direct that the Union of India will appoint another unbiased person in place of Shri Gohil for determination of compensation payable to the appellants. No costs.

Civil Appeal arising out of S.L.P. (C) No.29771 of 2009

Leave granted.

2. This is an appeal against the order dated 17.07.2009 of the Division Bench of the High Court of Gujarat in Special Civil Application No.15424 of 2008.

3. In Special Civil Application No.15424 of 2008, the appellants had challenged the appointment of Shri V.I. Gohil as Competent Authority under the Act by notification dated 07.03.2006 and the High Court relying on the earlier order dated 06.12.2007 of the Division Bench of the High Court in Special Civil Application Nos.9015 of 2007 rejected the contention that the appointment of Shri V.I. Gohil as Competent Authority was invalid.

4. For reasons stated in Civil Appeals arising out of SLP (C) Nos.17022 of 2008 and 17021 of 2008, we allow this

appeal, set aside the impugned order dated 17.07.2009 in Special Civil Application No.15424 of 2008 as well as the proceedings for determination of compensation in the case of the appellants only. We make it clear that this judgment will not affect any orders passed by Shri V.I. Gohil with regard to acquisition of the right of user as the appellants filed the Writ Petition before the High Court in the present case only at the stage of determination of compensation. We direct that the Union of India will appoint another unbiased person in place of Shri Gohil for determination of compensation payable to the appellants. No costs.

R.P. Appeals allowed.

COMMISSIONER OF CUSTOMS, VISHAKHAPATNAM
v.
M/S AGGARWAL INDUSTRIES LTD.
(Civil Appeal No. 2521 of 2006)

OCTOBER 17, 2011

[D.K. JAIN AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

CUSTOMS VALUATION (DETERMINATION OF PRICE OF IMPORTED GOODS) RULES, 1988:

Rules 2(1)(f), 4(1)(2) and 10 – Transaction value – Import of crude sunflower seed oil – Contract entered into 26.6.2001 – Actual shipment taking place on 5.8.2001 – Meanwhile increase in price of imported goods – Assessees filing documents as per contract price – Revenue rejecting the contract price and demanding customs duty as per contemporary invoice price on which other importers entered into contract for supply of same item either with same suppliers or with other suppliers in the same country – Held : Section 14(1) read with r. 4 provides that the price paid by the importer in the ordinary course of commerce shall be taken to be the value in the absence of any special circumstances indicated in s.14(1) – Therefore, what should be accepted as the value for the purpose of assessment is the price actually paid for the particular transaction, unless the price is unacceptable for the reasons set out in r.4(2) – In the instant case, though the commodity involved had volatile fluctuations in its price in the international market but having delayed the shipment, the suppliers did not increase the price of the commodity even after the increase in its price in the international market – Therefore, the revenue was not justified in rejecting the transaction value declared by the respondents in the invoices submitted by them – Customs Act, 1962 – s.14.

WORDS AND PHRASES:

Expressions 'ordinarily' and 'reason to doubt' – Connotation of.

On 26.6.2001, the respondent in C.A.No.2521 of 2006 entered into a contract with foreign suppliers for import of 500 Metric tons of crude sunflower seed oil at the rate of US $ 435 CIF/Metric ton. The goods were actually shipped on 5.8.2001. A demand letter under r.10A of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 (CVR, 1988) was issued to the respondent stating that when actual shipment took place, after the expiry of the original shipment period, the international market price of crude sunflower seed oil had increased drastically and, therefore, the contract price could not be accepted as the 'transaction value' in terms of r. 4 of CVR 1988. The Adjudicating Authority confirmed the demand and ordered the respondent to pay the differential amount of duty. The respondent's appeal was dismissed by the Commissioner (Appeals). However, the Tribunal held that there was no basis for demand of differential duty by ignoring the invoice price. Aggrieved, the revenue filed the appeal. The other appeals were also filed in the similar facts and circumstances.

Dismissing the appeals, the Court

HELD: 1.1 According to s.14(1) of the Customs Act, 1962 the assessment of duty is to be made on the value of the goods. The value may be fixed by the Central Government u/s 14(2). Where the value is not so fixed it has to be decided u/s 14(1). The value, according to s.14(1), shall be deemed to be the price at which such or like goods are ordinarily sold or offered for sale, for delivery at the time and place and importation in the course of international trade. The word "ordinarily" implies the exclusion of special circumstances. This

position is clarified by the last sentence in s. 14(1) which describes an "ordinary" sale as one where the seller or the buyer have no interest in the business of each other and price is the sole consideration for the sale or offer for sale. Therefore, when the conditions regarding time, place and absence of special circumstances stand fulfilled, the price of imported goods shall be decided u/s 14(1A) read with the Rules framed thereunder. The said Rules are CVR 1988. [para 12] [1141-E-H; 1142-A-B]

Eicher Tractors Ltd., Haryana Vs. Commissioner of Customs, Mumbai **2000 (4) Suppl. SCR 597 = 2000 (122) E.L.T. 321 (SC): 2001 (1) SCC 315;** *Commissioner of Customs (Gen), Mumbai Vs. Abdulla Koyloth* **2010 (13) SCR 280 = (2010) 13 SCC 473 – relied on.**

1.2 According to r. 2(1)(f) of CVR 1988, "transaction value" means the value determined in accordance with r.4 thereof. [para 10] [1138-F]

1.3 In *Eicher Tractors Ltd*, it has been held that in cases where the circumstances mentioned in rr.4(2)(c) to (h) are not applicable, the Department is bound to assess the duty under transaction value. Therefore, unless the price actually paid for a particular transaction falls within the exceptions mentioned in rr.4(2)(c) to (h), the Department is bound to assess the duty on the transaction value. It was further held that r.4 is directly relatable to s.14(1) of the Act. [para 12] [1142-B-C]

1.4 Section 14(1) read with r.4 provides that the price paid by the importer in the ordinary course of commerce shall be taken to be the value in the absence of any special circumstances indicated in s.14(1). Therefore, what should be accepted as the value for the purpose of assessment is the price actually paid for the particular transaction, unless the price is unacceptable for the reasons set out in r.4(2). [para 12] [1142-C-E]

Rabindra Chandra Paul Vs. Commissioner of Customs (Preventive), Shillong **2007 (3) SCR 319 = (2007) 3 SCC 93 – relied on.**

1.5 Nevertheless, if on the basis of some contemporaneous evidence, the revenue is able to demonstrate that the invoice does not reflect the correct price, it would be justified in rejecting the invoice price and determine the transaction value in accordance with the procedure laid down in CVR 1988. Before rejecting the transaction value declared by the importer as incorrect or unacceptable, the revenue has to bring on record cogent material to show that contemporaneous imports, which obviously would include the date of contract, the time and place of importation etc., were at a higher price. In such a situation, r.10A of CVR 1988 contemplates that where the department has a 'reason to doubt' the truth or accuracy of the declared value, it may ask the importer to provide further explanation to the effect that the declared value represents the total amount actually paid or payable for the imported goods. [para 11] [1140-E-H; 1141-A]

1.6 However, 'reason to doubt' does not mean 'reason to suspect'. A mere suspicion upon the correctness of the invoice produced by an importer is not sufficient to reject it as evidence of the value of imported goods. The doubt held by the officer concerned has to be based on some material evidence and is not to be formed on a mere suspicion or speculation. Although strict rules of evidence do not apply to adjudication proceedings under the Act, yet the Adjudicating Authority has to examine the probative value of the documents on which reliance is sought to be placed by the revenue. It is well settled that the onus to prove under-valuation is on the revenue but once the revenue discharges the burden of proof by producing evidence of contemporaneous imports at a higher price, the onus

shifts to the importer to establish that the price indicated in the invoice relied upon by him is correct. [para 11] [1141-A-D]

1.7 In the instant case, the whole controversy arose on account of difference in price of the same commodity, contracted to be supplied under different contracts entered into at different points in time. Admittedly, the contract for supply of crude sunflower seed oil @ US $ 435 CIF/PMT was entered into on 26.6.2001. It could not be performed on time because of which extension of time for shipment was agreed to between the contracting parties. It is true that the commodity involved had volatile fluctuations in its price in the international market but having delayed the shipment, the supplier did not increase the price of the commodity even after the increase in its price in the international market. This fact is also proved by the actual amount paid to the supplier. There is no allegation of the supplier and importer being in collusion. It is also not the case of the revenue that the transaction entered into by the respondent was under-valued or was not genuine. Nor was there a misdescription of the goods imported. It is also not the case of the revenue that the subject imports fell within any of the situations enumerated in r.4(2) of CVR 1988. The import instances relied upon by the revenue could not be treated as instances indicating contemporaneous value of the goods because contracts for supply of the goods in those cases were entered into almost after a month from the date of contract in the instant cases, more so, when admittedly there were drastic fluctuations in the international price of the commodity involved. [para 13] [1142-F-H; 1143-A-C-D-F]

1.8 This Court is, therefore, of the opinion that the revenue was not justified in rejecting the transaction value declared by the respondents in the invoices submitted by them. [para 13] [1143-F]

Case Law Reference:

2000 (4) Suppl. SCR 597	**relied on**	**para 6**
2010 (13) SCR 280	**relied on**	**para 8**
2007 (3) SCR 319	**relied on**	**para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2521 of 2006.

From the Judgment and Order dted 04.08.2005 of the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench in Appeal No. C/139/02.

WITH

Civil Appeal Nos. 1699, 2129, 2114, 2518, 2519, 2520, 2522, 2523, 2853, 3197, 3487, 3564 of 2006 and 5006 of 2007

R.P. Bhatt, Shyam Divan, Shipra Ghose, Binu Tamta, B, Krishna Prasad, P. Parmeswaran, V.K. Verma. Pramod B. Agarwala, Praveena Gautam, Anuj P. Agarwala, Kailash Pandey, Ranjeet Singh, K.V. Shreekumar, M. Gireesh Kumar, K. Parameshwar, Khwairakpam Nobin Singh, S. Nanda Kumar, Anjali Chauhan, Satish Kumar, Parivesh Singh and V.N. Raghupathy for the appearing parties.

The Judgment of the Court was delivered by

D.K. JAIN, J.: 1. This batch of appeals arises out of final orders dated 4th August, 2005 in Appeal No. C/139-140/02; C/209/02; C/288/03; C/291-93/03; C/299/03; C/243/02; C/264/02 & C/313/03; 5th August, 2005 in Appeal No. C/265/03, 22nd June 2005 in Appeal No. C/213/02 and 29th December, 2006 in Appeal No. C/300/03 passed by the Customs, Excise & Service Tax Appellant Tribunal South Zonal Bench, Bangalore (for short "the Tribunal"). By the impugned orders, the Tribunal has allowed the appeals preferred by the respondents-importers.

2. Since all the appeals involve a common question of law, these are being disposed of by this common judgment. However, in order to appreciate the controversy, the facts emerging from C.A. No. 2521 of 2006, which was treated as the lead case, are being adverted to. These are as follows:

On 26th June 2001, the respondent entered into a contract with foreign suppliers viz: M/s Wilmar Trading Pvt. Ltd., Singapore, for import of 500 Metric tons of crude sunflower seed oil at the rate of US $ 435 CIF/Metric ton. Under the contract, the consignment was to be shipped in the month of July 2001 but as the mutually agreed time for shipment was extended to 'Mid August 2001' vide Addendum dated 31st July 2001, the goods were actually shipped on 5th August 2001. On filing of the bill of entry, the goods were assessed provisionally, pending verification of contemporary price, the original documents and the test report from the government chemical examiner.

3. On verification of the documents filed, the Adjudicating Authority noticed certain discrepancies in the shipment period. Accordingly, on 5th October 2001, he issued a demand letter to the respondent under Rule 10A of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 (for short "CVR 1988") to show cause as to why the contract price be not rejected and the Customs duty be not determined by adopting contemporary invoice price on which other importers had entered into contract for supply of the same item either with the same supplier or other suppliers in the same country. Since the imputation in the show cause notice has a material bearing on the determination of the issue involved, the relevant portion of the notice is extracted below:

> "As per the condition incorporated in the contract dated 26.6.2001, the goods are to be shipped during the month of July 2001. Whereas the goods were shipped after expiry of the Shipment period i.e. on 5.8.01. By the time of actual shipment i.e. during August 2001, the international

market prices of the Crude Sunflower Seed Oil (Edible Grade) have increased drastically. Hence, the contract price is not acceptable in terms of Section 14(1) read with Rule 4 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988."

4. In short, the case of the revenue was that when actual shipment took place, after the expiry of the original shipment period, the international market price of crude sunflower seed oil had increased drastically, and, therefore, the contract price could not be accepted as the 'transaction value' in terms of Rule 4 of CVR 1988.

5. In response, the plea of the respondent was that the contract envisaged extension of time for shipment but the exporter was bound to supply the oil at the agreed price despite delay of one month in shipment and further that in the absence of any evidence to show that they had paid or agreed to pay an extra price to the exporter for the consignment, the transaction value had to be the invoice price. However, the said plea did not find favour with the Adjudicating Authority. Accordingly, he confirmed the demand indicated in the demand letter and ordered the respondent to pay the differential amount of duty. Respondent's first appeal to the Commissioner (Appeals) was unsuccessful.

6. Being dissatisfied with the order of the Commissioner (Appeals), the respondent took the matter in further appeal to the Tribunal. As aforestated, by the impugned common order in the cases before us, the Tribunal has set aside the order of the Commissioner (Appeals) and held that there was no basis for demand of differential duty by ignoring the invoice price. Placing reliance on the decision of this Court in *Eicher Tractors Ltd., Haryana Vs. Commissioner of Customs, Mumbai*[1], the Tribunal held as follows:

"In the above mentioned case, the Supreme Court has held

1. 2000 (122) E.L.T. 321 (SC): (2001) 1 SCC 315.

that in the absence of 'special circumstances, price of imported goods is to be determined under Section 14(1)(A) in accordance with the Customs Valuation Rules, 1988. The 'special circumstances' have been statutorily particularized in Rule 4(2) and in the absence of these exceptions, it is mandatory of Customs to accept the price actually paid or payable for the goods in the particular transaction. In all the cases, we find that the transaction value has been arrived at purely on commercial considerations based on contracts. The supplier, in order to honour the contracts, supplied the goods at the contracted price. There is also no allegation that the appellants paid to the supplier more than the contracted value. Under these circumstances, there are actually no grounds to reject the transaction value."

7. Hence these appeals by the revenue.

8. Mr. R.P. Bhatt, learned senior counsel, appearing for the revenue submitted that in the light of the invoices, in possession of the adjudicating authority, showing contemporaneous import of the crude sunflower seed oil at much higher price, the adjudicating authority was justified in invoking Rule 10A of CVR 1988 and in rejecting the invoice price declared by the respondent-importer. It was argued that the contemporary invoices clearly indicated that at the time of actual shipment of the goods, the international market price was much higher and therefore, the transaction value declared by the respondent could not be accepted in terms of Rule 4 of CVR 1988. Placing reliance on the decision of this Court in *Commissioner of Customs (Gen), Mumbai Vs. Abdulla Koyloth*[2], learned senior counsel contended that in the light of cogent contemporaneous imports, showing much higher market price of identical goods as on the date of shipment of goods, the transaction value had been rightly rejected in terms of Section 14(1) read with Rule 4(2) of CVR 1988.

2. (2010) 13 SCC 473.

9. *Per contra,* Mr. Shyam Divan, learned senior counsel, appearing for the respondent contended that in the absence of any material even remotely showing that the market price of crude sunflower seed oil at the time of execution of the contract by the respondent was higher than what was recorded in the invoice, the adjudicating authority had no reason to doubt the genuineness or the accuracy of the declared value, so as to attract Rule 10A of CVR 1988. It was pointed out that under clause 7 of the special conditions under the contract, entered into between the respondent and the foreign supplier, the respondent was obliged to extend the period of shipment and therefore, addendum dated 31st July, 2001 was signed, whereunder, except for the change in the period of shipment all other conditions, including the price of crude sunflower seed oil remained unchanged. It was argued that in the absence of any material brought on record by the revenue indicating that as on the date of contract, i.e. 26th June 2001, the market price of the crude sunflower seed oil was more than the contracted price, none of the special circumstances enumerated in Sub-rule 2 of the Rule 4 of CVR 1988 were attracted and thus, the revenue was bound to accept the invoice price as the transaction value.

10. Before evaluating the rival submissions, it would be useful to have a bird's eye view of the relevant provisions. Section 14 of the Customs Act, 1962 (for short "the Act"), in so far as it is relevant for the present appeals, reads as follows:

> "**14. Valuation of goods for purposes of assessment.—**(1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force whereunder a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be —
>
> The price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale or offer for sale:
>
> Provided that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46, or a shipping bill or bill of export, as the case may be, is presented under section 50;
>
> (1A) Subject to the provisions of sub-section (1), the price referred to in that sub-section in respect of imported goods shall be determined in accordance with the rules made in this behalf.
>
> (2) Notwithstanding anything contained in sub-section (1) or sub-section (1A), if the Central Government is satisfied that it is necessary or expedient so to do it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.
>
> ……
> ……."

According to Rule 2(1)(f) of CVR 1988 "transaction value" means the value determined in accordance with Rule 4 of CVR 1988. The relevant portion of Rule 4 reads as follows:-

> "**4. Transaction value.—** (1) The transaction value of imported goods shall be the price actually paid or payable for the goods when sold for export to India, adjusted in accordance with the provisions of Rule 9 of these rules.
>
> (2) The transaction value of imported goods under sub-rule (1) above shall be accepted:

Provided that —

a. the sale is in the ordinary course of trade under fully competitive conditions;

b. the sale does not involve any abnormal discount or reduction from the ordinary competitive price;

c. the sale does not involve special discounts limited to exclusive agents;

d. objective and quantifiable data exist with regard to the adjustments required to be made, under the provisions of rule 9, to the transaction value;

e. there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which —

i. are imposed or required by law or by the public authorities in India;

or

ii. limit the geographical area in which the goods may be resold; or

iii. do not substantially affect the value of the goods;

f. the sale or price is not subject to same condition or consideration for which a value cannot be determined in respect of the goods being valued;

g. no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Rule 9 of these rules; and

h. the buyer and seller are not related, or where the buyer and seller are related, that transaction value is acceptable for customs purposes under the provisions of sub-rule (3).

…….

…….”

11. On a plain reading of Sections 14(1) and 14(1A), it is clear that the value of any goods chargeable to *ad valorem* duty is deemed to be the price as referred to in Section 14(1) of the Act. Section 14(1) is a deeming provision as it talks of deemed value of such goods. The determination of such price has to be in accordance with the relevant rules and subject to the provisions of Section 14(1) of the Act. Conjointly read, both Section 14(1) of the Act and Rule 4 of CVR 1988 provide that in the absence of any of the special circumstances indicated in Section 14 (1) of the Act and particularized in Rule 4(2) of CVR 1988, the price paid or payable by the importer to the vendor, in the ordinary course of international trade and commerce, shall be taken to be the transaction value. In other words, save and except for the circumstances mentioned in proviso to Sub-rule (2) of Rule 4, the invoice price is to form the basis for determination of the transaction value. Nevertheless, if on the basis of some contemporaneous evidence, the revenue is able to demonstrate that the invoice does not reflect the correct price, it would be justified in rejecting the invoice price and determine the transaction value in accordance with the procedure laid down in CVR 1988. It needs little emphasis that before rejecting the transaction value declared by the importer as incorrect or unacceptable, the revenue has to bring on record cogent material to show that contemporaneous imports, which obviously would include the date of contract, the time and place of importation, etc., were at a higher price. In such a situation, Rule 10A of CVR 1988 contemplates that where the department has a ‘reason to doubt’ the truth or accuracy of the declared value, it may ask

the importer to provide further explanation to the effect that the declared value represents the total amount actually paid or payable for the imported goods. Needless to add that 'reason to doubt' does not mean 'reason to suspect'. A mere suspicion upon the correctness of the invoice produced by an importer is not sufficient to reject it as evidence of the value of imported goods. The doubt held by the officer concerned has to be based on some material evidence and is not to be formed on a mere suspicion or speculation. We may hasten to add that although strict rules of evidence do not apply to adjudication proceedings under the Act, yet the Adjudicating Authority has to examine the probative value of the documents on which reliance is sought to be placed by the revenue. It is well settled that the onus to prove under-valuation is on the revenue but once the revenue discharges the burden of proof by producing evidence of contemporaneous imports at a higher price, the onus shifts to the importer to establish that the price indicated in the invoice relied upon by him is correct.

12. In *Eicher Tractors Ltd.* (supra), relied upon by the Tribunal, this Court had held that the principle for valuation of imported goods is found in Section 14(1) of the Act which provides for the determination of the assessable value on the basis of the international sale price. Under the said Act, customs duty is chargeable on goods. According to Section 14(1), the assessment of duty is to be made on the value of the goods. The value may be fixed by the Central Government under Section 14(2). Where the value is not so fixed it has to be decided under Section 14(1). The value, according to Section 14(1), shall be deemed to be the price at which such or like goods are ordinarily sold or offered for sale, for delivery at the time and place and importation in the course of international trade. The word "ordinarily" implies the exclusion of special circumstances. This position is clarified by the last sentence in Section 14(1) which describes an "ordinary" sale as one where the seller or the buyer have no interest in the business of each other and price is the sole consideration for the sale

or offer for sale. Therefore, when the above conditions regarding time, place and absence of special circumstances stand fulfilled, the price of imported goods shall be decided under Section 14(1A) read with the Rules framed thereunder. The said Rules are CVR 1988. It was further held that in cases where the circumstances mentioned in Rules 4(2)(c) to (h) are not applicable, the Department is bound to assess the duty under transaction value. Therefore, unless the price actually paid for a particular transaction falls within the exceptions mentioned in Rules 4(2)(c) to (h), the Department is bound to assess the duty on the transaction value. It was further held that Rule 4 is directly relatable to Section 14(1) of the Act. Section 14(1) read with Rule 4 provides that the price paid by the importer in the ordinary course of commerce shall be taken to be the value in the absence of any special circumstances indicated in Section 14(1). Therefore, what should be accepted as the value for the purpose of assessment is the price actually paid for the particular transaction, unless the price is unacceptable for the reasons set out in Rule 4(2). (Also See: *Rabindra Chandra Paul Vs. Commissioner of Customs (Preventive), Shillong*[3].)

13. Applying the above principles to the facts in hand, we are of the opinion that the revenue erred in rejecting the invoice price. As stated above, in the present case the whole controversy arose on account of difference in price of the same commodity, contracted to be supplied under different contracts entered into at different points in time. As aforesaid, in the instant case, admittedly the contract for supply of crude sunflower seed oil @ US $ 435 CIF/PMT was entered into on 26th June 2001. It could not be performed on time because of which extension of time for shipment was agreed to between the contracting parties. It is true that the commodity involved had volatile fluctuations in its price in the international market but having delayed the shipment, the supplier did not increase the price of the commodity even after the increase in its price in

3. (2007) 3 SCC 93.

the international market. This fact is also proved by the actual amount paid to the supplier. There is no allegation of the supplier and importer being in collusion. It is also not the case of the revenue that the transaction entered into by the respondent was not genuine or under-valued. Nor was there a misdescription of the goods imported. It is also not the case of the revenue that the subject imports fell within any of the situations enumerated in Rule 4(2) of CVR 1988. It is manifest from the show cause notice, extracted in para 3 supra, that the contract value was not acceptable to the Adjudicating Authority in terms of Section 14(1) of the Act read with Rule 4 of CVR 1988 merely because by the time actual shipment took place in August 2001, international price of the oil had increased drastically. No other reason has been ascribed to reject the transaction value under Rule 4(1) except the drastic increase in price of the commodity in the international market and the difference in price in the invoices in relation to the goods imported under contracts entered by the respondents in the month of August 2001. In our opinion, the import instances relied upon by the revenue could not be treated as instances indicating contemporaneous value of the goods because contracts for supply of the goods in those cases were entered into almost after a month from the date of contract in the present cases, more so, when admittedly there were drastic fluctuations in the international price of the commodity involved. We are, therefore, of the opinion that the revenue was not justified in rejecting the transaction value declared by the respondents in the invoices submitted by them.

14. For the foregoing reasons, we do not find any merit in these appeals. All the appeals are dismissed accordingly, with no order as to costs.

R.P. Appeals dismissed.

PRINCL. CHIEF CONSERVATOR OF FOREST & ANR.
v.
J.K. JOHNSON & ORS.
(Civil Appeal No. 2534 of 2011)

OCTOBER 17, 2011

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

WILD LIFE (PROTECTION) ACT, 1972:

Object of its enactment – Discussed.

s.54(1) – Power of specified officer to order forfeiture of seized items – Held: A specified officer empowered u/s.54(1) of the Act as amended by the Wild Life (Protection) Amendment Act, 2002 (Act 16 of 2003) to compound offences, has no power, competence or authority to order forfeiture of the seized items on composition of the offence by a person who is suspected to have committed offence against the Act – Wild Life (Protection) Amendment Act, 2002 (Act 16 of 2003).

s.39(1)(d) – Applicability of – Held: Is applicable if there is categorical finding about the use of seized items for commission of offence and not where seized items were suspected to have been used for committing offence.

s.39(1)(d) and s.51(2) – Distinction between.

s.54(2) – Prior to and after amendment – Held: s.54(2) of the 1972 Act, prior to the amendment by Act 16 of 2003, authorized the empowered officer, on payment of value of the property liable to be forfeited, to release the seized property, other than the government property – The provision underwent changes w.e.f. April 1, 2003 and the provision for release of the seized property was deleted – By deletion of the provision for release of the seized property, it cannot be said that the

Parliament intended to confer power on the specified officer to order forfeiture of the seized property which is nothing but one form of penalty in the context of the 1972 Act – Had the Parliament intended to do so, it would have made an express provision in that regard – Such conferment of power of penalty upon the specified officer cannot be read by implication in s.54(2) – Also any power of forfeiture conferred upon Executive authority merely on suspicion or accusation may amount to depriving a person of his property without authority of law – Such power cannot be readily read by relying on the Statement of Objects and Reasons (Act 16 of 2003) without any express provision in the statute – Interpretation of statutes.

s.54(2) – Composition of the offence under – Held: The composition of the offence u/s.54 is not during the course of trial or in the trial of a compoundable offence – Compounding u/s.54 is a departmental compounding and does not amount to an acquittal – s.54(2) provides that on payment of money to the empowered officer, the suspected person, if in custody, shall be discharged and no further proceedings in respect of the offence shall be taken against such person – In terms of sub-section (2) of s.54, therefore, on composition of the offence, the suspected person is saved from criminal prosecution, and from being subjected to further proceedings in respect of the offence.

Forfeiture and seizure – Connotation of and distinction between – Discussed.

INTERPRETATION OF STATUTES: Reference to the Statement of Objects and Reasons – Held: The reference to the Statement of Objects and Reasons is for understanding the enactment and the purpose is to ascertain the conditions prevailing at the time the Bill was introduced and the objects sought to be achieved by the proposed amendment – The Statement of Objects and Reasons is not ordinarily used to determine the true meaning of the substantive provisions of the statute – As an aid to the construction of a statute, the Statement of Objects and Reasons appended to the Bill, ordinarily must be avoided – Wild Life (Protection) Act, 1972.

The question which arose for consideration in the instant appeal was whether a specified officer empowered under Section 54(1) of the Wild Life (Protection) Act, 1972 as amended by the Wild Life (Protection) Amendment Act, 2002 (Act 16 of 2003), to compound offences, has power, competence and authority, to order forfeiture of the seized items, on payment of a sum of money by way of composition of the offence by a person who is suspected to have committed offence against the Act.

Disposing of the appeal, the Court

HELD: 1. A specified officer empowered under Section 54(1) of the Wild Life (Protection) Act, 1972 as amended by the Wild Life (Protection) Amendment Act, 2002 (Act 16 of 2003) to compound offences, has no power, competence or authority to order forfeiture of the seized items on composition of the offence by a person who is suspected to have committed offence against the Act. [para 41] [1172-F-G]

2.1. The Wild Life (Protection) Act, 1972 was enacted by the Parliament to provide for the protection of wild animals and birds and for matters connected therewith or ancillary or incidental thereto. The Act, *inter alia*, seeks to regulate hunting of wild animals and birds; regulate possession, acquisition or transfer of, or trade in, wild animals, animal articles and trophies and taxidermy thereof and provide penalties for contravention of the Act. Pertinently, the 1972 Act has been subjected to extensive amendments from time to time. It has been amended by Act 23 of 1982, Act 28 of 1986, Act 44 of 1991, Act 26 of 1993 and Act 16 of 2003. Chapter VI-A has been inserted

in the 1972 Act by Act 16 of 2003. This chapter makes provision for forfeiture of property derived from illegal hunting and trade. The applicability of Chapter VI-A is provided in Section 58A. This Chapter is, accordingly, applicable to (a) every person who has been convicted of an offence punishable under the Act with imprisonment for a term of three years or more; (b) every associate of a person referred to in clause (a) and (c) any holder of any property which was at any time held by a person referred to in clause (a) or clause (b) unless the present holder or, as the case may be, anyone who held such property after such person and before the present holder, is or was transferee in good faith for adequate consideration. The Statement of Objects and Reasons (Act 16 of 2003) annexed with Wild Life (Protection) Amendment Bill, 2002, in clause (xvi), proposed, "to provide that the vehicles, weapons and tools, etc. used in committing compoundable offences are not to be returned to the offenders". [paras 19, 25, 26] [1158-F; 1159-A-C; 1164-C-F]

2.2. The statutory provisions do not in explicit terms provide for the forfeiture of the seized items by the departmental authorities from a person who is suspected to have committed offence/s against the 1972 Act. Chapter VI-A which has been inserted in the 1972 Act by Act 16 of 2003 that provides for forfeiture of property derived from illegal hunting and trade is entirely different provision and has nothing to do with forfeiture of the property seized from a person accused of commission of offence against the 1972 Act. Insofar as Section 39(1)(d) of the 1972 Act is concerned, it provides that every vehicle, vessel, weapon, trap or tool that has been used for committing an offence and has been seized under the provisions of the Act shall be the property of the state government and in a certain situation, the property of the central government. The key words in

Clause (d) of Section 39(1) are, "..... has been used for committing an offence .....". The kind of absolute vesting of the seized property in the state government, on mere suspicion of an offence committed against the 1972 Act, could not have been intended by the Parliament. It is not even scarcely disputed that every enactment in the country must be in conformity with the Indian Constitution. In this view, it is not sufficient – nor the law-makers intended to make it – to deprive a person of the property seized under the 1972 Act on accusation that such property has been used for committing an offence against the Act. Section 39(1)(d) does not get attracted where the items, suspected to have been used for committing an offence, are seized under the provisions of the Act. It is implicit in Section 39(1)(d) that for this provision to come into play there has to be a categorical finding by the competent court of law about the use of seized items such as vehicle, weapon, etc. for commission of the offence. [para 28] [1164-G-H; 1165-A-F]

3. Section 51(2) of the 1972 Act provides for forfeiture of the property on conviction; it says, *inter-alia*, that when any person is convicted of an offence against the Act, the court trying the offence may order that any captive animal, wild animal, etc. in respect of which the offence has been committed and any vehicle, vessel or weapon etc. used in the commission of the said offence be forfeited to the state government. 'Forfeiture' and 'seizure' have different meaning and connotation in law. In law, seizure is the taking possession of property by an officer under legal process. Seizure of property under legal process is a temporary measure. It is temporary interference with the right to hold the property. Seizure under legal process is usually followed by confiscation or forfeiture or disposal in accordance with the provisions under which seizure has been made or the property is

returned to the person from whom it has been seized or to the lawful claimant to such property. While Section 39(1)(d) provides that seized property under the 1972 Act used for commission of the offence/s against the Act shall be the property of the state government or the central government as the case may be, the other provisions like Section 51(2) and Chapter VI-A provide for forfeiture of the property in certain situations. However, for the seized property used for commission of offence to be the property of the state government or the central government under Section 39(1)(d), offence against the Act has to be legally ascertained and adjudicated by a competent court of jurisdiction. [Paras 29, 30] [1165-H; 1166-A-B-F-H; 1167-A-C]

State of Madhya Pradesh and Others v. *Madhukar Rao* **(2008) 14 SCC624: 2008 (1) SCR 413; *R.S. Joshi etc. v. Ajit Mills Ltd & Anr.* AIR 1977 SC 2279: 1978 (1) SCR 338;** *The Chairman of the Bankura Municipality v. Lalji Raja & sons* **AIR 1953 SC 248: 1953 SCR 767– relied on.**

The Law Lexicon' by P. Ramanatha Aiyer [2nd edition (Reprint 2000); *Concise Oxford English Dictionary* **(Tenth Edition) – referred to.**

4. The composition of the offence under Section 54 of the 1972 Act is not during the course of trial or in the trial of a compoundable offence. Compounding under Section 54 is a departmental compounding and does not amount to an acquittal. Section 54(2) provides that on payment of money to the empowered officer, the suspected person, if in custody, shall be discharged and no further proceedings in respect of the offence shall be taken against such person. In terms of sub-section (2) of Section 54, therefore, on composition of the offence, the suspected person is saved from criminal prosecution, and from being subjected to further proceedings in respect of the offence. Section 54(2) of the 1972 Act, prior

to the amendment by Act 16 of 2003, authorized the empowered officer, on payment of value of the property liable to be forfeited, to release the seized property, other than the government property. The provision underwent changes w.e.f. April 1, 2003 and the provision for release of the seized property was deleted. By deletion of the provision for release of the seized property, it cannot be said that the Parliament intended to confer power on the specified officer to order forfeiture of the seized property which is nothing but one form of penalty in the context of the 1972 Act. Had the Parliament intended to do so, it would have made an express provision in that regard. Such conferment of power of penalty upon the specified officer cannot be read by implication in Section 54(2). Secondly, any power of forfeiture conferred upon Executive authority merely on suspicion or accusation may amount to depriving a person of his property without authority of law. Such power cannot be readily read by relying on the Statement of Objects and Reasons (Act 16 of 2003) without any express provision in the statute. [paras 34, 36, 37] [1168-G-H; 1169-A; 1170-A-G]

5. The reference to the Statement of Objects and Reasons is for understanding the enactment and the purpose is to ascertain the conditions prevailing at the time the Bill was introduced and the objects sought to be achieved by the proposed amendment; the Statement of Objects and Reasons is not ordinarily used to determine the true meaning of the substantive provisions of the statute. As an aid to the construction of a statute, the Statement of Objects and Reasons appended to the Bill, ordinarily must be avoided. It is true that by Act 16 of 2003, the Parliament has consciously deleted from Section 54 the provision concerning release of seized property liable to be forfeited on payment of value of such property but the plain language that is retained in Section 54 (2) after

amendment which reads, 'on payment of such sum of money to such officer, the suspected person, if in custody, shall be discharged and no further proceedings in respect of the offence shall be taken against such person' does not show that the Legislature intended to empower the specified officer under Section 54 to forfeit the seized property used by the suspected person in commission of offence against the Act. There is no replacement of the deleted words by any express provision. Section 54 substituted by Act 16 of 2003 does not speak of seized property at all–neither its return nor its forfeiture – while providing for composition of offence. The property seized under Section 50(1)(c) and Section 50(3A) has to be dealt with by the Magistrate according to law. This is made clear by Section 50(4) which provides that things seized shall be taken before a Magistrate to be dealt with according to law. Section 54 substituted by Act 16 of 2003 does not empower the specified officer to deal with the seized property. In this view of the matter, it was incorrect to state that a comparative reading of pre-amended Section 54(2) and Section 54 (2) as substituted by Act 16 of 2003 makes the legislative intent clear that seized articles shall be forfeited on composition of the offence under the 1972 Act. When the language of the statutory provision is plain and clear no external aid is required and the legislative intention has to be gathered from the language employed. Neither Section 54(2) of the 1972 Act by itself nor Section 54(2) read with Section 39(1)(d) or any other provision of the 1972 Act empowers and authorizes the specified officer under Section 54, on composition of the offence, to deal with the seized property much less order forfeiture of the seized property used by the person suspected of commission of offence against the Act. In view of that, the order passed by the Conservator of Forests, Nizamabad against respondent nos. 1 to 3 for forfeiture of their vehicle and rifles to the state government was *de hors* the provisions of the 1972 Act and was unsustainable. The respondent nos. 1 to 3 must accordingly apply to the concerned Magistrate for the return of seized items who obviously will consider such application according to law. [Paras 38, 39, 40] [1171-A-H; 1172-A-D-E-F]

*The Central Bank of India & Ors. v. Their Workmen, **etc.*** **AIR 1960 SC 12: 1960 SCR 200 – relied on.**

Sewpujanrai Indrasanrai Ltd. v. *Collector of Customs and Ors.* **AIR 1958 SC 845: 1959 SCR 821;** *Biswabahan Das* v. *Gopen Chandra Hazarika and Ors.* **(1967) 1 SCR 447;** *Madhukar Rao S/o Malik Rao* v. *State of M.P. and others* **2000(1) MPLJ 289;** *A.C. Sharma* v. *Delhi Administration* **(1973) 1 SCC 726: 1973 (3) SCR 477;** *State of Maharashtra* v. *Marwanjee F. Desai and Others* **(2002) 2 SCC 318: 2001 (5) Suppl. SCR 647;** *Prakash Kumar alias Prakash Bhutto* v. *State of Gujarat* **(2005) 2 SCC 409: 2005 (1) SCR 408** *Mohd. Shahabuddin* v. *State of Bihar and others* **(2010) 4 SCC 653: 2010 (3) SCR 911** ***Mandvi Cooperative Bank Limited* v. *Nimesh B. Thakore*** **(2010) 3 SCC 83: 2010 (1) SCR 219 – referred to.**

Case Law Reference:

1959 SCR 821	**referred to**	**Para 13**
(1967) 1 SCR 447	**referred to**	**Para 13**
2000(1) MPLJ 289	**referred to**	**Para 16**
2008 (1) SCR 413	**relied on**	**Para 16,17**
1973 (3) SCR 477	**referred to**	**Para 16**
2001 (5) Suppl. SCR 647	**referred to**	**Para 16**
2005 (1) SCR 408	**referred to**	**Para 16**
2010 (3) SCR 911	**referred to**	**Para 16**
2010 (1) SCR 219	**relied on**	**Para 16**

1978 (1) SCR 338	**relied on**	**Para 30**
1953 SCR 767	**relied on**	**Para 30**
1960 SCR 200	**relied on**	**Para 38**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2534 of 2011.

From the Judgment and Order dated 22.01.2010 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Writ Appeal No. 1035 of 2006.

R. Sundervardhan, C.K. Sucharita and Nirada Das for the Appellants.

Jayant Kumar Mehta, Sukant Vikram and Rishi Raj Saxena for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The significant and important question raised in this appeal, by special leave, is : whether a specified officer empowered under Section 54(1) of the Wild Life (Protection) Act, 1972 as amended by the Wild Life (Protection) Amendment Act, 2002 (Act 16 of 2003) to compound offences has power, competence and authority, on payment of a sum of money by way of composition of the offence by a person who is suspected to have committed offence against the Act, to order forfeiture of the seized items?

2. The above question arises in this way. In the intervening night of July 24/25, 2004, at the Pothamsettipalli, Cross Roads, the vehicles were being checked by the Sub-Inspector of Police, Kulcharam Police Station, District Medak. In the course of the checking, at 2.45 a.m. a jeep bearing Registration No. AP – 12 – D 703 was also stopped and checked. The said jeep was occupied by the present respondent nos. 1, 2 and 3 and two other persons. On checking, the Sub-Inspector of Police found one gunny bag tied to the front side of the bumper

of the jeep. The gunny bag had two bags inside; one bag contained a hunted wild boar and the other had three rabbits. The seizure panchnama was prepared immediately at 3.30 a.m. The jeep, a battery, a torchlight, dead animals and two rifles of foreign make fitted with telescope were seized. The persons (including respondent nos. 1 to 3 who were occupying the jeep) were taken into custody and a case (Crime No. 43 of 2004) was registered against them under Section 9 of the Wild Life (Protection) Act, 1972 (for short, 'the 1972 Act'). The Division Forest Officer, Medak was also immediately informed.

3. On July 25, 2004 itself, the Divisional Forest Officer, Medak recorded the statement of respondent nos. 1 to 3 and two other persons. They gave some explanation with regard to the gunny bag containing wild pig and three rabbits and the rifles in their possession but stated that the offence was done by them in ignorance and they were willing to pay money by way of composition of the offence.

4. On August 10, 2004, the Conservator of Forests, Nizamabad Circle, Nizamabad on the report submitted by the Divisional Forest Officer, Medak that the accused persons (Respondent Nos. 1 to 3) had offered for compounding the offence and they were willing to pay the money by way of composition of the offence, ordered that the offence be compounded for Rs. 30,000/- under Section 54 of the 1972 Act and the vehicle and the weapons used in committing the offence be forfeited.

5. The respondent no. 1 challenged the above order in appeal before the Principal Chief Conservator of Forests, Andhra Pradesh. The Principal Chief Conservator of Forests although by his order dated October 9, 2004 held that appeal was not maintainable but asked the Conservator of Forests, Nizamabad to reduce the composition fee from Rs. 30,000/- to Rs. 25,000/- . The respondent no. 1 was asked by the Principal Chief Conservator of Forests to approach the Conservator of Forests, Nizamabad for further action.

6. The Conservator of Forests, Nizamabad then passed a fresh order on November 4, 2004 permitting the respondent nos. 1 to 3 to compound the offence for Rs. 25,000/-. The seized items viz; vehicle No. AP – 12 – D 703 and two rifles were ordered to be forfeited to the state government. It was also ordered that if the offenders fail to pay compounding fee within seven days, necessary action against them for their prosecution under Section 51 of the 1972 Act may be taken.

7. The respondent nos. 1, 2 and 3 challenged the above three orders insofar as forfeiture of the vehicle and two rifles to the state government was concerned in a writ petition filed under Article 226 of the Constitution of India before the Andhra Pradesh High Court.

8. The Single Judge of the High Court, on hearing the parties, by his judgment dated March 29, 2005 set aside the order of forfeiture of the vehicle and the two rifles.

9. The present appellants—the Principal Chief Conservator of Forests, Hyderabad and the Conservator of Forests, Nizamabad – preferred intra-court appeal against the order of the Single Judge. The Division Bench of the High Court dismissed the intra-court appeal and maintained the order of the Single Judge. This is how the present appeal has reached this Court.

10. We heard Mr. R. Sundervardhan, learned senior counsel for the appellants and Mr. Jayant Kumar Mehta, learned counsel for the contesting respondent nos. 1 to 3.

11. Mr. R. Sundervardhan, learned senior counsel for the appellants invited our attention to Section 54 of the 1972 Act, particularly sub-section (2) thereof prior to its amendment by Act 16 of 2003 and the amended Section 54 (2) whereby the portion, "the property other than Government property, if any, seized, shall be released" has been omitted and submitted that the legislative intent was clear that release of seized items was

not permissible and it was competent for the specified officer empowered to compound offences to order forfeiture of the seized items to the state government. In this regard, learned senior counsel also referred to Section 39 (1)(d) of the 1972 Act and submitted that the property seized from a person accused of commission of an offence against the 1972 Act, irrespective of the fact that offence has been compounded, stands forfeited and the property becomes the property of the state government or central government, as the case may be.

12. Mr. R. Sundervardhan, learned senior counsel would submit that the Statement of Objects and Reasons of Act 16 of 2003 leaves no manner of doubt that one of the objects sought to be achieved by the amendment was to provide that the vehicles, vessel, weapons, tools etc. used in committing compoundable offences are not returned to the offenders. He argued that legislative intent and policy must be given due regard.

13. Learned senior counsel for the appellants would also contend that compounding of the offences under Section 54 is not during the course of a trial or in the trial of a compoundable offence and, therefore, an order of empowered officer in compounding the offence is not an order of acquittal; it is plain and simple departmental compounding. He urged that the effect of the compounding offences, as provided in Section 320(8) of the Code of Criminal Procedure, 1973, (for short, 'the Code') is not applicable to the compounding of offences under Section 54 of the 1972 Act as amended by Act 16 of 2003. He also referred to two decisions of this Court (i) *Sewpujanrai Indrasanrai Ltd. v. Collector of Customs and Ors.*[1] to draw distinction between the expressions, "offender", "offence" and "confiscation" and (ii) *Biswabahan Das v. Gopen Chandra Hazarika and Ors.*[2], particularly, paragraphs 8, 9 and 13 thereof. Learned senior counsel, thus, submitted that the view of the High

1. AIR 1958 SC 845.
2. (1967) 1 SCR 447.

Court in quashing the order of forfeiture of the seized items is contrary to the statutory provisions in the 1972 Act as amended by Act 16 of 2003.

14. On the other hand, Mr. Jayant Kumar Mehta, learned counsel for respondent nos. 1 to 3 stoutly supported the view of the High Court. He submitted that Section 54 did not expressly empower the specified officer to order forfeiture of property in the event of composition of the offence. He submitted that the Statement of Objects and Reasons of Act 16 of 2003 cannot be acted upon in the absence of clear and explicit provision for forfeiture of property in Section 54 of the 1972 Act. Learned counsel submitted that the submission of the learned senior counsel for the appellants that regardless of composition of offence, the property seized from a person accused of commission of an offence against the 1972 Act stands forfeited under Section 39, if accepted, would not only result in anomaly but also lead to vesting of unguided, arbitrary or unconstitutional power in the hands of the empowered officer.

15. Mr. Jayant Kumar Mehta, learned counsel for respondent nos. 1 to 3 argued that the plain language of Section 39 (1)(d) does not give sanction to an officer empowered under Section 54 of the 1972 Act to forfeit seized items under the provisions of the Act on composition of offence. He submitted that the expression used in Section 39 (1)(d) is, "……. that has been used for committing an offence ……. " and not, " ……. is suspected to have been used for committing an offence…….".

16. Learned counsel for respondent nos. 1 to 3 also referred to Section 50, Section 51(2) and Section 53 of the 1972 Act and submitted that if the interpretation canvassed by the learned senior counsel for the appellants is accepted, that would render Section 50(4), Section 51(2) and Section 53 superfluous. He argued that even in cases of *casus omissus*, the court should not supply any words which are found to be missing in the enactment. The Statement of Objects and

Reasons cannot be read to supplement or supplant a statutory provision much less a source of power and in any event, the penal provisions in the 1972 Act are required to be construed strictly. He relied upon the Full Bench decision of the Madhya Pradesh High Court in the case of *Madhukar Rao S/o Malik Rao v. State of M.P. and others*[3] and the judgment of this Court in *State of Madhya Pradesh and Others v. Madhukar Rao*[4] affirming the Full Bench decision of Madhya Pradesh High Court. He also relied upon decisions of this Court in *A.C. Sharma v. Delhi Administration*[5]*; State of Maharashtra v. Marwanjee F. Desai and Others*[6]; *Prakash Kumar alias Prakash Bhutto v. State of Gujarat*[7]; *Mohd. Shahabuddin v. State of Bihar and others*[8] and *Mandvi Cooperative Bank Limited* v. *Nimesh B. Thakore*[9].

17. Mr. R. Sundervardhan, learned senior counsel, in rejoinder, distinguished the decision of this Court in the case of *Madhukar Rao*[4]. He submitted that the issue in *Madhukar Rao*[4] and the issue raised in the present appeal are distinct and even on facts the case of *Madhukar Rao*[4] is distinguishable. He submitted that Section 54 of the 1972 Act as amended by Act 16 of 2003 was not under consideration in *Madhukar Rao*[4].

18. For a proper consideration of the question raised before us as noted above, it is necessary to read few relevant sections of the 1972 Act prior to amendment by Act 16 of 2003 and Section 54 after amendment with effect from April 1, 2003.

19. The 1972 Act was enacted by the Parliament to

3. 2000 (1) MPLJ 289.
4. (2008) 14 SCC 624.
5. (1973) 1 SCC 726.
6. (2002) 2 SCC 318.
7. (2005) 2 SCC 409.
8. (2010) 4 SCC 653.
9. (2010) 3 SCC 83.

provide for the protection of wild animals and birds and for matters connected therewith or ancillary or incidental thereto. The Act, inter alia, seeks to regulate hunting of wild animals and birds; regulate possession, acquisition or transfer of, or trade in, wild animals, animal articles and trophies and taxidermy thereof and provide penalties for contravention of the Act. Pertinently, the 1972 Act has been subjected to extensive amendments from time to time. It has been amended by Act 23 of 1982, Act 28 of 1986, Act 44 of 1991, Act 26 of 1993 and Act 16 of 2003.

20. The relevant portion of Section 39 in Chapter V, 'Trade or Commerce in Wild animals, Animal articles and Trophies' is as follows :

"S. 39. Wild animals, etc., to be Government property.— (1) Every—

(a), (b), (c) x x x x x x

(d) vehicle, vessel, weapon, trap or tool that has been used for committing an offence and has been seized under the provisions of this Act,

shall be the property of the State Government, and, where such animal is hunted in a sanctuary or National Park declared by the Central Government, such animal or any animal article, trophy, uncured trophy or meat derived from such animal or any vehicle, vessel, weapon, trap or tool used in such hunting shall be the property of the Central Government.

(2), (3) (a), (b), (c) x x x x x x"

21. Chapter VI deals with the prevention and detection of offences. Section 50 after its amendment by Act 44 of 1991 and Act 16 of 2003 to the extent it is relevant, reads as follows:

"S.50. Power of entry, search, arrest and detention.— (1)

Notwithstanding anything contained in any other law for the time being in force, the Director or any other officer authorised by him in this behalf or the Chief Wild Life Warden or the authorised officer or any Forest Officer or any Police Officer not below the rank of a sub-inspector, may, if he has reasonable grounds for believing that any person has committed an offence against this Act,—

(a) require any such person to produce for inspection any captive animal, wild animal, animal article, meat, trophy, uncured trophy, specified plant or part or derivative thereof in his control, custody or possession, or any licence, permit or other document granted to him or required to be kept by him under the provisions of this Act;

(b) stop any vehicle or vessel in order to conduct search or inquiry or enter upon and search any premises, land, vehicle or vessel, in the occupation of such person, and open and search any baggage or other things in his possession;

(c) seize any captive animal, wild animal, animal article, meat, trophy or uncured trophy, or any specified plant or part or derivative thereof, in respect of which an offence against this Act appears to have been committed, in the possession of any person together with any trap, tool, vehicle, vessel or weapon used for committing any such offence and, unless he is satisfied that such person will appear and answer any charge which may be preferred against him, arrest him without warrant, and detain him:

(2) .....

(3) It shall be lawful for any of the officers referred to in sub-section (1) to stop and detain any person, whom he sees doing any act for which a licence or permit is required under the provisions of this Act, for the purposes of requiring such person to produce the licence or permit and

if such person fails to produce the licence or permit, as the case may be, he may be arrested without warrant, unless he furnishes his name and address, and otherwise satisfies the officer arresting him that he will duly answer any summons or other proceedings which may be taken against him.

(3A) Any officer of a rank not inferior to that of an Assistant Director of Wild Life Preservation or an Assistant Conservator of Forests, who, or whose subordinate, has seized any captive animal or wild animal under clause (c) of sub-section (1) may give the same for custody on the execution by any person of a bond for the production of such animal if and when so required, before the Magistrate having jurisdiction to try the offence on account of which the seizure has been made.

(4) Any person detained, or things seized under the foregoing power, shall forthwith be taken before a Magistrate to be dealt with according to law under intimation to the Chief Wild Life Warden or the officer authorized by him in this regard.

(5) to (9) x x x x x x.

22. The penalties are provided in Section 51 of the 1972 Act. This Section too has undergone changes in 1986, 1991 and 2003. Section 51 has also been amended subsequently by Act 39 of 2006 but that is not relevant for our purpose. Sub-section (2) of Section 51 reads as under:

"S. 51. Penalties.—

(1), (1A), (1B) x x x x x x

(2) When any person is convicted of an offence against this Act, the court trying the offence may order that any captive animal, wild animal, animal article, trophy, uncured trophy, meat, ivory imported into India or an article

made from such ivory, any specified plant, or part or derivative thereof in respect of which the offence has been committed, and any trap, tool, vehicle, vessel or weapon, used in the commission of the said offence be forfeited to the State Government and that any licence or permit, held by such person under the provisions of this Act, be cancelled.

(3), (4), (5) x x x x x x

23. Section 54, prior to amendment by Act 16 of 2003, read as under :

"S. 54. Power to compound offences.—(1) The Central Government may, by notification, empower the Director of Wild Life Preservation or any other officer and the State Government may, by notification, empower the Chief Wild Life Warden or any officer of a rank not inferior to that of a Deputy Conservator of Forests,—

(a) to accept, from any person against whom a reasonable suspicion exists that he has committed an offence against this Act, payment of a sum of money by way of composition of the offence which such person is suspected to have committed; and

(b) when any property has been seized as liable to be forfeited, to release the same on payment of the value thereof as estimated by such officer.

(2) On payment of such sum of money or such value, or both, as the case may be, to such officer, the suspected person, if in custody, shall be discharged, and the property, other than Government property, if any, seized, shall be released and no further proceedings in respect of the offence shall be taken against such person.

(3) The officer compounding any offence may order the cancellation of any licence or permit granted under this

Act to the offender, or if not empowered to do so, may approach an officer so empowered, for the cancellation of such licence or permit.

(4) The sum of money accepted or agreed to be accepted as composition under clause (b) of sub-section (1) shall in no case, exceed the sum of two thousand rupees:

Provided that no offence, for which a minimum period of imprisonment has been prescribed in sub-section (1) of section 51, shall be compounded."

24. After amendment by Act 16 of 2003, Section 54 reads as follows :

"S. 54. Power to compound offences.—(1) The Central Government may, by notification, empower the Director of Wild Life Preservation or any other officer not below the rank of Assistant Director of Wild Life Preservation and in the case of a State Government in the similar manner, empower the Chief Wild Life Warden or any officer of a rank not below the rank of a Deputy Conservator of Forests, to accept from any person against whom a reasonable suspicion exists that he has committed an offence against this Act, payment of a sum of money by way of composition of the offence which such person is suspected to have committed.

(2) On payment of such sum of money to such officer, the suspected person, if in custody, shall be discharged, and no further proceedings in respect of the offence shall be taken against such person.

(3) The officer compounding any offence may order the cancellation of any licence or permit granted under this Act to the offender, or if not empowered to do so, may approach an officer so empowered, for the cancellation of

such licence or permit.

(4) The sum of money accepted or agreed to be accepted as composition under sub-section (1) shall, in no case, exceed the sum of twenty-five thousand rupees:

Provided that no offence, for which a minimum period of imprisonment has been prescribed in section 51, shall be compounded."

25. Chapter VI-A has been inserted in the 1972 Act by Act 16 of 2003. This chapter makes provision for forfeiture of property derived from illegal hunting and trade. The applicability of Chapter VI-A is provided in Section 58 A. This Chapter is, accordingly, applicable to (a) every person who has been convicted of an offence punishable under the Act with imprisonment for a term of three years or more; (b) every associate of a person referred to in clause (a) and (c) any holder of any property which was at any time held by a person referred to in clause (a) or clause (b) unless the present holder or, as the case may be, anyone who held such property after such person and before the present holder, is or was transferee in good faith for adequate consideration.

26. The Statement of Objects and Reasons (Act 16 of 2003) annexed with Wild Life (Protection) Amendment Bill, 2002, in clause (xvi), proposed, "to provide that the vehicles, weapons and tools, etc. used in committing compoundable offences are not to be returned to the offenders".

27. In the backdrop of the above scheme of law, we have to consider the correctness of the view of the High Court and the question of law raised in the appeal.

28. One thing is clear that the statutory provisions noticed above do not in explicit terms provide for the forfeiture of the seized items by the departmental authorities from a person who is suspected to have committed offence/s against the 1972

Act. Chapter VI-A which has been inserted in the 1972 Act by Act 16 of 2003 that provides for forfeiture of property derived from illegal hunting and trade is entirely different provision and has nothing to do with forfeiture of the property seized from a person accused of commission of offence against the 1972 Act. Insofar as Section 39(1)(d) of the 1972 Act is concerned, it provides that every vehicle, vessel, weapon, trap or tool that has been used for committing an offence and has been seized under the provisions of the Act shall be the property of the state government and in a certain situation, the property of the central government. The key words in Clause (d) of Section 39(1) are, "..... has been used for committing an offence . .. .". What is the meaning of these words? The kind of absolute vesting of the seized property in the state government, on mere suspicion of an offence committed against the 1972 Act, could not have been intended by the Parliament. It is not even scarcely disputed that every enactment in the country must be in conformity with our Constitution. In this view, it is not sufficient – nor the law-makers intended to make it – to deprive a person of the property seized under the 1972 Act on accusation that such property has been used for committing an offence against the Act. Section 39(1)(d) does not get attracted where the items, suspected to have been used for committing an offence, are seized under the provisions of the Act. It seems to us that it is implicit in Section 39(1)(d) that for this provision to come into play there has to be a categorical finding by the competent court of law about the use of seized items such as vehicle, weapon, etc. for commission of the offence. There is merit in the submission of the learned counsel for the respondent nos. 1 to 3 that if the construction put upon Section 39(1)(d) by Mr. R. Sundervardhan is accepted, the expression 'has been used for committing an offence' occurring therein has to be read as, 'is suspected to have been used for committing an offence'. In our view, this cannot be done.

29. Section 51(2) of the 1972 Act provides for forfeiture of the property on conviction; it says, inter-alia, that when any

person is convicted of an offence against the Act, the court trying the offence may order that any captive animal, wild animal, etc. in respect of which the offence has been committed and any vehicle, vessel or weapon etc. used in the commission of the said offence be forfeited to the state government.

30. 'Forfeiture' and 'seizure' have different meaning and connotation in law. In 'The Law Lexicon' by P. Ramanatha Aiyer [2nd edition (Reprint 2000)], 'forfeiture' is defined as the divestiture of specific property without compensation in consequence of some default or act forbidden by law. The word 'forfeit' is defined in Concise Oxford English Dictionary (Tenth Edition): 'lose or be deprived of (property or a right or privilege) as a penalty for wrongdoing'. In *R.S. Joshi etc. v. Ajit Mills Ltd & Anr.*[10]., this Court speaking through Krishna Iyer, J., with reference to expression 'forfeiture' occurring in Section 37 (1) of the Bombay Sales Tax Act, said, "this word 'forfeiture' must bear the same meaning of a penalty for breach of a prohibitory direction". While construing the word 'forfeiture' with reference to Sections 431 and 432 of the Bengal Municipal Act (15 of 1932), this Court stated in the case of *The Chairman of the Bankura Municipality v. Lalji Raja & sons*[11] that unless the loss or deprivation of the goods is by way of a penalty or punishment for a crime, offence or breach of engagement, it would not come within the definition of forfeiture. However, in light of the provisions under consideration, the Court held that forfeiture of property was not one of the penalties or punishments for any of the offences under that Act. 'Seizure' on the other hand is generally understood to mean a forcible taking possession. In law, seizure is the taking possession of property by an officer under legal process. Seizure of property under legal process is a temporary measure. It is temporary interference with the right to hold the property. Seizure under legal process is usually followed by confiscation or forfeiture or disposal in accordance with the provisions under which seizure has been made or the

10. AIR 1977 SC 2279.

11. AIR 1953 SC 248.

property is returned to the person from whom it has been seized or to the lawful claimant to such property. While Section 39(1)(d) provides that seized property under the 1972 Act used for commission of the offence/s against the Act shall be the property of the state government or the central government as the case may be, the other provisions like Section 51(2) and Chapter VI-A provide for forfeiture of the property in certain situations. However, for the seized property used for commission of offence to be the property of the state government or the central government under Section 39(1)(d), in our view, offence against the Act has to be legally ascertained and adjudicated by a competent court of jurisdiction.

31. In *Madhukar Rao*[4], a*lbeit,* the question was little different but this Court considered the ambit and scope of Section 39(1)(d). That matter reached this Court from a Full Bench decision of the Madhya Pradesh High Court. The question before the Full Bench was whether as a result of deletion of sub-section (2) of Section 50 withdrawing power of interim release, there existed any power with the authorities under the 1972 Act or the Code to release the vehicle used in the course of alleged commission of offence under the Act. The Full Bench of the High Court held that any property including vehicle seized on accusation or suspicion of commission of offence under the 1972 Act can be released by the Magistrate pending trial in accordance with Section 50(4) read with Section 451 of the Code. The Full Bench also held that mere seizure of any property including vehicle on the charge of commission of offence would not make the property to be of the State Government under Section 39(1)(d) of the 1972 Act. Against the decision of the Full Bench, the State of Madhya Pradesh preferred special leave petition in which leave was granted. This Court extensively considered the statutory provisions and approved the view of the Full Bench of the High Court that deletion of sub-section (2) and its replacment by sub-section (3)(A) in Section 50 of the 1972 Act had no effect on the powers of the Court to release the seized vehicle during

the pendency of trial under the provisions of the Code. While dealing with Section 39(1)(d), this Court also approved the view of the Full Bench of the High Court that Section 39(1)(d) would come into play only after a court of competent jurisdiction found that accusation and allegations made against the accused were true and recorded the finding that the seized article was, as a matter of fact, used in the commission of offence. This Court said :

> " ……. . Any attempt to operationalise Section 39(1)(*d*) of the Act merely on the basis of seizure and accusations/ allegations levelled by the departmental authorities would bring it into conflict with the constitutional provisions and would render it unconstitutional and invalid……."

32. We are in complete agreement with the view of this Court in *Madhukar Rao4* that on the basis of seizure and mere accusations/allegations, Section 39(1)(d) of the 1972 Act cannot be allowed to operate and if it is so done, it would be hit by the constitutional provisions.

33. Now, we have to see whether Section 54(2) of the 1972 Act, after its amendment by Act 16 of 2003, empowers the specified officer to order forfeiture of the property, in respect of the offences against the Act suspected to have been committed by such person, on composition of such offence. In other words, whether in the absence of any specific provision in Section 54(2) that the property seized shall be released, the specified officer empowered to compound offences is authorized to order forfeiture of the seized property and not return the property to the person from whom it has been seized.

34. Mr. R. Sundervardhan, learned senior counsel for the appellants was right in contending that the composition of the offence under Section 54 of the 1972 Act is not during the course of trial or in the trial of a compoundable offence. He is also right in his submission that compounding under Section 54 is a departmental compounding and does not amount to an

acquittal. But then, what is the sequitar? What is the effect of such departmental composition of offence under Section 54(1) of the 1972 Act?

35. The observations made by this Court in *Biswabahan Das2* may be useful in order to understand the effect of compounding offence/s. That was a case in which this Court was concerned with the provision for composition of forest offence under Assam Forest Regulation, 1891 – a provision quite similar to Section 54 of the 1972 Act prior to amendment by Act 16 of 2003. This Court said:

> "……It must be borne in mind that although the marginal note to s. 62 of the Assam Regulation is "power to compound offences" the word "compounding" is not used in sub-s. (1) clause (a) of that section. That provision only empowers a forest officer to accept compensation for a forest offence from a person suspected of having committed it. The person so suspected can avoid being proceeded with for the offence by rendering compensation. He may think that he was being unjustly suspected of an offence and he ought to defend himself or he may consider it prudent on his part to pay such compensation in order to avoid the harassment of a prosecution even when he is of the view that he had not committed the offence. By adopting the latter course he does not remove the suspicion of having committed the offence unless he is to have such benefit conferred on him by some provision of law. In effect the payment of compensation amounts to his acceptance of the truth of the charge against him. Sub-s. (2) of s. 62 only protects him with regard to further proceedings, but has not the effect of clearing his character or vindicating his conduct."

36. There may be myriad reasons, for a person, suspected of commission of offence, to apply for composition of the offence. What is important is not the reason for composition of offence but the effect of composition. The effect of composition

of offence has to be found in the statute itself. Section 54(2) provides that on payment of money to the empowered officer, the suspected person, if in custody, shall be discharged and no further proceedings in respect of the offence shall be taken against such person. In terms of sub-section (2) of Section 54, therefore, on composition of the offence, the suspected person is saved from criminal prosecution, and from being subjected to further proceedings in respect of the offence.

37. Section 54(2) of the 1972 Act, prior to the amendment by Act 16 of 2003, authorized the empowered officer, on payment of value of the property liable to be forfeited, to release the seized property, other than the government property. The provision underwent changes w.e.f. April 1, 2003 and the provision for release of the seized property has been deleted. Does the provision in new Section 54(2) authorize the empowered officer to order forfeiture of the seized property to the state government? We think not. In the first place, by deletion of such expression, it cannot be said that the Parliament intended to confer power on the specified officer to order forfeiture of the seized property which is nothing but one form of penalty in the context of the 1972 Act. Had the Parliament intended to do so, it would have made an express provision in that regard. Such conferment of power of penalty upon the specified officer cannot be read by implication in Section 54(2). Secondly, any power of forfeiture conferred upon Executive authority merely on suspicion or accusation may amount to depriving a person of his property without authority of law. Such power cannot be readily read by relying on the Statement of Objects and Reasons (Act 16 of 2003) without any express provision in the statute.

38. Way back in 1960, this Court in *The Central Bank of India* & Ors*. v.* Their W*orkmen, etc.*[12] said that the Statement of Objects and Reasons is not admissible for construing the section, far less can it control the actual words used. It has been

12. AIR 1960 SC 12.

reiterated by this Court time and again that the reference to the Statement of Objects and Reasons is for understanding the enactment and the purpose is to ascertain the conditions prevailing at the time the Bill was introduced and the objects sought to be achieved by the proposed amendment; the Statement of Objects and Reasons is not ordinarily used to determine the true meaning of the substantive provisions of the statute. As an aid to the construction of a statute, the Statement of Objects and Reasons appended to the Bill, ordinarily must be avoided.

39. It is true that by Act 16 of 2003, the Parliament has consciously deleted from Section 54 the provision concerning release of seized property liable to be forfeited on payment of value of such property but the plain language that is retained in Section 54 (2) after amendment which reads, 'on payment of such sum of money to such officer, the suspected person, if in custody, shall be discharged and no further proceedings in respect of the offence shall be taken against such person' does not show that the Legislature intended to empower the specified officer under Section 54 to forfeit the seized property used by the suspected person in commission of offence against the Act. There is no replacement of the deleted words by any express provision. Section 54 substituted by Act 16 of 2003 does not speak of seized property at all – neither its return nor its forfeiture – while providing for composition of offence. The property seized under Section 50(1)(c) and Section 50(3A) has to be dealt with by the Magistrate according to law. This is made clear by Section 50(4) which provides that things seized shall be taken before a Magistrate to be dealt with according to law. Section 54 substituted by Act 16 of 2003 does not empower the specified officer to deal with the seized property. In this view of the matter, we are unable to accept the submission of the learned senior counsel for the appellants that a comparative reading of pre-amended Section 54(2) and Section 54 (2) as substituted by Act 16 of 2003 makes the legislative intent clear that seized articles shall be forfeited on

composition of the offence under the 1972 Act. When the language of the statutory provision is plain and clear no external aid is required and the legislative intention has to be gathered from the language employed. In our view, neither Section 54(2) of the 1972 Act by itself nor Section 54(2) read with Section 39(1)(d) or any other provision of the 1972 Act empowers and authorizes the specified officer under Section 54, on composition of the offence, to deal with the seized property much less order forfeiture of the seized property used by the person suspected of commission of offence against the Act.

40. In view of the above, the order passed by the Conservator of Forests, Nizamabad for forfeiture of the vehicle and two rifles to the state government is *de hors* the provisions of the 1972 Act and unsustainable. The High Court has rightly set aside such illegal order. However, the Single Judge was not right in his order dated March 29, 2005 in directing the respondents therein (present appellants) to release the vehicle and rifles. The Division Bench also erred in maintaining the above direction. Since the items were seized in exercise of the power under Section 50(1)(c), the seized property has to be dealt with by the Magistrate under Section 50(4) of the 1972 Act. The respondent nos. 1 to 3 must accordingly apply to the concerned Magistrate for the return of seized items who obviously will consider such application according to law.

41. We hold, as we must, that a specified officer empowered under Section 54(1) of the 1972 Act as substituted by Act 16 of 2003 to compound offences, has no power, competence or authority to order forfeiture of the seized items on composition of the offence by a person who is suspected to have committed offence against the Act. Our answer to the question framed at the outset is in the negative.

42. The appeal is disposed of as indicated above with no order as to costs.

D.G. Appeal disposed of.

PANCHO

v.

STATE OF HARYANA

(Criminal Appeal No.1050 of 2005)

OCTOBER 20, 2011

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

PENAL CODE, 1860:

ss.302, 302/34 and 392 – Four accused stated to have caused death of a tractor owner and taken away his tractor – Five months later extra-judicial confession stated to have been made by one of the accused – Three accused arrested and fourth died meanwhile – A country made pistol and some parts stated to have been recovered from the accused – Conviction by trial court – Life imprisonment to two accused and sentence of death awarded to the accused who was stated to have shot at the deceased – High Court commuting the death sentence to life imprisonment – Appeals by two accused – Held: The extra-judicial confession made by one of the accused is the main plank of prosecution case – Five months delay in the extra-judicial confession creates a doubt about its credibility – Besides, the said confession was made to a person who resides in a different village 35-40 kms away from accused's village and had no intimacy with the accused concerned – There is discrepancy as to who shot at the deceased – Further, the accused, in his statement u/s. 313 CrPC denied to have made the said confessional statement – This further makes a dent in the extra-judicial confession – There being no credible evidence to upheld the conviction, the impugned judgments and orders are set aside – Evidence Act, 1872 – ss. 3 and 30 – Investigation – Recovery of incriminating articles.

EVIDENCE ACT, 1872:

ss. 3 and 30 – Extra-judicial confession of a co-accused – Evidentiary value of – Held: In dealing with a case against an accused, the court cannot start with the confession of a co-accused; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence – In the instant case, except the evidence of alleged belated recovery of certain articles, which have been found to be doubtful, there is no other evidence on record to connect the accused to the offence – Therefore, he cannot be convicted on the basis of the alleged extra-judicial confession of the co-accused – Penal Code, 1860 – ss. 302 and 392.

INVESTIGATION:

Incriminating articles recovered five months after the incident at the instance of accused – Held: The brother of the deceased has signed the discovery statements of all the accused – Articles which are stated to have been discovered are easily available in the market – Belated discovery of these articles raises a question about their intrinsic evidentiary value – The recovery of country made pistol is made more than about six months after the date of incident – The prosecution has not led any evidence to show as to in whose custody this pistol was during the period of six months after the incident – Accused, in his statement u/s. 313 Cr.P.C. has denied that any such recovery was made from him – The evidence relating to discovery of these articles must, therefore, be rejected – Penal Code, 1860 – ss. 302 and 392.

Accused A-1, A-2 and A-3 were prosecuted for an offence punishable u/s 396 IPC. According to the prosecution case, as stated in the FIR lodged by PW 1, on 7.2.1999, his brother 'KS' left the house for the Sugar

Mill on his tractor in order to bring back two trolleys which had been parked outside the Sugar Mill; that on 8.2.1999 at about 7.00 a.m., information was received that the dead body of 'KS' was lying in a pool of blood in the fields 10 feet away from the road; that both the trolleys were parked on the road side but the tractor was not there; that some unknown persons had shot the said 'KS' dead and taken away the tractor. On 31.7.1999, A-1 was said to have approached PW 4, an ex-member of Panchayat, and told him that he along with A-2, A-3 and the fourth accused (who died later), went on a truck; A-2 fired a shot from a country made pistol at 'KS'; A-3 stopped the tractor and threw the dead body in a wheat field; they left the trolley and took away the tractor to accused 'B' (absconding) and asked him to sell the tractor. However, as the tractor could not be sold, they removed some of its parts and left it on the road. A-1 was produced before the Inspector of Police (PW24). He was arrested and interrogated and on his disclosure statement and at the instance of the fourth accused, some parts of the tractor were recovered. On 16.8.1999, PW 24 arrested A-2 and recovered a country made postol from him. On 25.9.1999, A-3 was arrested. The fourth accused died after the charge had been framed. The trial court found that only 4 persons had participated in the crime and, as such, convicted A-2 u/s 302 IPC and A-1 and A-3 u/s 302/34 IPC. A-2 was sentenced to death; whereas A-1 and A-3 were awarded life sentence. All the three were further convicted and sentenced to 10 years RI u/s 392 IPC. The High Court interfered only to the limited extent that it commuted the death sentence of A-2 to imprisonment for life. A-1 and A-2 filed the appeals.

Allowing the appeals, the Court

HELD: 1.1. The extra-judicial confession made by A-1 is the main plank of the prosecution case. It is true that

an extra-judicial confession can be used against its maker, but as a matter of caution, courts look for corroboration to the same from other evidence on record. [para 10] [1183-C-D]

Gopal Sah v. State of Bihar **(2008) 17 SCC 128 – referred to**

1.2. In the instant case, the incident is stated to have occurred in the night intervening 7/2/1999 and 8/2/1999. About five months later, on 31/7/1999, A1 is stated to have made a confession. This delay creates a doubt about its credibility. Besides, PW-4 before whom A1 is stated to have confessed, in his evidence has stated that his village is about 35 to 40 k.m. from the village of A1 and none of his relatives stay in that village. He has stated that he knew A1; that he had come to his village at about 7.30 to 8.00 a.m. and stayed with him for 2.00 to 2.30 hours. It does not stand to reason that A1 would go voluntarily to PW-4, who stayed in another village which is about 35 to 40 k.m. away from his village and make a confessional statement to him. The prosecution evidence does not indicate that A1and PW-4 knew each other intimately. Therefore, the prosecution case that A1 made any extra-judicial confession to PW-4 cannot be accepted. Further, PW-4 stated that A1 had confessed that A2 had shot dead deceased 'KS' with country made pistol. PW-24, the Inspector of Police, has stated that A1 confessed that they had shot dead the deceased. He does not say that A1 told him that A2 had fired at the deceased. A1, in his statement recorded u/s 313 CrPC, has denied that he made any such statement. This retraction further makes a dent in the alleged extra-judicial confession. [para 11] [1183-F-H; 1184-A-D]

2.1. A2 was arrested on 16/8/1999. According to the prosecution, his search resulted in recovery of a country

made pistol (Ex-P/12) of .315 bore. The recovery of country made pistol is made more than about six months after the date of incident. The prosecution has not led any evidence to show as to in whose custody this pistol was during the period of six months after the incident. A-2 in his statement recorded u/s. 313 Cr.P.C. has denied that any such recovery was made from him. Even assuming that the recovery is proved, in the absence of any other cogent, it cannot be held that it is sufficient to establish that A2 caused the fatal firearm injury to deceased with the said pistol. [para 12] [1184-E-H; 1185-A]

2.2. The prosecution has relied on certain other discoveries made at the instance of the accused. These discoveries are made five months after the incident and significantly, PW-15 who is the brother of the deceased, is stated to be present when the discoveries were effected and all articles are identified by him. Pertinently, he has signed the discovery statements of all the accused. The articles which are stated to have been discovered are easily available in the market. Belated discovery of these articles raises a question about their intrinsic evidentiary value. Besides, if as contended by the prosecution, the accused wanted to sell parts of the tractor, it is difficult to believe that they would preserve them till 1/8/1999. The evidence relating to discovery of these articles must, therefore, be rejected. [para 13] [1185-B-F]

3.1. As against A2, the prosecution is relying mainly on the extra-judicial confessional statement of A1. However, A1 retracted his confession. This Court in the case of *Haricharan Kurmi clarified that though confession may be regarded as evidence in generic sense because of the provisions of s. 30 of the Evidence Act, the fact remains that it is not evidence as defined in s.3 thereof. Therefore, in dealing with a case against an**

accused, the court cannot start with the confession of a co-accused; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. [para 11, 14 and 16] [1184-C-D; 1185-G; 1187-D-E]

** Haricharan Kurmi v. State Bihar* **1964 SCR 623 =AIR 1964 SC 1184;** *Kashmira Singh v. The State of Madhya Pradesh,* **1952 SCR 526 = AIR 1952 SC 159 – referred to**

Bhuboni Sahu v. The King **76 Indian Appeals 147;** *Emperor v. Lalit Mohan Chukerbutty,* **38 Cal. 559 – *referred to***

3.2. In the case on hand, so far as A2 is concerned, except the evidence of alleged belated discovery of certain articles at his instance, which have already been found to be doubtful, there is no other evidence on record to connect him to the offence in question. Therefore, he cannot be convicted on the basis of the alleged extra-judicial confession of co-accused A1, which is also not credible. [para 17] [1187-F-H]

4. Once the extra-judicial confession stated to have been made by A1 is obliterated and kept out of consideration, his conviction also cannot be sustained because the alleged discovery of articles at his instance cannot be relied upon. There is thus, no credible evidence to uphold the conviction of A1. In this view of the matter, the impugned judgments and orders are set aside. [para 17 and 18] [1187-F-H; 1188-A-B]

Case Law Reference:

(2008) 17 SCC 128	**referred to**	**para 10**

1952 SCR 526	**referred to**	**para 15**
76 Indian Appeals 147	**referred to**	**para 15**
38 Cal. 559	**referred to**	**para 15**
1964 SCR 623	**referred to**	**para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1050 of 2005.

From the Judgment & Order dated 3.5.2005 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 854-DB of 2004.

WITH

Crl. Appeal No. 1222 of 2005.

U.U. Lalit, (A.C.), S.R. Sharma (for S. Srinivasan), Dr. Vipin Gupta, Rajeev Gaur 'Naseem' (for Kamal Mohan Gupta) for the appearing parties.

The Judgment of the Court was delivered by

(SMT.) RANJANA PRAKASH DESAI, J. 1. These two appeals, by special leave, can be disposed of by a common judgment as they arise out of the same facts and challenge the same judgment and order dated 3/5/2005 of the Punjab and Haryana High Court. Criminal Appeal No.1050 of 2005 is filed by original accused 2 – Pancho and Criminal Appeal No.1222 of 2005 is filed by original accused 1 – Pratham. For the sake of convenience, original accused 1 - Pratham is referred to as "A1-Pratham", original accused 2 – Pancho is referred to as "A2-Pancho" and original accused 3 – Gajraj is referred to as "A3-Gajraj".

2. A1-Pratham, A2-Pancho and A3-Gajraj were tried by the Additional Sessions Judge, Faridabad in Sessions Case No.40 of 11.12.2002 / 30.11.1999 for offence punishable under Section 396 of the Indian Penal Code (for short, "**the IPC**").

According to the prosecution, two more persons were involved in the offence in question viz. Shishu Ram @ Shishu, who expired after the charge was framed and one Bhago, who is absconding. He is declared absconder.

3. Shortly stated the case of the prosecution is that PW-1 Jagat Singh, brother of deceased Kartar Singh lodged FIR (Ex-PA) on 8/2/1999 at 8.40 a.m. with PW-12 ASI Keshav Ram at Sadar Palwal, Faridabad. PW-1 Jagat Singh reported that on 7/2/1999 deceased Kartar Singh had left their house for the Sugar Mill, Palwal. He drove his own tractor. He was to bring back two trolleys of sugar cane which were already parked outside the Sugar Mill. PW-1 Jagat Singh further reported that on 8/2/1999 at about 7.00 a.m., they were informed that the dead body of Kartar Singh was lying in a pool of blood at a distance of 10 feet from the road in the field of PW-1 Jagat Singh, a resident of Gopalgarh. Both the trolleys were parked on the road side but the tractor was not at the spot. PW-1 Jagat Singh further reported that some unknown persons opened fire at deceased Kartar Singh due to which he sustained injuries on his waist and succumbed to the said injuries. PW-1 Jagat Singh further reported that the said unknown persons had taken away the tractor.

4. It appears that till 31/7/1999, the investigating agency did not make any progress. According to the prosecution, on 31/7/1999, A1-Pratham approached PW-4 Nathi Singh, Ex-Member of Panchayat and told him that on 5/2/1999 when he, accused-Shishu and A3-Gajraj were sitting in the house of A1-Pratham, A3-Gajraj told them that they were in need of money. A2-Pancho told them that he had a country made pistol. They discussed about the Sugar Mill at Bamnikhera where some farmers came with new tractors. They planned a robbery. They went on a truck to Bamnikhera at 7.00 p.m. where A3-Gajraj and accused-Shishu had a conversation with deceased Kartar Singh. When the tractor was unloaded, both of them

accompanied deceased Kartar Singh in his tractor. Accused-Shishu and A1-Pratham were standing outside. When the tractor traveled a distance of two killas, A3-Gajraj gave a signal to A2-Pancho, who fired a shot at deceased Kartar Singh from his country made pistol. A3-Gajraj stopped the tractor, removed the dead body of deceased Kartar Singh and threw it in a wheat field. They left the tractor trolley at the spot and ran away with the tractor so as to reach Paramendra via Barsana. A1-Pratham is further stated to have told PW-4 Nathi Singh that they took the tractor to accused-Bhago and narrated the entire incident to him and asked him to sell the tractor and thereafter they went back to their house. A1-Pratham is further stated to have told PW-4 Nathi Singh that they came back after a couple of days and came to know that the tractor could not be sold. Therefore, they removed some parts of the tractor and left it on the road near Bharatpur. As desired by A1-Pratham, he was produced before PW-24 Inspector Raghbir Singh on 31/7/1999 by PW-4 Nathi Singh. PW-24 Inspector Raghbir Singh arrested A1-Pratham and interrogated him. According to PW-24 Raghbir Singh, during interrogation, A1-Pratham told him that about 3-4 months back, he along with accused Shishu and other accused had snatched a tractor, shot the driver of that tractor, thrown his body in the field and taken the tractor with them. On the same day, accused-Shishu was arrested by PW-24 Raghbir Singh.

5. According to the prosecution, on 1/8/1999, A1-Pratham disclosed that he had left the tractor on the road near Bharatpur, concealed some parts, which had come to his share i.e. the seat cover, one thin rod along with bumper in his field. In pursuance to this disclosure statement, the said articles were recovered at the instance of A1-Pratham. A battery box with one tool box is stated to have been recovered at the instance of accused-Shishu. On 16/8/1999, PW-24 Inspector Raghbir Singh arrested A2-Pancho near Dabchick on the basis of suspicion. His personal search led to recovery of a country

made pistol of .315 bore (Ex-P12) which was taken into possession vide recovery memo (Ex-PL). It was attested by PW-15 Samunder Singh, brother of deceased Kartar Singh and one Hardev. On a statement made by A2-Pancho, the police also discovered an iron pipe and three pieces of rope from under stones at Village Barsana which were identified by PW-15 Samunder Singh to be that of their tractor. They were taken into possession vide recovery memo (Ex-PM/1). On 25/9/1999, A3-Gajraj was arrested and at his instance, three pieces of ropes are stated to have been recovered.

6. Though the accused were charged under Section 396 of the IPC, learned Sessions Judge was of the view that conviction of the three accused cannot be recorded under Section 396 of the IPC as only four persons had participated in the crime. Learned Sessions Judge was of the view further that A2-Pancho could be convicted under Section 302 of the IPC simplicitor and A1-Pratham and A3-Gajraj could be convicted under Section 302 read with Section 34 of the IPC. According to him, all the accused were also liable to be convicted under Section 392 of the IPC. So far as A2-Pancho is concerned, learned Sessions Judge sentenced him to death for offence under Section 302 of the IPC as according to him, it was a heinous crime which would have wide ramification on the life of agricultural community. He sentenced A1-Pratham and A3-Gajraj to undergo imprisonment for life under Section 302 read with Section 34 of the IPC. All the accused were sentenced to undergo rigorous imprisonment for 10 years for the offence under Section 392 of the IPC.

7. While dealing with the reference under Section 366 of the Criminal Procedure Code (for short, "**the Code**") and the criminal appeal filed by A1-Pratham and A3-Gajraj, the High Court commuted the sentence of death imposed on A2-Pancho to imprisonment for life. The High Court confirmed the sentence of life imprisonment imposed on A1-Pratham and A3-Gajraj. The High Court maintained the sentence imposed on the

accused for offence under Section 392 of the IPC.

8. We have heard counsel for the parties. We also requested Mr. Lalit, learned senior counsel to assist us. In deference to our request, Mr. Lalit has, as usual, ably assisted us.

9. There is no dispute about the fact that deceased Kartar Singh died on account of firearm injuries. Evidence of PW-17 Dr. Jagmohan Mittal, who did the postmortem on the dead body of deceased Kartar Singh is clear on that point.

10. Extra-judicial confession made by A1-Pratham is the main plank of the prosecution case. It is true that an extra-judicial confession can be used against its maker, but as a matter of caution, courts look for corroboration to the same from other evidence on record. In *Gopal Sah v. State of Bihar*[1], this court while dealing with an extra-judicial confession held that an extra-judicial confession is on the face of it, a weak evidence and the courts are reluctant, in the absence of chain of cogent circumstances, to rely on it for the purpose of recording a conviction. We must, therefore, first ascertain whether extra-judicial confession of A1-Pratham inspires confidence and then find out whether there are other cogent circumstances on record, to support it.

11. We have already referred to the evidence of PW-4 Nathi Singh before whom A1-Pratham is stated to have confessed that A2-Pancho had shot dead deceased Kartar Singh with country made pistol. PW-24 Inspector Raghbir Singh has stated that A1-Pratham confessed that they had shot dead deceased Kartar Singh. He does not say that A1-Pratham told him that A2-Pancho had fired at deceased Kartar Singh. The incident is stated to have occurred in the night intervening 7/2/1999 and 8/2/1999. About five months later, on 31/7/1999, A1-Pratham is stated to have made a confession. This delay

1. (2008) 17 SCC 128.

creates a doubt about its credibility. Besides, in his evidence PW-4 Nathi Singh has stated that his village is about 35 to 40 k.m. from the village of A1-Pratham and none of his relatives stay in that village. He has stated that he knew A1-Pratham; that he had come to his village at about 7.30 to 8.00 a.m. and stayed with him for 2.00 to 2.30 hours. It does not stand to reason that A1-Pratham would go voluntarily to PW-4 Nathi Singh, who stayed in another village which is about 35 to 40 k.m. away from his village and make a confessional statement to him. The prosecution evidence does not indicate that A1-Pratham and PW-4 Nathi Singh knew each other intimately. It is, therefore, difficult to accept the prosecution case that A1-Pratham made any extra-judicial confession to PW-4 Nathi Singh. It may be stated here that in his statement recorded under Section 313 of the Code, A1-Pratham has denied that he made any such statement. This retraction further makes a dent in the alleged extra-judicial confession.

12. A2-Pancho was arrested on 16/8/1999 near Dabchick Modale. According to the prosecution, his search resulted in recovery of a country made pistol (Ex-P/12) of .315 bore. The recovery of country made pistol is made more than about six months after the date of incident. It is true that the report of FSL (Ex-PT) states that the country made pistol marked W/1 was test fired and that bullet marked BC/1 taken out from the body of deceased Kartar Singh had been fired from the said country made pistol. The report also states that the holes on the clothes of deceased Kartar Singh which were sent for examination, had been caused by bullet projectiles. We are, however, of the opinion that, on the basis of this report, it is difficult to come to a conclusion that A2-Pancho was responsible for the firearm injury caused to deceased Kartar Singh. The prosecution has not led any evidence to show as to in whose custody this pistol was during the period of six months after the incident. In his statement recorded under Section 313 of the Code, A2-Pancho has denied that any such recovery was made from him. Even

assuming that the recovery is proved, we are unable to hold in the absence of any other cogent evidence that it is sufficient to establish that A2-Pancho caused the fatal firearm injury to deceased Kartar Singh with the said pistol.

13. Apart from the pistol which is stated to have been recovered from A2-Pancho, the prosecution has relied on certain other discoveries made at the instance of the accused. On 1/8/1999, pursuant to the statement made by A1-Pratham, one bumper, one patli and one seat cover are stated to have been discovered. PW-15 Samunder Singh, brother of the deceased identified the said articles to be that of their tractor. On 16/8/1999 at the instance of A1-Pancho, three pieces of ropes along with an iron pipe are stated to have been discovered. PW-15 Samunder Singh identified them as parts of their tractor. These discoveries are made five months after the incident and significantly, PW-15 Samunder Singh, who is the brother of the deceased, is stated to be present when the discoveries were effected and all articles are identified by him. Pertinently, he has signed the discovery statements of all the accused. Articles which are stated to have been discovered are easily available in the market. There is nothing special about them. Belated discovery of these articles raises a question about their intrinsic evidentiary value. Besides, if as contended by the prosecution, the accused wanted to sell parts of the tractor, it is difficult to believe that they would preserve them till 1/8/1999. The evidence relating to discovery of these articles must, therefore, be rejected.

14. As against A2-Pancho, the prosecution is relying mainly on the extra-judicial confessional statement of A1-Pratham. The question which needs to be considered is what is the evidentiary value of a retracted confession of a co-accused?

15. The law on this point is well settled by catena of judgments of this court. We may, however, refer to only two judgments to which our attention is drawn by Mr. Lalit, learned

senior counsel. In *Kashmira Singh v. The State of Madhya Pradesh*[2], referring to the judgment of the Privy Council in *Bhuboni Sahu v. The King*[3], and observations of Sir Lawrence Jenkins in *Emperor v. Lalit Mohan Chukerbutty*[4], this court observed that proper way to approach a case involving confession of a co-accused is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then it is not necessary to call the confession in aid. This court further noted that cases may arise where the judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event, the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession, he would not be prepared to accept.

16. In *Haricharan Kurmi v. State Bihar*[5], the Constitution Bench of this court was again considering the same question. The Constitution Bench referred to Section 3 of the Evidence Act and observed that confession of a co-accused is not evidence within the meaning of Section 3 of the Evidence Act. It is neither oral statement which the court permits or requires to be made before it as per Section 3(1) of the Evidence Act nor does it fall in the category of evidence referred to in Section 3(2) of the Evidence Act which covers all documents produced for the inspection of the court. This court observed that even then Section 30 provides that a confession may be taken into consideration not only against its maker, but also against a co-accused. Thus, though such a confession may not be evidence as strictly defined by Section 3 of the Evidence Act, it is an element which may be taken into consideration by the criminal

2. AIR 1952 SC 159.
3. 76 Indian Appeals 147.
4. 38 Cal. 559.
5. AIR 1964 SC 1184.

court and in that sense, it may be described as evidence in a non-technical way. This court further observed that Section 30 merely enables the court to take the confession into account. It is, not obligatory on the court to take the confession into account. This court reiterated that a confession cannot be treated as substantive evidence against a co-accused. Where the prosecution relies upon the confession of one accused against another, the proper approach is to consider the other evidence against such an accused and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused, the court turns to the confession with a view to assuring itself that the conclusion which it is inclined to draw from the other evidence is right. This Court clarified that though confession may be regarded as evidence in generic sense because of the provisions of Section 30 of the Evidence Act, the fact remains that it is not evidence as defined in Section 3 of the Evidence Act. Therefore, in dealing with a case against an accused, the court cannot start with the confession of a co-accused; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence.

17. Applying the above principles to the case on hand, we find that so far as A2-Pancho is concerned, except the evidence of alleged belated discovery of certain articles at his instance, which we have already found to be doubtful, there is no other evidence on record to connect him to the offence in question. When there is no other evidence of sterling quality on record establishing his involvement, he cannot be convicted on the basis of the alleged extra-judicial confession of the co-accused A1-Pratham, which in our opinion, is also not credible. Once A1-Pratham's extra-judicial confession is obliterated and kept out of consideration, his conviction also cannot be sustained

because we have come to the conclusion that the alleged discovery of articles at his instance cannot be relied upon. There is thus, no credible evidence to persuade us to uphold the conviction of A1-Pratham.

18. In view of the above, we set aside the impugned judgment and order. A1-Pratham and A2-Pancho are on bail. Their bail bonds stand discharged.

19. Appeals are disposed of in the aforestated terms.

R.P. Appeals allowed.

THE COMMANDANT, 22 BATTALION, CRPF SRINAGAR, C/O 56/APO & ORS.

v.

SURINDER KUMAR

(Civil Appeal No. 2177 of 2006)

OCTOBER 20, 2011

[P. SATHASIVAM AND A.K. PATNAIK, JJ.]

Central Reserve Police Force Act, 1949 – ss. 10 (n) and 12 (1) – Respondent-constable in Central Reserve Police Force left his patrolling party without permission while on duty in the operational area for 20 minutes and returned on his own – He was found in state of intoxication and got enraged when Assistant Commandant took him for medical examination – Also snatched rifle of the Assistant Commandant and pointed out barrel towards him – Respondent convicted and sentenced to imprisonment till the rising of the court u/s 10 (n) and dismissed from service by order passed u/s. 12 (1) – Writ Petition by the constable, dismissed by the Single Judge – However, the Division Bench of the High Court held that the punishment of dismissal was disproportionate since the respondent was punished for imprisonment for a less heinous offence and only till the rising of the court and directed the appellants to reconsider the nature and quantum of punishment awarded to the respondent – On appeal, held: For less heinous offences enumerated in s. 10, a person was liable for punishment with imprisonment and u/s. 12(1) every person sentenced under the Act to imprisonment was liable to be dismissed from the CRPF – On facts, the acts of indiscipline for which the respondent had been sentenced for imprisonment were serious and grave for a disciplined force – The competent authority was right in imposing the punishment of dismissal from service – Instant case is not where the punishment of dismissal was strikingly

disproportionate or where on the face of it there was perversity or irrationality – Thus, the order passed by the Division Bench of the High Court is set aside.

It is alleged that respondent, Constable in the Central Reserve Police Force was detailed with vehicle to carry patrolling party but he left the vehicle unattended without permission of his superior officer for 20 minutes. He consumed illicit alcohol while on duty and in an inebriated state of mind misbehaved with his superior officer, snatched his AK-47 rifle and pointed the barrel of the rifle to him. The respondent was held guilty of charges and convicted and sentenced to imprisonment till the rising of the Court u/s. 10 of the Central Reserve Police Force Act, 1949. He was also dismissed from service by order passed under Section 12 (1) of the Act. The respondent filed a writ petition. The Single Judge of the High Court dismissed the same. The Division Bench held that the punishment of dismissal of the respondent was disproportionate in as much as his conviction was till the rising of the court for having committed a less heinous offence and directed the appellants to reconsider the nature and quantum of punishment awarded to the respondent. Therefore, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1. It is clear from Section 10(n) of the Central Reserve Police Force Act, 1949 that a member of the CRPF who is guilty of any act or omission which is prejudicial to good order and discipline is punishable with imprisonment for a term which may extend to one year or with fine which may extend to three months' pay, or with both. Section 12(1) of the Act provides that every person sentenced under this Act to imprisonment may be dismissed from the CRPF. The word "may" in Section 12(1) of the Act confers a discretion on the competent

authority whether or not to dismiss a member of the CRPF from service pursuant to a sentence of imprisonment under the Act and while exercising the discretion, the competent authority has to consider various relevant factors including the nature of the offence for which he has been sentenced to imprisonment. [Para 6] [1195-G-H; 1196-A-B]

1.2. In the instant case, the acts of indiscipline of the respondent have been established beyond doubt by the Assistant Commandant-cum-Magistrate. These acts of indiscipline were obviously prejudicial to the good order and discipline and when committed by a member of a disciplined force like the CRPF were serious enough to warrant dismissal from service. [Para 7] [1196-C-E]

1.3. The Division Bench of the High Court took a view in the impugned order that as the respondent has been punished for imprisonment for a less heinous offence and only till the rising of the court, the punishment of dismissal was disproportionate. The Division Bench of the High Court failed to appreciate that for less heinous offences enumerated in Section 10 of the Act, a person was liable for punishment with imprisonment and under Section 12(1) of the Act every person sentenced under the Act to imprisonment was liable to be dismissed from the CRPF. In other words, the legislative intent was that once a member of the CRPF was sentenced for imprisonment under the Act, he was also liable for dismissal from service. The Division Bench of the High Court should have looked into the acts of indiscipline proved against the respondent for which he has been sentenced to imprisonment and then decided whether the dismissal of the respondent from service was disproportionate to the gravity of acts of indiscipline. The acts of indiscipline for which the respondent had been sentenced for imprisonment were serious and grave for

a disciplined force. Therefore, the competent authority was right in imposing the punishment of dismissal from service. [Para 8] [1196-F-H; 1197-A-B]

Union of India vs. Parma Nanda **AIR 1989 SC 1185: 1989 (2) SCR 19 – referred to.**

1.4. The instant case is not one of those cases where the punishment of dismissal was strikingly disproportionate or where on the face of it there was perversity or irrationality, the Division Bench of the High Court ought not to have interfered with the order of dismissal from service. The impugned order of the Division Bench of the High Court is set aside. [Paras 9 and 10] [1197-D-F]

Union of India vs. R.K. Sharma **AIR 2001 SC 3053: 2001 (3) Suppl. SCR 664 – referred to.**

Case Law Reference:

1989 (2) SCR 19	**Referred to.**	**Para 5**
2001 (3) Suppl. SCR 664	**Referred to.**	**Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2177 of 2006.

From the Judgment & Order dated 12.2.2004 of the High Court of Jammu and Kashmir in L.P.A. No. 600-A of 1999.

Ashok Bhan, Rashmi Malhotra, Sadhna Sandhu, Shreekant N. Terdal for the Appellants.

J.P. Dhanda, Amrendra Kr. Singh for the Respondent.

The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. This is an appeal against the order dated 12.02.2004 of the Division Bench of the Jammu and

Kashmir High Court in L.P.A. No.600-A 1999 (for short 'the impugned order').

2. The facts very briefly are that the respondent was working as a Constable in the Central Reserve Police Force (for short 'the CRPF'). A complaint was lodged against the respondent. It was alleged in the complaint that he was detailed with vehicle no.25 to carry patrolling party on Chandel Palel Road but he left the vehicle unattended and absented himself without permission of his superior officer and reported on his own after 20 minutes. It was also alleged in the complaint that while he was on duty, he consumed illicit alcohol and in an inebriated state of mind misbehaved with his superior officer H.N. Singh, snatched his AK-47 rifle and pointed the barrel of the rifle to him and on the intervention of Lachhi Ram, Assistant Commandant, the barrel of the rifle was pointed upward and an untoward incident was avoided. A copy of the complaint was served on the respondent and a disciplinary enquiry was conducted and the Assistant Commandant-cum-Magistrate First Class in his order dated 10.06.1993 found the respondent guilty of charges and convicted him and sentenced him to imprisonment till the rising of the Court. By a separate order dated 10.06.1993, the Commandant also dismissed the respondent from service.

3. Aggrieved, the respondent challenged the order dated 10.06.1993 passed by the Assistant Commandant-cum-Magistrate First Class as well as the order of dismissal dated 10.06.1993 passed by the Commandant in Writ Petition No.555 of 1994 before the High Court. The Learned Single Judge dismissed the writ petition on 09.11.1998. The respondent challenged the order of the learned Single Judge in L.P.A. No. 600-A 1999 and by the impugned order, the Division Bench held that the punishment of dismissal of the respondent was disproportionate in as much as his conviction was till the rising of the court for having committed a less heinous offence. By the impugned order, the Division Bench of

the High Court directed the appellants to reconsider the nature and quantum of punishment awarded to the respondent and accordingly grant him consequential benefits.

4. Mr. Ashok Bhan, learned counsel for the appellants, submitted that the respondent was punished with imprisonment for one day by the judgment dated 10.06.1993 of the Assistant Commandant-cum-Magistrate First Class for having committed a less heinous offence under Section 10(n) of the Central Reserve Police Force Act, 1949 (for short 'the Act'). He submitted that Section 12(1) of the Act provides that every person sentenced under the Act to imprisonment may be dismissed from the CRPF and in exercise of this power the Commandant 22 Battalion, CRPF, dismissed the respondent from service by order dated 10.06.1993. He submitted that the findings in the judgment of the Assistant Commandant-cum-Magistrate in the order under Section 10(n) of the Act would show that the respondent was guilty of grave charges of indiscipline and therefore the Division Bench of the High Court was not right in coming to the conclusion in the impugned order that the punishment of dismissal from service was disproportionate.

5. Mr. J.P. Dhanda, learned counsel appearing for the respondent, on the other hand, submitted that Section 10 of the Act is titled *'Less heinous offences'* and it is under Section 10(n) that the respondent has been punished for imprisonment till the rising of the court. He argued that for a less heinous offence and for an imprisonment till rising of the Court, the respondent could not have been dismissed from service. He submitted that in *Union of India vs. Parma Nanda* (AIR 1989 SC 1185), this Court has held that even in cases where an enquiry is dispensed with under the proviso (b) to Article 311(2) of the Constitution if the penalty impugned is apparently unreasonable or uncalled for, having regard to the nature of the criminal charge, the Administrative Tribunal may step in to render substantial justice and may remit the matter to the competent

authority for reconsideration or itself substitute one of the penalties. He submitted that the High Court has relied upon the decision in *Union of India vs. Parma Nanda (*supra) and has set aside the order of dismissal without going into the merits of the findings of the Assistant Commandant-cum Magistrate on the charges against the respondent.

6. We have considered the submissions of the learned counsel for the parties and we find that the respondent has been imprisoned by the judgment of the Assistant Commandant-cum Magistrate under Section 10(n) of the Act and has been dismissed from service by a separate order of the Commandant, 22 Battalion, CRPF passed under Section 12(1) of the Act. Sections 10(n) and 12(1) of the Act are extracted hereinbelow:

> "10. *Less heinous offences:*- Every member of the Force who
>
> > (n) is guilty of any act or omission which, though not specified in this Act, is prejudicial to good order and discipline; or
>
> shall be punishable with imprisonment for a term which may extend to one year, or with the fine which may extend to three months' pay, or with both.
>
> 12. *Place of imprisonment and liability to dismissal on imprisonment*.-(1) Every person sentenced under this Act to imprisonment may be dismissed from the Force, and shall further be liable to forfeiture of pay, allowance and any other moneys due to him as well as of any medals and decorations received by him."

It will be clear from Section 10(n) of the Act that a member of the CRPF who is guilty of any act or omission which is prejudicial to good order and discipline is punishable with imprisonment for a term which may extend to one year or with fine which may extend to three months' pay, or with both. Section

12(1) of the Act provides that every person sentenced under this Act to imprisonment may be dismissed from the CRPF. The word "may" in Section 12(1) of the Act confers a discretion on the competent authority whether or not to dismiss a member of the CRPF from service pursuant to a sentence of imprisonment under the Act and while exercising the discretion, the competent authority has to consider various relevant factors including the nature of the offence for which he has been sentenced to imprisonment.

7. In the present case, the acts of indiscipline of the respondent which have been established beyond doubt by the Assistant Commandant-cum-Magistrate are that the respondent left his party without permission while on duty in the operational area for 20 minutes and returned on his own and he got enraged when H.N. Singh, Assistant Commandant, decided to take him for medical examination when he found him to be in a state of intoxication and he snatched the AK-47 rifle of H.N. Singh and pointed the barrel towards him and due to the intervention of Lachhi Ram, Assistant Commandant, an untoward incident was avoided. These acts of indiscipline were obviously prejudicial to the good order and discipline and when committed by a member of a disciplined force like the CRPF were serious enough to warrant dismissal from service.

8. The Division Bench of the High Court has taken a view in the impugned order that as the respondent has been punished for imprisonment for a less heinous offence and only till the rising of the court, the punishment of dismissal was disproportionate. The Division Bench of the High Court failed to appreciate that for less heinous offences enumerated in Section 10 of the Act, a person was liable for punishment with imprisonment and under Section 12(1) of the Act every person sentenced under the Act to imprisonment was liable to be dismissed from the CRPF. In other words, the legislative intent was that once a member of the CRPF was sentenced for imprisonment under the Act, he was also liable for dismissal from service. The Division Bench of the High Court, in our

considered opinion, should have looked into the acts of indiscipline proved against the respondent for which he has been sentenced to imprisonment and then decided whether the dismissal of the respondent from service was disproportionate to the gravity of acts of indiscipline. As we have already held, the acts of indiscipline for which the respondent had been sentenced for imprisonment were serious and grave for a disciplined force. Therefore, the competent authority was right in imposing the punishment of dismissal from service.

9. Moreover, it appears from the impugned order that the High Court has in exercise of power of judicial review interfered with the punishment of dismissal on the ground that it was disproportionate. In *Union of India vs. R.K. Sharma* (AIR 2001 SC 3053), this Court has taken the view that the punishment should not be merely disproportionate but should be strikingly disproportionate to warrant interference by the High Court under Article 226 of the Constitution and it was only in an extreme case, where on the face of it there is perversity or irrationality that there can be judicial review under Articles 226 or 227 or under Article 32 of the Constitution. Since this is not one of those cases where the punishment of dismissal was strikingly disproportionate or where on the face of it there was perversity or irrationality, the Division Bench of the High Court ought not to have interfered with the order of dismissal from service.

10. We, accordingly, allow this appeal and set aside the impugned order of the Division Bench of the High Court. No costs.

N.J. Appeal allowed.

UNION OF INDIA & ANR.

v.

M/S DEEPAK ELECTRIC & TRADING COMPANY & ANR.

(Civil Appeal No. 1734 of 2006)

OCTOBER 20, 2011.

[P. SATHASIVAM AND A.K. PATNAIK, JJ.]

Limitation Act, 1963 – Article 119(b) of the Schedule – Period of limitation for filing applications under the Arbitration Act, 1940 for setting aside an arbitral award – Starting point of – Held: An application for setting aside an award has to be filed within 30 days from "the date of service of the notice of the filing of the award" – The starting point of limitation is the date of service of the notice of the filing of the award and not the date of knowledge of the filing of the award – Arbitration Act, 1940.

The appellants and respondent No.1 had entered into a contract for construction of a Complex. The contract contained an arbitration clause. As disputes arose between the parties, respondent No.1 invoked the arbitration clause and an arbitrator was appointed. The arbitrator published his award whereupon the respondents filed a petition in the High Court under Sections 14 and 17 of the Arbitration Act, 1940 for filing the award and for making the award a rule of the court and for passing a decree in terms of the award. After the award was filed, notice of the filing of the award was directed to be issued to the parties. Notice was served on the Union of India, but notice could not be served on the Executive Engineer, C.P.W.D. A letter was addressed by the Executive Engineer to the Registrar of the High Court saying that he had not received a formal notice from the court. Fresh notice was again directed to be issued to the Executive Engineer. While service of notice

on the Executive Engineer was awaited, Union of India filed objections to the award of the arbitrator.

Respondent No.1 contended that the objections filed by the Union of India to the award of the arbitrator were not within the period of limitation, i.e. 30 days from the date of service of the notice of filing of the award. The appellants, on the other hand, contended that the Executive Engineer had not been served with the notice of filing of award and, therefore, limitation had not been begun to run.

The Single Judge of the High Court held that under Section 79 of CPC when suits are filed against the Central Government, only the Union of India has to be arrayed as a party and the Executive Engineer by no stretch of imagination can be taken to be a party in such proceedings; that the objections of Union of India to the award were time barred and accordingly made the award a rule of the court.

Aggrieved, the appellants filed appeal before the Division Bench of the High Court. The Division Bench held that as the counsel on behalf of the Executive Engineer had inspected the record of the case in the court on 21.05.1997, the Executive Engineer will be deemed to have acquired knowledge of the filing of the award on 21.05.1997 and the period of 30 days counted from 21.05.1997 had expired by the time objections were filed by the Union of India and the objections to the award were time barred. Accordingly, the Division Bench of the High Court dismissed the appeal of the appellants.

The question which arose for consideration in the present appeal was whether the Division Bench of the High Court took a correct view in the impugned order that the objections to the award were time barred.

Allowing the appeal, the Court

HELD:1.1. Article 119 of the Schedule to the Limitation Act, 1963, prescribes the period of limitation for filing applications under the Arbitration Act, 1940. It is clear from clause (b) of Article 119 of the Schedule to the Limitation Act, 1963 that an application for setting aside of an award has to be filed within 30 days from "the date of service of the notice of the filing of the award". Thus, the starting point of limitation is the date of service of the notice of the filing of the award and not the date of knowledge of the filing of the award. [Para 6] [1203-F-G]

Deo Narain Choudhury vs. *Shree Narain Choudhaury* **[(2008) 8 SCC 626] – relied on.**

Union of India vs. *Surinder Kumar* **[61 (1996) DLT 42 (D.B.)] – referred to.**

1.2. The Division Bench of the High Court was not right in coming to the conclusion that as the Executive Engineer had knowledge of the filing of the award on 21.05.1997 and as the objections were filed beyond the period of 30 days counted from 21.05.1997, the objections to the award were barred by time. [Para 8] [1204-D-F]

1.3. The matter is remanded to the Single Judge of the High Court for fresh decision in accordance with law. [Para 9] [1204-G]

Case Law Reference:

[61 (1996) DLT 42 (D.B.)]	**referred to**	**Para 4**
[(2008) 8 SCC 626]	**relied on**	**Para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1734 of 2006.

From the Judgment & Order dated 3.1.2003 of the High

Court of Delhi at New Delhi in F.A.O. (O.S.) No. 551 of 2001.

A.S. Chandhiok, ASG, Sadhana Sandhu, Sumit Sharma, Sarabjeet Sharma, Bhagat Singh, V.K. Verma for the Appellants.

The Judgment of the Court was delivered

A. K. PATNAIK, J. 1. This is an appeal against the order dated 03.01.2003 of the Division Bench of the High Court of Delhi in FAO(OS) No. 551 of 2001 (for short 'the impugned order').

2. The facts very briefly are that the appellants and the respondent No.1 entered into a contract for construction of PMT Complex for NSG at Manesar. The contract contained an arbitration clause for resolving disputes between the parties. As disputes arose between the parties, the respondent No.1 invoked the arbitration clause and an arbitrator was appointed. The arbitrator published his award on 17.06.1996 and on 08.07.1996, the respondents filed a petition in the High Court of Delhi under Sections 14 and 17 of the Arbitration Act, 1940 (for short 'the Act') for filing the award and for making the award a rule of the court and for passing a decree in terms of the award. The petition was registered as Suit No.1673-A/1996. After the award was filed, notice of the filing of the award was directed to be issued to the parties on 13.01.1997. Notice was served on the Union of India, but notice could not be served on the Executive Engineer, C.P.W.D. A letter dated 21.03.1997 was addressed by the Executive Engineer to the Registrar of the Delhi High Court saying that he had not received a formal notice from the court. On 17.07.1997, fresh notice was again directed to be issued to the Executive Engineer.

3. While service of notice on the Executive Engineer was awaited, Union of India filed objections to the award of the arbitrator numbered as IA 9423 of 1997. The respondent No.1 contended that the objections filed by the Union of India to the award of the arbitrator were not within the period of limitation, i.e. 30 days from the date of service of the notice of filing of

the award. The appellants, on the other hand, contended that the Executive Engineer had not been served with the notice of filing of award and, therefore, limitation had not been begun to run. The learned Single Judge of the High Court held that under Section 79 of the Code of Civil Procedure (for short 'the CPC') when suits are filed against the Central Government, only the Union of India has to be arrayed as a party and the Executive Engineer by no stretch of imagination can be taken to be a party in such proceedings. The learned Single Judge further held that as the Union of India had filed objections, the Court was only considering the objections of the Union of India and the Union of India had been served with a notice of filing of the award in November, 1996. The learned Single Judge, therefore, held that the objections of the Union of India to the award were time barred and made the award a rule of the court.

4. Aggrieved, the appellants filed FAO(OS) No. 551 of 2001 before the Division Bench of the High Court. After hearing learned counsel for the parties, the Division Bench held in the impugned order that in *Union of India* vs. *Surinder Kumar* [61 (1996) DLT 42 (D.B.)], the Delhi High Court has already taken a view that it was necessary that a notice of filing of the award has to be served on the Executive Engineer as it was the Executive Engineer who on behalf of the Union of India was looking after the proceedings before the arbitrator. The Division Bench, however, held that as the learned counsel on behalf of the Executive Engineer had inspected the record of the case in the court on 21.05.1997, the Executive Engineer will be deemed to have acquired knowledge of the filing of the award on 21.05.1997 and the period of 30 days counted from 21.05.1997 had expired by the time objections were filed by the Union of India and the objections to the award were time barred. Accordingly, the Division Bench of the High Court dismissed the appeal of the appellants by the impugned order.

5. We have heard Mr. A.S. Chandhiok, learned Additional Solicitor General for the appellants. No one has appeared for the respondents despite notice.

6. The only question, which we have to decide in this case, is whether the Division Bench of the High Court has taken a correct view in the impugned order that the objections to the award were time barred. Article 119 of the Schedule to the Limitation Act, 1963, which prescribes the period of limitation for filing applications under the Arbitration Act, 1940, is quoted hereinbelow:

	"Description of application	Period of of	Time from which period begins to limitation run
119.	Under the Arbitration Act, 1940 (10 of 1940)-		
(a)	for the filing in court of an award.	Thirty days	The date of service of the notice of the making of the award.
(b)	for setting aside an award or getting an award remitted for reconsideration	Thirty days	The date of service of the notice of the filing of the award."

It will be clear from clause (b) of article 119 of the Schedule to the Limitation Act, 1963 that an application for setting aside of an award has to be filed within 30 days from "the date of service of the notice of the filing of the award". Thus, the starting point of limitation is the date of service of the notice of the filing of the award and not the date of knowledge of the filing of the award.

7. In support of this view that the starting point of limitation for filing objections to an award under the Act is the date of service of notice of the filing of the award, we may cite an authority. In *Deo Narain Choudhury* vs. *Shree Narain Choudhaury* [(2008) 8 SCC 626], the facts were that on 16.07.1996 the Court sent a notice to the parties about filing

of the award and the notice was received by the respondent on 25.07.1996 and the respondent filed his objections to the award on 21.08.1996. The appellant contended that the objections had been filed beyond the period of limitation as the respondent had received the notice from the arbitrator that the award had been filed and the respondent had also filed a caveat on 11.06.1996. This Court held that mere filing of the caveat did not start the period of limitation and as the notice was received by the respondent on 25.07.1996, the period of limitation started running from that date and, therefore, the objections filed on 21.08.1996 were within the period of 30 days as provided by article 119 of the Limitation Act, 1963.

8. The Division Bench of the High Court has taken a view in the impugned order that as the Executive Engineer was looking after the arbitration proceedings, he was the one who could have filed the objections to the award on behalf of the Union of India and thus notice of the filing of the award on the Executive Engineer was mandatory and the starting point of limitation for filing the application for setting aside the award would be the date of service of notice on the Executive Engineer as provided in article 119(b) of the Schedule to the Limitation Act, 1963. The High Court, therefore, was not right in coming to the conclusion that as the Executive Engineer had knowledge of the filing of the award on 21.05.1997 and as the objections were filed beyond the period of 30 days counted from 21.05.1997, the objections to the award were barred by time.

9. We, accordingly, set aside the order of the learned Single Judge as well as the impugned order of the Division Bench of the High Court and remand the matter to the Single Judge of the High Court for fresh decision in accordance with law. The appeal is allowed with no order as to costs.

B.B.B. Appeal allowed.

SURINDER KUMAR
v.
STATE OF HARYANA
(Criminal Appeal No. 328 of 2004)

OCTOBER 21, 2011

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

***Penal Code, 1860**: s.302 – Conviction based on dying declaration – Allegation against the accused that he poured kerosene on the victim and set her on fire which resulted in her death in hospital – Victim made statement in hospital implicating the accused – Trial court did not find the dying declaration reliable and acquitted the accused – High Court convicted the accused on the basis of dying declaration – On appeal, held: The dying declaration was totally in conflict with the version of the prosecution as to the time of her burning and the relation of the accused with the victim – There were serious omissions on part of investigating officer in conducting investigation – Though there were immediate neighbours/co-tenants and landlord in the premises where incident took place, their statements were not recorded – The dying declaration was recorded in the absence of doctor – At the time of recording the statement of the victim, no endorsement of the doctor was obtained about her fitness to make such statement – The victim was under the influence of injections and was not supposed to have normal alertness – As per the doctor's report, victim had suffered 95-97% burns injuries – In view of that it is highly doubtful that she could possibly put her thumb impression below her statement – Dying declaration did not carry a certificate by the Magistrate to the effect that it was a voluntary statement made by the victim and that he had read over the statement to her – Trial court rightly rejected the dying declaration which was altogether shrouded by suspicious circumstances and*

contrary to the story of prosecution – Inasmuch as the dying declaration was the only piece of evidence put forward against the accused, the accused entitled to the benefit of doubt – Conviction set aside – Evidence Act, 1872 – s.32.

The prosecution case was that the appellant-accused was on visiting terms to the house of victim's husband PW-7 who was working and living in a different city. The appellant developed illicit relationship with the victim. PW-7 suspected the same and stopped the victim from meeting the appellant whereafter the appellant started threatening and harassing the victim. On the fateful night, when PW-7 was away from his house, the appellant come to the house of victim and set her on fire. The victim was taken to the hospital where she was initially examined by the doctor (PW-1). PW-1 referred her to PGI, Chandigarh. Thereafter, at P.G.I., the doctor (PW-9) examined her and reported a case of 95% burns. The Magistrate (PW-2) was deputed to record her statement. The Magistrate who reached PGI applied to the Doctor In-charge to certify if the victim was mentally and physically fit to make a statement. The doctor certified that she was fit to make a statement. Thereafter, her statement was recorded which was to the effect that she had gone to see a movie with four ladies where one boy 'S' was sitting on the back seat. After seeing the movie, the victim came back to her house. The appellant came in the evening to her house and said that if she had any sense of shame, she should die by burning herself. Thereafter, the appellant took kerosene from a container and sprinkled it over her and set her on fire with a match stick. When she was in flame, he put a quilt upon her and ran away. The neighbour took her to hospital and from there she was referred to P.G.I., Chandigarh.

The trial court did not find the dying declaration Ex. PD reliable and acquitted the appellant. The High Court

allowed the appeal filed by the State and convicted the appellant under Section 302, IPC and sentenced him to undergo rigorous imprisonment for life. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

Held: 1. If, after careful scrutiny, the Court is satisfied that the dying declaration is free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make a basis of conviction, even if there is no corroboration. It is not in dispute that if the dying declaration is by a person who is conscious and the same was made and recorded after due certification by the doctor, it cannot be ignored. In the instant case, in the first sentence of Ex. PD, it was mentioned that on the date of occurrence, the victim had gone for a movie at 10.00 O' clock with four other ladies. According to her, these ladies came to her house and on their request she also went to see the movie and returned back to her home. Though I.O. had examined some persons, there was no information about the "four ladies" who accompanied the deceased to the cinema house. In the same declaration, she also stated that apart from the four ladies one boy 'S' was also seeing the movie along with them. The said 'S' was also not examined by the I.O. Non-examination of four ladies, who accompanied the deceased to the cinema house and no information about 'S' would give an impression that the I.O. had not properly conducted the investigation. If at least one of the ladies or 'S' was examined, it would have strengthened the prosecution case. The landlord of the deceased and other neighbours were also not examined at the trial. It was the landlord who had driven the van to take the deceased from Civil Hospital, Naraingarh to PGI, Chandigarh. The brother-in-law of the deceased ('SP')

informed husband of the deceased about the incident. I.O. did not examine 'SP' on the side of the prosecution. All these were important omissions on the part of the I.O. When PW-11, Assistant Sub-Inspector was examined, he fairly admitted that he had not obtained opinion of the Doctor about her fitness to make a statement. [Paras 7, 8] [1219-C; 1220-F-H; 1221-A-H]

Sham Shankar Kankaria vs. State of Maharashtra, **(2006) 13 SCC 165: 2006 (5) Suppl. SCR 709;** *Puran Chand vs. State of Haryana*, **(2010) 6 SCC 566: 2010 (7) SCR 21;** *Panneerselvam vs. State of Tamil Nadu*, **(2008) 17 SCC 190: 2008 (8) SCR 962– referred to.**

2. All the doctors mentioned that the victim was admitted with burn injuries to the extent of 100% and after sometime she succumbed to the injuries. PW-2, Tahsildar-cum-Executive Magistrate recorded her statement. He deposed that when he had contacted the victim she was present in the general ward and some persons were also standing there who left the room on his direction. About the absence of the doctor certifying at the time and date when she made a statement, he clarified that the doctor issuing such certificate was busy with his professional work. He deposed that the victim had made a statement in local dialect of mixed Hindi/ Punjabi and PW-2 had recorded her statement in Hindi script. These were not found to be factually correct. Though, according to PW-2, the victim had put her thumb impression, in view of the evidence of the doctors that she was brought to hospital with 100% burns and at the time of recording her statement, she suffered 95-97% burn injuries, it was highly doubtful that she could possibly put her thumb impression below her statement. It was also not clear that when the whole body was burnt and bandaged how the thumb impression of the deceased was obtained. [para 10] [1222-D-H; 1223-A]

3. Admittedly, at the time of recording the statement of the deceased by PW-2, no endorsement of the doctor was made about her position to make such statement. On the other hand, an application was filed by Assistant Sub-Inspector (PW-11) to Doctor In-charge PGI, Chandigarh seeking clarification "whether she is fit to make the statement or not" and for the said query an endorsement was made by the doctor mentioning that "patient conscious answering the questions, patient fit to give statement". The comparison of the dying declaration Ex. PD recorded by PW-2 and the endorsement made in the requisition of ASI (PW-11) showed that different doctors had certified and made such statement. The doctor, PW-9, PGI Chandigarh in his evidence had stated that the victim was admitted in the Emergency ward of PGI Hospital on 26.06.1991 at about 4.30 a.m. with 95% burns. He also deposed that when Ex. C/1 was submitted by PW-2, gave his opinion that the patient was fit to make a statement on 26.06.1991 at about 7.25 a.m. At the time when PW-2 recorded the statement of the deceased, the doctor (PW-9) was not present and subsequently on the request of the police officer, he offered his opinion to the effect that the patient was fit to make a statement. The procedure adopted by PW-2 while recording the statement of dying declaration cannot be acceptable. [Para 11] [1223-B-F]

4. As per the prosecution, the incident took place at 2 a.m. on 26.06.1991 and as per her statement, the occurrence of burning was in the evening of 25.06.1991, that is, the previous day. The dying declaration did not carry a certificate by the Executive Magistrate to the effect that it was a voluntary statement made by the deceased and that he had read over the statement to her. The dying declaration was not even attested by the doctor. Though the Magistrate had stated that the statement was made in mixed dialect of Hindi and Punjabi

but the statement was recorded only in Hindi. There was evidence that the victim was under the influence of Fortwin and Pethidine injections and was not supposed to be having normal alertness. The trial court rightly rejected the dying declaration which was altogether shrouded by suspicious circumstances and contrary to the story of prosecution. [Para 12] [1223-G-H; 1224-A-C]

5. It is settled that a valid and well reasoned judgment of the trial Court is seldom set aside unless there is some perversity or not based on correct law. From the materials available, absolutely there was no case to presume that the death of the deceased occurred at the hands of the appellant especially, when her statement was shrouded by suspicious circumstances and contrary to the claim of the prosecution. Particularly, when she was alleged to have 97% burns and being under constant sedatives first at Civil Hospital, Naraingarh and then at PGI, Chandigarh, in such a situation she could not be expected to make a statement at a stretch without asking any questions. Admittedly, the Executive Magistrate, PW-2 did not put any question and record her answers. [Para 13] [1224-D-E]

6. Another important aspect relating to failure on the part of prosecution was that on the date of the incident, the deceased had two children aged about six and four years respectively and both of them were present there, admittedly, the I.O. had not enquired them about the genuineness of the incident. Though, there were number of immediate neighbours/co-tenants in the same premises, their statements were not recorded which meant that nobody supported the version of the prosecution. Though there is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration but the court must be satisfied that the dying declaration is true and voluntary and in that event, there is no impediment in basing conviction on it,

without corroboration. It is the duty of the court to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. Where a dying declaration is suspicious, it should not be acted upon without corroborative evidence. Likewise, where the deceased was unconscious and could never make any declaration the evidence with regard to it is rejected. The dying declaration which suffers from infirmity cannot form the basis of conviction. All these principles were fully adhered to by the trial Court and on wrong assumption the High Court interfered with the order of acquittal. [para 14] [1224-F-H; 1225-A-C]

7. The dying declaration was totally in conflict with the version of the prosecution as to the time of her burning, relation of the appellant with the deceased, except for the implication part, which was clarified in favour of the appellant by PW-10 in his cross-examination. In such circumstances, the dying declaration was totally unacceptable, could not be believed as trustworthy, which was rightly not believed so by the trial Court. [Para 16] [1225-F]

8. In view of the infirmities and contradictions as to the occurrence, failure on the part of the Executive Magistrate in obtaining certificate as to whether the victim had made a voluntary statement and not attested by any doctor and also his statement which was contradictory to that of the deceased the victim and of the fact that at the relevant time she was under the influence of Fortwin and Pethidine injections and was not supposed to be having normal alertness, as rightly observed by the trial court, the dying declaration Ex.PD did not inspire confidence in the mind of the Court. Inasmuch as the dying declaration was the only piece of evidence put forward against the accused, the accused is entitled to

the benefit of doubt. Consequently, the conviction and sentence ordered by the High Court is set aside and the order of acquittal passed by the trial Court is restored. [Paras 17, 18] [1225-H; 1226-A-D]

Case law reference:

2006 (5) Suppl. SCR 709	**referred to**	**Para 6**
2010 (7) SCR 21	**referred to**	**Para 6**
2008 (8) SCR 962	**referred to**	**Para 6**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 328 of 2004.

From the Judgment & Order dated 19.12.2003 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 241-DBAof 1993.

Sushil Kumar, K.G. Bhagat, Neha Jain, Vinay Arora, Aditya Kumar, Gaurav Murthy, Divya Shukla, Debasis Misra for the Appellant.

Manjit Singh, AAG, Kamal Mohan Gupta 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 19.12.2003 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 241-DBA of 1993 whereby the High Court while reversing the judgment dated 17.12.1992 passed by the Sessions Judge, Ambala allowed the appeal filed by the State and convicted the appellant herein under Section 302 of the Indian Penal Code, 1860 (in short 'IPC') and sentenced him to undergo rigorous imprisonment for life and to pay a fine of Rs.25,000/- and in default of payment of fine, to further undergo rigorous imprisonment for one year.

2. **Brief facts:**

(a) According to the prosecution, the accusation against the appellant-accused was that he was on visiting terms to the house of Inder Pal (PW-7), husband of Kamlesh Rani (since deceased), who was working at Mullana and keeping his family at Naraingarh, Dist. Ambala, Haryana. The appellant-accused had been visiting Inder Pal's house and developed illicit relationship with his wife-Kamlesh Rani. Inder Pal (PW-7) suspected the same between them and stopped his wife from meeting the appellant-accused. When the appellant-accused was stopped to visit their house, he had started threatening and harassing Kamlesh Rani for which she made a complaint to her husband. Inder Pal (PW-7) also visited the shop of the appellant-accused and told him not to visit his house and harass his wife.

(b) On the intervening night of 25/26.06.1991, when Inder Pal (PW-7) was away from his house, the appellant-accused went to his house and taunted his wife that she had become a woman of immoral character and called upon her to burn herself to death if she had any sense of shame. Thereafter, the appellant-accused picked up a kerosene can lying in the one room apartment and after pouring the same on the deceased, set her on fire. When the fire developed, the appellant-accused ran away from the room after placing a quilt on the deceased. The neighbours of the deceased took her to the Civil Hospital, Naraingarh where she was examined by Dr. Ashwani Kumar Kashyap, Medical Officer (PW-1). He immediately sent intimation to In-charge Police Station, Naraingarh to the effect that the deceased had been brought to the hospital with 100% burns, and as the condition of the patient was critical she had been referred to P.G.I., Chandigarh. At P.G.I. Chandigarh, she was admitted in the Emergency Ward and Dr.Vipul Sood (PW-9) examined her and reported a case of 95% burn injuries.

(c) On receiving the information, Dalip Rattan (PW-3), Sub-

Inspector, P.S. West, Chandigarh applied to the Sub-Divisional Magistrate, Chandigarh for appointment of an Executive Magistrate to record the statement of Kamlesh Rani. Consequently, Shri P.K. Sharma, Tehsildar-cum-Executive Magistrate (PW-2) was deputed to record her statement. On 26.06.1991, PW-2 recorded her statement and a First Information Report was registered being No. 86/1991 at P.S. Naraingarh at 5.30 p.m. under Section 307 IPC. On the intervening night of 28/29.06.1991, Kamlesh Rani succumbed to the injuries and the case was converted into Section 302 IPC. Thereafter, Ram Niwas (PW-13), Sub Inspector, P.S. Ambala, arrived at P.G.I., Chandigarh and prepared the inquest report. Post mortem was conducted at General Hospital, Sector 16, Chandigarh by Dr. V.K. Chopra and Dr. Ajay Verma (PW-12) on 29.06.1991 at 4.45 p.m. On the same day, the accused was arrested and the case was committed to the Court of Sessions.

(d) The Sessions Judge, Ambala, after analyzing the evidence and after giving the benefit of doubt, vide judgment dated 17.12.1992 acquitted the appellant-accused.

(e) Challenging the said judgment, the State of Haryana filed an appeal bearing Criminal Appeal No. 241-DBA of 1993 before the Division Bench of the High Court. The High Court, vide judgment dated 19.12.2003, reversed the judgment of the Sessions Judge, Ambala and sentenced the appellant-accused to rigorous imprisonment for life and imposed a fine of Rs.25,000/- and in default of payment of fine, to further undergo rigorous imprisonment for one year.

(f) Aggrieved by the said judgment, the appellant-accused has filed this appeal before this Court.

3. Heard Mr. Sushil Kumar, learned senior counsel for the appellant-accused and Mr. Manjit Singh, learned Additional Advocate General for the respondent-State.

4. The trial Court based on the dying declaration Ex. PD alleged to have been made by the deceased-Kamlesh Rani before Shri P.K. Sharma (PW-2), Executive Magistrate, Chandigarh and after finding that it does not inspire confidence in the mind of the Court and being the only evidence appearing against the accused, after giving the benefit of doubt in his favour, acquitted from the charges levelled against him. On the other hand, the High Court relying on the dying declaration holding that it is extremely difficult to reject the dying declaration altogether and finding that in the said dying declaration the deceased had positively stated that she had been immolated by the accused/appellant, set aside the order of acquittal passed by the trial Court and found him guilty under Section 302 IPC and sentenced to undergo rigorous imprisonment for life. In view of the same, the only question for consideration in this appeal is whether the dying declaration Ex. PD of Kamlesh Rani is reliable, acceptable and based on which conviction is sustainable.

5. We have already referred to the accusation against the accused that he was on visiting terms to the house of Inder Pal-husband of the deceased who was keeping his family at Naraingarh, however, working at Mullana. The accused Surinder Kumar had been visiting the house of the deceased-Kamlesh Rani during the absence of her husband Inder Pal. Inder Pal suspected illicit relationship between Surinder Kumar and his wife Kamlesh Rani. It is further seen that on the date of occurrence, that is, on 26.06.1991, Kamlesh Rani went to the cinema in the company of four other ladies. On the same evening, Surinder Kumar confronted her of having loose character and called upon her to immolate herself to death if she had any sense of shame. Thereafter, Surinder Kumar picked up a kerosene can lying in the one-room apartment and after pouring the same on Kamlesh Rani set her on fire. When the fire developed, he ran away from the room after placing a quilt on her person. On hearing her cries, neighbours reached at the spot and carried her to the Civil Hospital, Naraingarh and

then she had been shifted to PGI Hospital, Chandigarh where she made a dying declaration statement before P.K. Sharma, (PW-2), Executive Magistrate and thereafter on 28/29.06.1991, she succumbed to her injuries.

6. Before considering the acceptability of dying declaration (Ex.PD), it would be useful to refer the legal position.

(i) In *Sham Shankar Kankaria vs. State of Maharashtra*, (2006) 13 SCC 165, this Court held as under:

> "10. This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eyewitness in a serious crime, the exclusion of the statement would leave the court without a scrap of evidence.
>
> **11.** Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of deceased was not as a result of either tutoring or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. *It cannot*

be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in Paniben v. State of Gujarat (1992) 2 SCC 474 (SCC pp.480-81, para 18)

(Emphasis supplied)

(*i*) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See *Munnu Raja* v. *State of M.P.,(1976) 3 SCC 104*)

(*ii*) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See *State of U.P.* v. *Ram Sagar Yadav, (1985) 1 SCC 552* and *Ramawati Devi* v. *State of Bihar,(1983) 1 SCC 211*)

(*iii*) The Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (See *K. Ramachandra Reddy* v. *Public Prosecutor,(1976) 3 SCC 618*)

(*iv*) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See *Rasheed Beg* v. *State of M.P.,(1974) 4 SCC 264*)

(*v*) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (See *Kake Singh* v. *State of M.P., 1981 Supp SCC 25*)

(*vi*) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See *Ram Manorath* v. *State of U.P.,(1981) 2 SCC 654*)

(*vii*) Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected. (See *State of Maharashtra* v. *Krishnamurti Laxmipati Naidu,1980 Supp SCC 455*)

(*viii*) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (See *Surajdeo Ojha* v. *State of Bihar,1980 Supp SCC 769*.)

(*ix*) Normally the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (See *Nanhau Ram* v. *State of M.P.,1988 Supp SCC 152*)

(*x*) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See *State of U.P.* v. *Madan Mohan, (1989) 3 SCC 390*)

(*xi*) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. (See *Mohanlal Gangaram Gehani* v. *State of Maharashtra,(1982) 1 SCC 700*)"

(ii) In *Puran Chand vs. State of Haryana*, (2010) 6 SCC 566, this Court once again reiterated the abovementioned principles.

(iii) In *Panneerselvam vs. State of Tamil Nadu*, (2008) 17

SCC 190, a Bench of three Judges of this Court reiterating various principles mentioned above held that it cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of the conviction unless it is corroborated and the rule requiring corroboration is merely a rule of prudence.

7. In the light of the above principles, the acceptability of the alleged dying declaration in the instant case has to be considered. If, after careful scrutiny, the Court is satisfied that it is free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make a basis of conviction, even if there is no corroboration. With these principles, let us consider the statement of Kamlesh Rani and its acceptability.

8. Kamlesh Rani was initially taken to the Civil Hospital, Naraingarh at 2.20 a.m. on 26.06.1991 where she was initially examined by Dr. Ashwani Kumar Kashyap (PW-1). The said Medical Officer immediately sent intimation to In-charge P.S. Naraingarh to the effect that Kamlesh Rani had been brought to the hospital with 100% burns, the patient was critical and had been referred to PGI, Chandigarh. Thereafter, at P.G.I., she was admitted in the Emergency ward and Dr. Vipul Sood (PW-9) examined her at 04:35 a.m. and reported a case of 95% burns. It is further seen that on receiving information, Sub-inspector Dalip Rattan (PW-3) applied to the Sub-Divisional Magistrate, Chandigarh for appointment of Executive Magistrate to record Kamlesh Rani's statement. Based on the same, Shri P.K. Sharma, Tahsildar-cum-Executive Magistrate (PW-2) was deputed to record her statement. The Magistrate who reached PGI applied to the Doctor In-charge to certify if Kamlesh Rani was mentally and physically fit to make a statement or not. The doctor certified at 07.25 a.m. that she was fit to make a statement. Thereafter, Kamlesh Rani's statement was recorded which is marked as Ex. PD. It was marked with thumb impression of Kamlesh Rani and signed by the Magistrate at

7.45 a.m. It is relevant to note the said dying declaration which reads thus:

> "Yesterday, at about 10:00 o'clock four ladies came to my house and asked me to accompany them to see a movie and we all had gone to see the movie. One boy Subhash was also seeing movie. He was sitting there on the back seat. After seeing the movie, I came back to my house. Surinder Kumar Garg who is a so-called brother (dharma Bhai) of my husband came in the evening and asked me that I had gone to see picture and stated that I had become a bad character. My husband is doing service at Mullana and lives there. At that time, he was at Mullana. Then Surinder said if I had any sense of shame, I should die by burning myself. Then, he took kerosene from a container (small peepi) and sprinkled it over me and set me on fire with a match stick. When I was in flame, he put a quilt upon me and ran away. My neighbour removed me to Naraingarh hospital and from there I was referred to P.G.I., Chandigarh. I have made my statement in full senses and without any pressure."

As observed earlier, initially, the trial Court acquitted the accused and the High Court convicted him solely on the basis of the above declaration. In the light of the same, we have to find out whether the dying declaration made and recorded is acceptable and whether it satisfied the required norms/ procedure as held by this Court. In other words, we have to see whether the dying declaration inspire the confidence of the court. It is not in dispute that if the dying declaration is by a person who is conscious and the same was made and recorded after due certification by the doctor, it cannot be ignored. In the first sentence of Ex. PD, it has been mentioned that on the date of occurrence, she had gone for a movie at 10.00 O' clock with four other ladies. According to her, these ladies came to her house and on their request she also went to see the movie and returned back to her home. Though I.O.

has examined some persons, there is no information about the "four ladies" who accompanied the deceased to the cinema house. The I.O. did not care to verify those four ladies who accompanied the deceased to the cinema house. In the same declaration, she also stated that apart from the four ladies one boy Subhash was also seeing the movie along with them. According to her, he was sitting there on the back seat. The said Subhash was also not examined by the I.O. Non-examination of four ladies, who accompanied the deceased to the cinema house and no information about Subhash gave an impression that the I.O. had not properly conducted the investigation. If at least one of the ladies or Subhash was examined, it would strengthen the prosecution case. However, the I.O. purposely omitted to examine the ladies who went for cinema and in the same manner no effort was made to trace Subhash whom the deceased saw at the movie. None of the so-called neighbours were produced at the trial. The landlord of the deceased-Ram Rattan was not examined at the trial. It was Ram Rattan who had driven the van to take Kamlesh Rani from Civil Hospital, Naraingarh to PGI, Chandigarh. It is to be noted that Kamlesh Rani's sister's husband Surinder Pal informed Inder Pal-husband of the deceased about the incident. Inder Pal and Surinder Pal had together gone to Chandigarh and later met Kamlesh Rani. For the reasons best known to the I.O., the said Surinder Pal was not examined on the side of the prosecution. In other words, non-examination of any one of the ladies who accompanied the deceased to cinema in the morning, presence of Subhash and the landlord of the deceased, namely, Ram Rattan, another tenant Jeet Singh were all vital to the prosecution. All these were important omissions on the part of the I.O. When Hira Lal (PW-11), Assistant Sub-Inspector was examined, he fairly admitted that he had not obtained opinion of the Doctor at that time about her fitness to make a statement. Another doctor-PW-12, who conducted post mortem, had opined that the cause of death is septicemia due to extensive burns (approx. 97%) which is

sufficient to cause death in ordinary course of nature.

9. Ram Niwas (PW-13), Sub-inspector also admitted that he did not make any effort to ascertain the women who had accompanied Kamlesh Rani to see the movie. He also admitted that he had not associated Subhash referred to in the dying declaration during investigation. He fairly admitted that he had no knowledge about any person by name Surinder Pal who happened to be sister's husband of Kamlesh Rani who was employed in Civil Hospital, Naraingarh. All the above infirmities/defects have not been properly explained by the prosecution.

10. Now coming to her state of mind, all the doctors have mentioned that she was admitted with burn injuries to the extent of 100% and after sometime she succumbed to the injuries. It is true that P.K. Sharma (PW-2), Tahsildar-cum-Executive Magistrate recorded her statement. In his evidence, PW-2 has stated that on the orders of Shri Jagjit Puri, SDM, Union Territory of Chandigarh, by his order Ex. PB/1 deputed him to record the statement of Kamlesh Rani. Pursuant to the said direction, he went to the PGI and moved an application to seek the opinion of the doctor whether Kamlesh Rani was fit to make a statement or not. He further deposed that when he had contacted Kamlesh Rani she was present in the general ward and some persons were also standing there, they left the room on his direction. About the absence of the doctor certifying at the time and date when she made a statement, he clarified that the doctor issuing such certificate was busy with his professional work. Kamlesh Rani had made a statement in local dialect of mixed Hindi/Punjabi and PW-2 had recorded her statement in Hindi script. Here again, it was pointed out that these were not factually correct. In view of the doubt, we verified the original which is in Hindi script only and not local dialect in mixed Hindi/Punjabi. Though, according to PW-2, she put her thumb impression, in view of the evidence of the doctors that she was brought to hospital with 100% burns and at the time of

recording her statement, she suffered 95-97% burn injuries, it is highly doubtful whether it would be possible for her to have her thumb impression below her statement. It is also not clear that when the whole body is burnt and bandaged how the thumb impression of the deceased was obtained.

11. We have already noted that admittedly at the time of recording the statement of the deceased by PW-2, no endorsement of the doctor was made about her position to make such statement. On the other hand, an application was filed by Hira Lal, (PW-11) to Doctor In-charge PGI, Chandigarh seeking clarification "whether she is fit to make the statement or not" and for the said query an endorsement was made by the doctor mentioning that "patient conscious answering the questions, patient fit to give statement". We compared the dying declaration Ex. PD recorded by PW-2 as well as the endorsement made in the requisition of Hira Lal, ASI (PW-11). The verification of both the documents show different doctors have certified and made such a statement. Dr. Vipul Sood, PW-9, PGI Chandigarh in his evidence has stated Kamlesh Rani was admitted in the Emergency ward of PGI Hospital on 26.06.1991 at about 4.30 a.m. with 95% burns. He also deposed that when Ex. C/1 was submitted by P.K. Sharma, PW-2 on which he gave his opinion that the patient is fit to make a statement on 26.06.1991 at about 7.25 a.m. It is clear that at the time when PW-2 recorded the statement of the deceased Dr. Vipul Sood (PW-9) was not present and subsequently on the request of the police officer, he offered his opinion to the effect that the patient was fit to make a statement. The procedure adopted by PW-2 while recording the statement of dying declaration is not acceptable.

12. As per the prosecution, the incident took place at 2 a.m. on 26.06.1991 and as per her statement, the occurrence of burning was in the evening of 25.06.1991, that is, the previous day. The dying declaration did not carry a certificate by the Executive Magistrate to the effect that it was a voluntary

statement made by the deceased and that he had read over the statement to her. The dying declaration was not even attested by the doctor. As stated earlier, though the Magistrate had stated that the statement had been made in mixed dialect of Hindi and Punjabi and the statement was recorded only in Hindi. Another important aspect is that there was evidence that Kamlesh Rani was under the influence of Fortwin and Pethidine injections and was not supposed to be having normal alertness. In our view, the trial Court rightly rejected the dying declaration altogether shrouded by suspicious circumstances and contrary to the story of prosecution and acquitted the appellant.

13. It is settled that a valid and well reasoned judgment of the trial Court is seldom set aside unless there was some perversity or not based on correct law. From the materials available, absolutely there was no case to presume that the death of the deceased occurred at the hands of the appellant especially, when her statement was shrouded by suspicious circumstances and contrary to the claim of the prosecution. Particularly, when she was alleged to have 97% burns and being under constant sedatives first at Civil Hospital, Naraingarh and then at PGI, Chandigarh, in such a situation she could not be expected to make a statement at a stretch without asking any questions. Admittedly, the Executive Magistrate, PW-2 did not put any question and recorded her answers.

14. Another important aspect relating to failure on the part of prosecution is that on the date of the incident, the deceased had two children aged about six and four years respectively and both of them were present there, admittedly, the I.O. has not enquired them about the genuineness of the incident. Though, there are number of immediate neighbours/co-tenants in the same premises, their statements were not recorded which means that nobody supported the version of the prosecution. Though there is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration but the

court must be satisfied that the dying declaration is true and voluntary and in that event, there is no impediment in basing conviction on it, without corroboration. It is the duty of the court to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. Where a dying declaration is suspicious, it should not be acted upon without corroborative evidence. Likewise, where the deceased was unconscious and could never make any declaration the evidence with regard to it is rejected. The dying declaration which suffers from infirmity cannot form the basis of conviction. All these principles have been fully adhered to by the trial Court and rightly acquitted the accused and on wrong assumption the High Court interfered with the order of acquittal.

15. It is the consistent stand of the defence from the beginning that the appellant had been falsely implicated, more particularly, at the instance of I.O. Hira Lal (PW-11) who had a previous enmity with him for asking some bribe for running his business of ghee. As rightly pointed out, other witnesses who accompanied the injured Kamlesh Rani did not make any statement involving the appellant in the burning of Kamlesh Rani till 29.06.1991.

16. We are satisfied that the dying declaration was totally in conflict with the version of the prosecution as to the time of her burning, relation of the appellant with the deceased, except for the implication part, which was clarified in favour of the appellant by PW-10 Surinder Singh in his cross-examination. In such circumstances, the dying declaration was totally unacceptable, could not be believed as trustworthy, which was rightly not believed so by the trial Court.

17. Inasmuch as the acquittal by the trial Court and conviction by the High Court is solely based on the dying declaration, in view of our above discussion, there is no need to traverse the evidence and other factual details. In view of the infirmities pointed above, and contradictions as to the

occurrence, failure on the part of the Executive Magistrate in obtaining certificate as to whether Kamlesh Rani had made a voluntary statement and not attested by any doctor and also his statement which is contradictory to that of the deceased Kamlesh Rani and of the fact that at the relevant time she was under the influence of Fortwin and Pethidine injections and was not supposed to be having normal alertness, as rightly observed by the trial Court, we hold that the dying declaration Ex.PD does not inspire confidence in the mind of the Court. Inasmuch as the dying declaration is the only piece of evidence put forward against the accused in the light of our discussion and reasoning, the accused - Surinder Kumar is entitled to the benefit of doubt.

18. Consequently, the conviction and sentence ordered by the High Court is set aside and the order of acquittal passed by the trial Court is restored. Since the appellant is on bail, his bail bonds shall stand discharged. The appeal is allowed.

D.G. Appeal allowed.

##NEXT FILE
RANBAXY LABORATORIES LTD.
v.
UNION OF INDIA AND ORS.
(Civil Appeal No. 6823 of 2010)

OCTOBER 21, 2011

[D.K. JAIN AND ANIL R. DAVE, JJ.]

Central Excise Act, 1944: s.11BB – Interest on refund claim – Liability of revenue to pay interest u/s.11BB – Held: Commences from the date of expiry of three months from the date of receipt of application for refund and not from the expiry of the said period from the date on which order of refund is made- Circular no.670/61/2002-CX dated 1.10.2002.

Interpretation of statutes: Fiscal legislation – Held: Has to be construed strictly and one has to look merely at what is said in the relevant provision; there is nothing to be read in; nothing to be implied and there is no room for any intendment – Central Excise Act, 1944.

The question which arose for consideration in these appeals was whether the liability of the revenue to pay interest under Section 11BB of the Central Excise Act, 1944 commences from the date of expiry of three months from the date of receipt of application for refund or on the expiry of the said period from the date on which the order of refund is made.

Disposing of the appeals, the Court

HELD: 1.1. Section 11BB of the Central Excise Act, 1944 comes into play only after an order for refund has been made under Section 11B of the Act. Section 11BB of the Act lays down that in case any duty paid is found refundable and if the duty is not refunded within a period of three months from the date of receipt of the application to be submitted under sub-section (1) of Section 11B of the Act, then the applicant shall be paid interest at such rate, as may be fixed by the Central Government, on expiry of a period of three months from the date of receipt of the application. The Explanation appearing below Proviso to Section 11BB introduces a deeming fiction that where the order for refund of duty is not made by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise but by an Appellate Authority or the Court, then for the purpose of this Section the order made by such higher Appellate Authority or by the Court shall be deemed to be an order made under sub-section (2) of Section 11B of the Act. It is clear that the Explanation has nothing to do with the postponement of the date from which interest becomes payable under Section 11BB of the Act. Manifestly, interest under Section 11BB of the Act becomes payable, if on an expiry of a period of three months from the date of receipt of the application for refund, the amount claimed is still not refunded. Thus, the only interpretation of Section 11BB that can be arrived at is that interest under the said Section becomes payable on the expiry of a period of three months from the date of receipt of the application under Sub-section (1) of Section 11B of the Act and that the said Explanation does not have any bearing or connection with the date from which interest under Section 11BB of the Act becomes payable. [Para 9]

1.2. It is a well settled proposition of law that a fiscal legislation has to be construed strictly and one has to look merely at what is said in the relevant provision; there is nothing to be read in; nothing to be implied and there is no room for any intendment. Ever since Section 11BB was inserted in the Act with effect from 26th May 1995, the department has maintained a consistent stand about its interpretation. Explaining the intent, import and the

manner in which it is to be implemented, the Circular dated 1st October, 2002 and Circular dated 2nd, June 1998 clearly stated that the relevant date in this regard is the expiry of three months from the date of receipt of the application under Section 11B(1) of the Act. The liability of the revenue to pay interest under Section 11BB of the Act commences from the date of expiry of three months from the date of receipt of application for refund under Section 11B(1) of the Act and not on the expiry of the said period from the date on which order of refund is made. Accordingly, the jurisdictional Excise officers are required to determine the amount of interest payable to the assessees in these appeals, under Section 11BB of the Act. [Paras 10, 12, 15, 16]

Cape Brandy Syndicate v. Inland Revenue Commissioners **(1921) 1 K.B. 64;** *Ajmera Housing Corporation & Anr. v. Commissioner of Income Tax* **(2010) 8 SCC 739: 2010 (10) SCR 183;** *Union of India* v. *U.P. Twiga Fiber Glass Ltd.* **2009 (243) E.L.T. A27 (S.C.) – relied on.**

Union of India & Anr. v. Shreeji Colour Chem Industries **2008 9 SCC 515: 2008 (13) SCR 502– referred to.**

Case Law Reference:

2008 (13) SCR 502	**referred to**	**Paras 5 ,6, 14**
2009 (243) E.L.T.A27 (S.C.)	**relied on**	**Paras 6, 13**
(1921) 1 K.B. 64	**relied on**	**Para 10**
2010 (10) SCR 183	**relied on**	**Para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6823 of 2010.

From the Judgment & Order dated 18.12.2009 of the High Court of Delhi at New Delhi in Writ Petition (C) No. 13940 of 2009.

WITH

C.A. Nos. 7637 of 2009 & 3088 of 2010.

Arijit Prasad, B.K. Prasad, Anil Katiyar, Krishna Mohan Menon, (For M.P. Devanath), Tarun Gulati, Shruti Sabharwal, Shashi Mathews, Kishore Kunal, Praveen Kumar for the appearing parties.

The Judgment of the Court was delivered by

D.K. JAIN, J.: 1. The challenge in this batch of appeals is to the final judgments and orders delivered by the High Court of Delhi in W.P. No.13940/2009 and the High Court of Judicature at Bombay in Central Excise Appeal Nos.163/2007 and 124 of 2008. The core issue which confronts us in all these appeals relates to the question of commencement of the period for the purpose of payment of interest, on delayed refunds, in terms of Section 11BB of the Central Excise Act, 1944 (for short "the Act"). In short, the question is whether the liability of the revenue to pay interest under Section 11BB of the Act commences from the date of expiry of three months from the date of receipt of application for refund or on the expiry of the said period from the date on which the order of refund is made?

2. As aforesaid, in all these appeals the question in issue being the same, these are being disposed of by this common judgment. However, in order to appreciate the controversy in its proper perspective, a few facts from C.A. No. 6823 of 2010 may be noted. These are as follows:

The appellant filed certain claims for rebate of duty, amounting to Rs.4,84,52,227/- between April and May 2003. However, the Assistant Commissioner of Central Excise, vide order dated 23rd June 2004, rejected the claim. Aggrieved, the appellant filed an appeal before the Commissioner, Central

Excise (Appeals), who by his order dated 30th September 2004 allowed the appeal and sanctioned the rebate claim. Being aggrieved by the said order, the revenue filed an appeal before the Joint Secretary, Government of India, Ministry of Finance, but without any success. Ultimately rebate was sanctioned on 11th January, 2005. On 21st April 2005, appellant filed a claim for interest under Section 11BB of the Act on account of delay in payment of rebate.

3. A show cause notice was issued to the appellant on 5th July 2005, proposing to reject their claim for interest on the ground that rebate had been sanctioned to them within three months of the receipt of order of the Commissioner (Appeals) dated 30th September, 2004. Upon consideration of the reply submitted by the appellant, relying on Explanation to Section 11BB of the Act, the Assistant Commissioner rejected the claim.

4. Against the said order, the appellant filed an appeal before the Commissioner (Appeals). The Commissioner (Appeals) allowed the appeal and directed the Assistant Commissioner to compute and pay the interest to the appellant. Aggrieved by the said direction, the Assistant Commissioner filed an appeal before the Customs, Excise and Service Tax Appellate Tribunal (for short 'the Tribunal'). However, the appeal was dismissed by the Tribunal on the ground that it did not have jurisdiction to deal with a rebate claim. Feeling aggrieved, the Assistant Commissioner filed a revision application before the Joint Secretary, Ministry of Finance, Govt. of India who vide his order dated 30th July 2009 set aside the order passed by the Commissioner (Appeals) and held that the appellant was not entitled to interest under Section 11BB of the Act.

5. Being dissatisfied with the said order, the appellant filed a writ petition in the High Court of Delhi. Relying on the decision of this Court in *Union of India & Anr. Vs. Shreeji Colour Chem Industries*[1], by the impugned order, the High Court has affirmed the decision of the revisional authority and held that the appellant is not entitled to interest under Section 11BB of the Act. Hence, in the lead case the assessee is in appeal before us. However, in the connected appeals, the High Court of Judicature at Bombay having affirmed the decisions of the Tribunal, upholding the claim of the assessee for interest under Section 11BB of the Act, the revenue is the appellant.

6. Learned counsel appearing for the assessee contended that the language of Section 11BB of the Act is clear and admits of no ambiguity, in as much as the revenue becomes liable to pay interest at the prescribed rate on refunds on the expiry of three months from the date of receipt of application under Section 11B(1) of the Act and such liability continues till the refund of duty. Learned counsel urged that reliance on the decision of this Court in *Shreeji Colour Chem Industries* (supra) by the Delhi High Court in rejecting the claim for interest is misplaced. It was contended that the said judgment deals with two kinds of interest, *viz.* (i) equitable interest because of delayed refunds and (ii) statutory interest payable under Section 11BB of the Act. According to the learned counsel in terms of the latter, the judgment supports the assessee's claim, but the High Court has erroneously applied the principle laid down for payment of equitable interest. According to the learned counsel, the said decision clearly holds that an assessee is entitled to interest under the said Section after the expiry of three months from the date of receipt of application for payment of refund. In support of the claim, learned counsel commended us to the order passed by this Court in *Union of India Vs. U.P. Twiga Fiber Glass Ltd.*[2], whereby the appeal preferred by the revenue against the decision of the Allahabad High Court has been dismissed. In the said decision, following the decision of the Rajasthan High Court in *J.K. Cement Works Vs. Assistant Commissioner of Central Excise & Customs*[3], the Allahabad High Court had held that the relevant date for the purpose of determining the liability to pay interest under Section 11BB of the Act is with reference to the date of application, laying claim

for refund and not the actual determination of refund under Section 11B(2) of the Act. To bolster the claim, learned counsel placed strong reliance on a number of Circulars on the point, issued by the Department of Revenue, Ministry of Finance, Govt. of India, clarifying that with the insertion of new Section 11BB of the Act, the department had become liable to pay interest under the said Section if the refund applications were not processed within three months from the date of receipt of refund applications.

7. Mr. Arijit Prasad, learned counsel appearing for the revenue, on the other hand, submitted that since in the present cases no refunds were sanctioned under Section 11B of the Act, the provisions of Section 11BB of the Act were not attracted. In the alternative, it was submitted that the refund orders having been sanctioned within three months of the passing of orders by the appellate authority, interest under the said Section was not payable.

8. Before evaluating the rival contentions, it would be necessary to refer to the relevant provisions of the Act. Section 11B of the Act deals with claims for refund of duty. Relevant portion thereof reads as under:

> **"11B.Claim for refund of duty.-**(1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence including the documents referred to in section 12A as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from or paid by him and the incidence of such duty and interest if any, paid on such duty had not been passed on by him to any other person:
>
> **Provided** that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the Act and the same shall be dealt with in accordance with the provisions of sub-section (2) as substituted by that Act:
>
> **Provided** further that the limitation of one year shall not apply where any duty has been paid under protest.
>
> (2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:
>
> **Provided** that the amount of duty of excise and interest, if any, paid on such duty of excise as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to——-
>
> (a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;
>
> (b) unspent advance deposits lying in balance in the applicant's current account maintained with the Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise and interest, if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(e) the duty of excise and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(f) the duty of excise and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify :

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government, the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal of any Court in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

(4) …….

(5) ……."

Section 11BB, the pivotal provision, reads thus:

"**11BB. Interest on delayed refunds.-**

If any duty ordered to be refunded under sub-section (2) of section 11B to any applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that applicant interest at such rate, not below five per cent and not exceeding thirty per cent per annum as is for the time being fixed by the Central Government, by Notification in the Official Gazette, on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty :

Provided that where any duty ordered to be refunded under sub-section (2) of section 11B in respect of an application under sub-section (1) of that section made before the date on which the Finance Bill, 1995 receives the assent of the President, is not refunded within three months from such date, there shall be paid to the applicant interest under this section from the date immediately after three months from such date, till the date of refund of such duty.

Explanation : Where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal or any Court against an order of the Assistant Commissioner of Central Excise, under sub-section (2) of section 11B, the order passed by the Commissioner (Appeals), Appellate Tribunal or, as the case may be, by the Court shall be deemed to be an order passed under the said sub-section (2) for the purposes of this section."

9. It is manifest from the afore-extracted provisions that Section 11BB of the Act comes into play only after an order for refund has been made under Section 11B of the Act. Section 11BB of the Act lays down that in case any duty paid is found refundable and if the duty is not refunded within a period of three months from the date of receipt of the application to be submitted under sub-section (1) of Section 11B of the Act, then the applicant shall be paid interest at such rate, as may be fixed

by the Central Government, on expiry of a period of three months from the date of receipt of the application. The Explanation appearing below Proviso to Section 11BB introduces a deeming fiction that where the order for refund of duty is not made by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise but by an Appellate Authority or the Court, then for the purpose of this Section the order made by such higher Appellate Authority or by the Court shall be deemed to be an order made under sub-section (2) of Section 11B of the Act. It is clear that the Explanation has nothing to do with the postponement of the date from which interest becomes payable under Section 11BB of the Act. Manifestly, interest under Section 11BB of the Act becomes payable, if on an expiry of a period of three months from the date of receipt of the application for refund, the amount claimed is still not refunded. Thus, the only interpretation of Section 11BB that can be arrived at is that interest under the said Section becomes payable on the expiry of a period of three months from the date of receipt of the application under Sub-section (1) of Section 11B of the Act and that the said Explanation does not have any bearing or connection with the date from which interest under Section 11BB of the Act becomes payable.

10. It is a well settled proposition of law that a fiscal legislation has to be construed strictly and one has to look merely at what is said in the relevant provision; there is nothing to be read in; nothing to be implied and there is no room for any intendment. (See: *Cape Brandy Syndicate Vs. Inland Revenue Commissioners*[4] and *Ajmera Housing Corporation & Anr. Vs. Commissioner of Income Tax.*[5]).

11. At this juncture, it would be apposite to extract a Circular dated 1st October 2002, issued by the Central Board of Excise & Customs, New Delhi, wherein referring to its earlier Circular dated 2nd June 1998, whereby a direction was issued to fix responsibility for not disposing of the refund/rebate claims within three months from the date of receipt of application, the Board has reiterated its earlier stand on the applicability of Section 11BB of the Act. Significantly, the Board has stressed that the provisions of Section 11BB of the Act are attracted "automatically" for any refund sanctioned beyond a period of three months. The Circular reads thus:

"**Circular No.670/61/2002-CX, dated 1-10-2002**

F.No.268/51/2002-CX.8

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject : Non-payment of interest in refund/rebate cases which are sanctioned beyond three months of filing – regarding

I am directed to invite your attention to provisions of section 11BB of Central Excise Act, 1944 *that wherever the refund/rebate claim is sanctioned beyond the prescribed period of three months of filing of the claim, the interest thereon shall be paid to the applicant at the notified rate.* Board has been receiving a large number of representations from claimants to say that interest due to them on sanction of refund/rebate claims beyond a period of three months has not been granted by Central Excise formations. On perusal of the reports received from field formations on such representations, it has been observed that in majority of the cases, no reason is cited. Wherever reasons are given, these are found to be very vague and unconvincing. In one case of consequential refund, the jurisdictional Central Excise officers had taken the view that since the Tribunal had in its order not directed for payment of interest, no interest needs to be paid.

2. In this connection, *Board would like to stress that the provisions of section 11BB of Central Excise Act, 1944 are attracted automatically for any refund sanctioned*

beyond a period of three months. The jurisdictional Central Excise Officers are not required to wait for instructions from any superior officers or to look for instructions in the orders of higher appellate authority for grant of interest. Simultaneously, Board would like to draw attention to Circular No.398/31/98-CX, dated 2-6-98 [1998 (100) E.L.T. T16] wherein *Board has directed that responsibility should be fixed for not disposing of the refund/rebate claims within three months from the date of receipt of application.* Accordingly, jurisdictional Commissioners may devise a suitable monitoring mechanism to ensure timely disposal of refund/rebate claims. Whereas all necessary action should be taken to ensure that no interest liability is attracted, should the liability arise, the legal provision for the payment of interest should be scrupulously followed."

(Emphasis supplied)

12. Thus, ever since Section 11BB was inserted in the Act with effect from 26th May 1995, the department has maintained a consistent stand about its interpretation. Explaining the intent, import and the manner in which it is to be implemented, the Circulars clearly state that the relevant date in this regard is the expiry of three months from the date of receipt of the application under Section 11B(1) of the Act.

13. We, thus find substance in the contention of learned counsel for the assessee that in fact the issue stands concluded by the decision of this Court in *U.P. Twiga Fiber Glass Ltd.* (supra). In the said case, while dismissing the special leave petition filed by the revenue and putting its seal of approval on the decision of the Allahabad High Court, this Court had observed as under:

"Heard both the parties.

In our view the law laid down by the Rajasthan High Court succinctly in the case of *J.K. Cement Works v. Assistant Commissioner of Central Excise & Customs* reported in 2004 (170) E.L.T. 4 vide Para 33:

"A close reading of Section 11BB, which now governs the question relating to payment of interest on belated payment of interest, makes it clear that relevant date for the purpose of determining the liability to pay interest is not the determination under sub-section (2) of Section 11B to refund the amount to the applicant and not to be transferred to the Consumer Welfare Fund but the relevant date is to be determined with reference to date of application laying claim to refund. The non-payment of refund to the applicant claimant within three months from the date of such application or in the case governed by proviso to Section 11BB, non-payment within three months from the date of the commencement of Section 11BB brings in the starting point of liability to pay interest, notwithstanding the date on which decision has been rendered by the competent authority as to whether the amount is to be transferred to Welfare Fund or to be paid to the applicant needs no interference."

The special leave petition is dismissed. No costs."

14. At this stage, reference may be made to the decision of this Court in *Shreeji Colour Chem Industries* (supra), relied upon by the Delhi High Court. It is evident from a bare reading of the decision that insofar as the reckoning of the period for the purpose of payment of interest under Section 11BB of the Act is concerned, emphasis has been laid on the date of receipt of application for refund. In that case, having noted that application by the assessee requesting for refund, was filed before the Assistant Commissioner on 12th January 2004, the Court directed payment of Statutory interest under the said Section from 12th April 2004 i.e. after the expiry of a period of

three months from the date of receipt of the application. Thus, the said decision is of no avail to the revenue.

15. In view of the above analysis, our answer to the question formulated in para (1) supra is that the liability of the revenue to pay interest under Section 11BB of the Act commences from the date of expiry of three months from the date of receipt of application for refund under Section 11B(1) of the Act and not on the expiry of the said period from the date on which order of refund is made.

16. As a sequitur, C.A.No.6823 of 2010, filed by the assessee is allowed and C.A.Nos.7637/2009 and 3088/2010, preferred by the revenue are dismissed. The jurisdictional Excise officers shall now determine the amount of interest payable to the assessees in these appeals, under Section 11BB of the Act, on the basis of the legal position, explained above. The amount(s), if any, so worked out, shall be paid within eight weeks from today.

17. However, on the facts and in the circumstances of the cases, there will be no order as to costs.

D.G. Appeals disposed of.

DURGA CHARAN RAUTRAY
v.
STATE OF ORISSA & ANR.
(Civil Appeal No. 1735 of 2006)

NOVEMBER 1, 2011

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

Arbitration Act, 1940 – Contractual agreement – Disputes/claims raised by contractor-appellant – After receipt of payment on preparation of the final bill, without raising objection – Redressal by way of arbitration – High Court holding that the appellant having received payment after preparation of final bill without raising objections, could not have initiated arbitral proceedings – On appeal, held: Appellant despite having received payment after preparation of final bill without raising objections, could seek redressal of his disputes by way of arbitration in terms of the contractual agreement – He could still raise his unsatisfied claims before an arbitrator – Order referring the dispute raised by the appellant to the arbitral tribunal, having attained finality, the respondents were precluded from asserting that the claims raised by the appellant could not be adjudicated upon by way of arbitration – Order passed by the High Court was contradictory in terms – Once the High Court concluded that the Miscellaneous Case filed by the respondents raising objections was barred by limitation, it was not open to the High Court to consider one of the objections raised by the respondents and to uphold the same, so as to disentitle the appellant from reaping the fruits of the arbitral award – Thus, order passed by the High Court is set aside and that of the civil judge making arbitral award rule of the court, is upheld.

Appellant was entrusted with a construction work by respondent-State. Dispute arose between the parties and were referred to an arbitral tribunal. The arbitral tribunal passed an award in favour of the appellant. The appellant filed an application to make the arbitral award, rule of the court. The respondents filed objections under Sections 30 and 33 of the Arbitration Act, 1940 by filing Miscellaneous Case. The Civil Judge dismissed the Miscellaneous Case on the ground of limitation. The award was made rule of the court. Aggrieved, the respondents filed an appeal before the High Court under Section 39 of the Arbitration Act, 1940. The High Court upheld the order of the Civil Judge on the issue of limitation, however, held that the appellant could not obtain the benefits of the award rendered by the Arbitral Tribunal in his favour since the appellant had received payments on the preparation of final bill without raising

objections. Therefore, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 A perusal of clause 23 of the contractual agreement leaves no room for any doubt that the appellant could claim arbitration on account of disputes arising from the contract "except where otherwise provided". Clause 23 includes within the purview of arbitration, disputes whether arising during the progress of the work or after the completion or abandonment thereof. There is no restraint whatsoever expressed in clause 23, which would deprive the appellant from seeking redressal by way of arbitration, merely because he had received payments after the preparation of the final bill, without raising any objections. Accordingly, even after the receipt of payment on the preparation of the final bill, it was open to the appellant to seek redressal of his disputes by way of arbitration, even though he had not raised any objections. [Para 8]

Bharat Coking Coa Ltd. v. Annapurna Construction **(2003) 8 SCC 154: 2003 (3) Suppl. SCR 122 – relied on.**

1.2 Despite receipt of payment on the preparation of the final bill, it was still open to the appellant to raise his unsatisfied claims before an arbitrator, under the contract agreement. It was no longer open to the respondents to contest the claim of the appellant on the instant issue after the appellant had obtained the court order dated 15.05.1981 which referred the disputes raised by the appellant to an arbitral tribunal. The court order dated 15.05.1981 referring the disputes raised by the appellant to arbitration, attained finality inasmuch as the same remained uncontested at the hands of the respondents. The respondents were, thereafter precluded from asserting that the claims raised by the appellant could not be adjudicated upon by way of arbitration. Once the disputes raised by the appellant were referred for arbitration and the rival parties submitted to the arbitration proceedings without any objection, it is no longer open to either of them to contend that arbitral proceedings were not maintainable. Further, the order passed by the High Court is contradictory in terms. Once the High Court had concluded, that the Miscellaneous Case filed by the respondents raising objections was barred by limitation, it was not open to the High Court to consider one of the objections raised by the respondents and to uphold the same, so as to disentitle the appellant from reaping the fruits of the arbitral award. Once the plea of limitation had been upheld, the objection(s) filed by the respondents, irrespective of the merit(s) thereof were liable to be rejected. [Para 8]

1.3 The High Court erred in concluding that the appellant having received payment after preparation of the final bill, without having raised any objection, could not have initiated arbitral proceedings. The judgment rendered by the High Court is set aside. The order passed by the Civil Judge, Senior Division is upheld. [Para 9]

Case Law Reference:

2003 (3) Suppl. SCR 122 relied on Para 8

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1735 of 2006.

From the Judgment & Order dated 22.12.2003 of the High Court of Orissa at Cuttack in ARBA No. 14 of 2003.

Ginny J. Rautray, Praveena Gautam for the Appellant.

Shibashish Misra for the Respondents.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. The appellant was entrusted with the construction of balance work of earth dam in connection with the Kharkhai Irrigation Project upto RL 316.50 on 31.12.1975. The estimated cost of the said balance work was Rs.13,78,810/-. As per the contract agreement, the work was to commence on 1.1.1976 and was to be completed on or before 31.7.1976. For some reasons including change in design, the work could not be completed within the prescribed time. The appellant eventually completed the assigned work in July, 1978. This delay in completion of work, according to the appellant, resulted in financial loss to the appellant. In addition to the aforesaid, the appellant had some other grievances as well. Illustratively, the appellant sought payment towards some additional work executed by him, and also, refund of royalty deducted on account of the supply of "morum". All these disputes were raised by the appellant, with the concerned respondent(s). The respondent(s) chose not to entertain the claims raised by the appellant. In fact, all communications addressed by the appellant to the respondents remained unanswered. The appellant then sought reference of his claims for adjudication before an arbitrator. This request of the appellant was also not heeded to. The appellant thereafter obtained a Court order dated 15.5.1981, whereby the disputes raised by the appellant were referred to an arbitral tribunal. The arbitral tribunal examined nine items of claim raised by the appellant.

2. The award rendered by the arbitral tribunal dated 15.9.1998, adjudicated claim item nos. 4, 5, 6 and 9, in favour of the appellant. In so far as claim item no.4 is concerned, the appellant had demanded an additional amount of Rs.2 lakhs on account of price escalation. This claim was based on the fact, that after the work was assigned to him, the State Government had revised minimum wages of labour, and increased the same by 16%. The appellant, accordingly, claimed extra payment of 16% over the gross amount paid in the final bill. The arbitral tribunal held the appellant entitled to Rs.24,380/- towards price escalation. In claim item no.5, the appellant claimed Rs.5,51,173/- towards cost of "morum" supplied, but for which no payment had been released. In this behalf, the appellant claimed carriage of 47,106 cubic meters with 15 kilometers lead, at the rate of Rs.21.35 per cubic meter. While adjudicating the instant claim, the arbitral tribunal found the appellant entitled to the difference between the cost of supply of "morum", as against the cost of supply of "earth". In respect of claim item no.5, the appellant was held entitled to a sum of Rs.78,667/-. In claim item no.6, the appellant demanded a refund of Rs.20,727/- deducted towards royalty from his bills. The aforesaid royalty was allegedly charged on the "morum" supplied by the appellant. The appellant was held entitled to refund of the entire sum of Rs.20,727/- deducted from his bills towards royalty. In so far as claim item no.9 is concerned, the appellant claimed interest at the rate of 18% per annum on the principal claim amount, from the due date till the date of final payment. The arbitral tribunal held the appellant entitled to interest at the rate of 10% per annum on the principal awarded amount of Rs.1,23,724/-, with effect from 19.8.1981 (i.e., the date with effect from which the Interest Act, 1978 came into force) till 5.4.1992. Calculated in the aforesaid terms, the arbitral tribunal awarded interest of Rs.1,31,544/- to the appellant.

3. Notice to make the arbitral award dated 15.9.1998 "rule of the court" was issued on 22.2.1999. In March, 1999, the respondents were served with the said notice. On 21.12.1999, the Government Pleader entered appearance on behalf of the respondents, and sought time to file objections. Objections on behalf of the respondents were filed before the Civil Judge, Senior Division, Bhubaneswar on 6.3.2000. To contest the arbitral award dated 15.9.1998, the respondents filed objections under sections 30 and 33 of the Arbitration Act, 1940 by filing a "Miscellaneous Case". It would be relevant to mention that section 30 aforesaid, postulates the grounds for setting aside an award, whereas, section 33 lays down the course to

be adopted for challenging, inter alia, the validity of an arbitral award.

4. The "Miscellaneous Case", filed by the respondents was contested by the appellant inter alia by raising a preliminary objection. It was sought to be asserted, that the "Miscellaneous Case" was barred by limitation. The "Miscellaneous Case" filed by the respondents was rejected by the Civil Judge, Senior Division, Bhubaneshwar by accepting the plea of limitation raised by the appellant. The suit filed by the appellant was decreed on 30.4.2002. The award of the arbitral tribunal dated 15.9.1998 was made "rule of the court". The respondents were directed to pay the awarded amount to the appellant, failing which, the appellant was granted liberty to recover the same through Court.

5. Dissatisfied with the order passed by the Civil Judge, Senior Division, Bhubaneshwar, the respondents preferred an appeal before the High Court of Orissa under section 39 of the Arbitration Act, 1940. In the said appeal, the respondents raised two contentions. Firstly it was sought to be asserted, that the objections filed by the respondents through the "Miscellaneous Case" filed under sections 30 and 33 of the Arbitration Act, 1940, were wrongly rejected by the Civil Judge, Senior Division, Bhubaneshwar, on the ground of limitation. Secondly it was asserted, that the controversy raised by the appellant could not have been referred for adjudication by way of arbitration, after the appellant had received the final bill without raising any objection.

6. The determination by the Civil Judge, Senior Division, Bhubaneshwar, on the issue of limitation was upheld by the High Court. Yet the contention advanced at the hands of the respondents, that it was not open to the appellant to have sought adjudication of his claims, by way of arbitration, after the appellant had received payments on the preparation of the final bill without raising any objections, was accepted. In sum and substance, therefore, by its order dated 22.12.2003 it was concluded by the High Court, that the appellant could not reap the benefits of the award rendered by the arbitral tribunal in his favour on 15.9.1998.

7. Dissatisfied with the judgment rendered by the High Court dated 22.12.2003, the appellant filed a petition for special leave to appeal bearing no.12183 of 2004. Leave was granted on 20.3.2006. Consequently, the matter came to be renumbered as civil appeal no.1735 of 2006.

8. Since the plea of limitation had been decided in favour of the appellant and against the respondents, the only question to be adjudicated upon, in the present appeal filed by the appellant, is, whether the disputes/claims raised by the appellant could have been referred for arbitration, after the appellant had received payment after the preparation of the final bill, without raising any objections. The answer to the instant query must necessarily flow from the relevant clause of the agreement which entitled the appellant to seek redressal of disputes through arbitration, as it is the arbitration clause alone which defines the parameters of the disputes which rival parties can raise for adjudication before an arbitrator (or arbitral tribunal). In so far as the instant aspect of the matter is concerned, clause 23 of the agreement dated 31.12.1975 is relevant. The same is being extracted hereinbelow:

> "Clause 23 – Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship of materials used on the work, or as to any other questions, claim, right matter, or thing whatsoever, if any way arising out of, or relating to the contract, designs, drawings, specifications, estimates instructions, orders or these conditions, or otherwise concerning the work or the execution, or failure to execute the same, whether arising

during the progress of the work, or after the completion or abandonment thereof shall be referred to the sole arbitration of a Superintending Engineer of the State Public Works Department unconnected with the work at any stage nominated by the concerned Chief Engineer. If there be no such Superintending Engineer, it should be referred to the sole arbitration of the Chief Engineer concerned. It will be no objection to any such appointment that the arbitrator so appointed is a Government Servant. The award of the Arbitrator so appointed shall be final, conclusive and binding on all parties to these contract."

A perusal of clause 23 of the contractual agreement extracted above, leaves no room for any doubt that the appellant could claim arbitration on account of disputes arising from the contract "except where otherwise provided". It is not the case of the respondents, that the appellant was precluded by any clause in the contractual agreement from seeking settlement of claims raised by the appellant (which have been allowed in favour of the appellant by the arbitral tribunal). Clause 23 includes within the purview of arbitration, disputes whether arising during the progress of the work or after the completion or abandonment thereof. There is no restraint whatsoever expressed in clause 23, which would deprive the appellant from seeking redressal by way of arbitration, merely because he had received payments after the preparation of the final bill, without raising any objections. Accordingly, we are of the view, that even after the receipt of payment on the preparation of the final bill, it was open to the appellant to seek redressal of his disputes by way of arbitration, even though he had not raised any objections. *Secondly*, in so far as the instant aspect of the matter is concerned, the issue in hand stands concluded by this Court in *Bharat Coking Coal Ltd. v. Annapurna Construction* (2003) 8 SCC 154 wherein it has been held as under:

"Only because the respondent has accepted the final bill, the same would not mean that it was not entitled to raise any claim. It is not the case of the appellant that while accepting the final bill, the respondent had unequivocally stated that he would not raise any further claim. In absence of such a declaration, the respondent cannot be held to be estopped or precluded from raising any claim…".

In the instant case also the appellant, while accepting payment on the preparation of the final bill, did not undertake that he would not raise any further claims. As such, we are satisfied that the judgment rendered in *Bharat Coking Coal Ltd.,* case (supra) leads to the irresistible conclusion, that despite receipt of payment on the preparation of the final bill, it was still open to the appellant to raise his unsatisfied claims before an arbitrator, under the contract agreement. *Thirdly*, it was no longer open to the respondents to contest the claim of the appellant on the instant issue after the appellant had obtained the court order dated 15.5.1981 which referred the disputes raised by the appellant to an arbitral tribunal. The Court order dated 15.5.1981 referring the disputes raised by the appellant to arbitration, attained finality inasmuch as the same remained uncontested at the hands of the respondents. The respondents were, thereafter precluded from asserting that the claims raised by the appellant could not be adjudicated upon by way of arbitration. Once the disputes raised by the appellant were referred for arbitration and the rival parties submitted to the arbitration proceedings without any objection, it is no longer open to either of them to contend that arbitral proceedings were not maintainable. And *fourthly*, the order passed by the High Court is contradictory in terms. Once the High Court had concluded, that the Miscellaneous Case filed by the respondents raising objections was barred by limitation, it was not open to the High Court to consider one of the objections raised by the respondents and to uphold the same, so as to disentitle the appellant from reaping the fruits of the arbitral award. In other words, once the plea of limitation had been upheld, the objection(s) filed by the respondents, irrespective of the merit(s) thereof were liable to be rejected.

9. For the reasons recorded hereinabove, we are of the view that the High Court erred in concluding that the appellant having received payment after preparation of the final bill, without having raised any objection, could not have initiated arbitral proceedings. The judgment rendered by the High Court dated 22.12.2003 is, accordingly, set aside. The order passed by the Civil Judge, Senior Division, Bhubaneshwar dated 30.4.2002 is upheld. The instant appeal is accordingly allowed. The respondents are directed to pay the appellant the awarded amount, failing which, the appellant shall be at liberty to recover the same through Court.

10. There will be no order as to costs.

N.J. Appeal allowed.

UNION OF INDIA AND ORS.

v.

M/S NITDIP TEXTILE PROCESSORS PVT. LTD. AND ANOTHER

(Civil Appeal No. 2960 of 2006)

NOVEMBER 03, 2011.

[H.L. DATTU AND CHANDRAMAULI KR. PRASAD,JJ.]

FINANCE (NO. 2) ACT, 1998:

ss. 87 (m) (ii)(a) and (b) – 'Tax arrears' – Connotation of – Application of Kar Vivad Samadhana Scheme, 1998 to 'tax arrears' in respect of the amount of excise duty, interest, fine or penalty determined as due or payable as on 31.3.1998, or which constituted the subject matter of the demand notice or a show cause notice issued on or before 31.3.1998, but remaining unpaid as on the date of making a declaration u/s 88 – High Court declared s.87(m)(ii)(b) as violative of Article 14 of the Constitution in so far as it seeks to deny the benefit of the Scheme to those who were in arrears of duties etc. as on 31.3.1998, but to whom notices were issued after 31.3.1998, and struck down the expression "on or before the 31st day of March 1998" – HELD: The classification made by the legislature appears to be reasonable for the reason that the legislature has grouped two categories of assesses, namely, the assessees whose dues are quantified but not paid and the assessees who are issued with the Demand and Show Cause Notice on or before a particular date – The Legislature has not extended this benefit to those persons who do not fall under this category or group — The distinction so made cannot be said to be arbitrary or illogical which has no nexus with the purpose of legislation – The findings and the conclusion reached by the High Court cannot be sustained – The impugned common judgment and order is set aside – Central Excise Act, 1944 – s. 11A – Constitution of India, 1950 – Article 14 – Interpretation of Statutes – Legal fiction.

CONSTITUTION OF INDIA, 1950:

Article 14 – Classification in taxation – HELD: In taxation, there is a broader power of classification than in some other exercises of legislation' – When the wisdom of the legislation while making classification is questioned, the role of the courts is very much limited – It is not reviewable by the courts unless palpably arbitrary – It is not the concern of the courts whether the classification is the wisest or the best that could be made – However, a discriminatory tax cannot be sustained if the classification is wholly illusory – Discrimination resulting from fortuitous circumstances arising out of particular situations, in which some of the tax payers find themselves, is not hit by Article 14 if the legislation, as such, is of general application and does not single them out for harsh treatment – In the instant case, keeping in view the Scheme, the legislation is based on a reasonable classification – Finance (No. 2) Act, 1998 – ss.87(m)(ii)(b) and 88. – Cut-off date – Kar Vivad Samadhana Scheme, 1998.

TAXATION:

Kar Vivad Samadhana Scheme, 1998 – Nature and scope of – Held: The Scheme is a step towards the settlement of outstanding disputed tax liability – The Scheme is a complete Code in itself and exhaustive of the matter dealt with therein – It is statutory in nature and character – While implementing the Scheme, liberal construction may be given but it cannot be extended beyond conditions prescribed in the statutory scheme – Therefore, the courts must construe the provisions of the Scheme with reference to the language used therein and ascertain what their true scope is by applying the normal rule of construction – Further, the object of the Scheme and its application to Customs and Central Excise cases involving arrears of taxes has been explained in detail by the Trade Notice No. 74/98 dated 17.8.1998 – It is a settled law that the Trade Notice, even if it is issued by the Revenue Department of any one State, is binding on all the other departments with equal force all over the country – However, the Trade Notice, as such, is not binding on the courts but is certainly binding on the assessee and can be contested by him – Interpretation of Statute – Finance (NO.2) Act, 1998 – ss. 87(m) (ii) and 88 – Trade Notice No. 74/98 dated 17.8.1998 issued by the Commissioner of Central Excise and Customs, Ahmedabad-I – Practice and Procedure:

The respondents in C. A. No. 2960 of 2006, engaged in the manufacture of textile fabrics, were found, on 5.9.1997, to have cleared the Man Made Fabric of Rs. 5,38,449/- without the payment of excise duty of Rs. 84,290/-. A show cause notice dated 06.01.1999 was issued to the respondents demanding a duty of Rs.84,290/- u/s 11A of the Excise Act, 1944 along with penalties and interest under the relevant provisions for non-payment of excise duty on clandestine clearance of the said fabrics. Kar Vivad Samadhana Scheme, 1998, as contained in the Finance (No.2) Act of 1998, was made applicable to tax arrears outstanding as on 31.3.1998. The benefit was also given to those assesses who had been issued show cause notice on or before 31.3.1998. The benefits of the Scheme could be availed by any eligible assessee by filing a declaration of his arrears u/s 88 of the Act between 1.9.1998 and 31.12.2998 (subsequently extended to 31.1.1999). Since the show cause notice to the respondents was issued on 6.1.1999, and, as such, they were not entitled to the benefit of the Scheme, they filed a writ petition, which was allowed by the High Court, by its judgment dated 25.7.2005. The High Court declared that s.87(m)(ii)(b) of Finance (No.2) Act,1998 was violative of Article 14 of the Constitution, and struck down the expression "on or before the 31st day of March, 1998" in s. 87 (m) (ii) (b) as being unconstitutional. It further directed the competent authority to entertain and decide the declarations made by the assessees in terms of the Scheme. Aggrieved, the Revenue filed the appeals.

Allowing the appeals, the Court

HELD: 1.1 Kar Vivad Samadhan Scheme, 1998, as contained in Chapter IV of the Finance (N0.2) Act, 1998, is a step towards the settlement of outstanding disputed tax liability. The object and the purpose of the Scheme is to minimise the litigation and to realize the arrears by way of settlement in an expeditious manner. The Scheme is a complete Code in itself and exhaustive of the matter dealt with therein. It is statutory in nature and character. While implementing the Scheme, liberal construction may be given but it cannot be extended beyond conditions prescribed in the statutory scheme. Therefore, the courts must construe the provisions of the Scheme with reference to the language used therein and ascertain what their true scope is by applying the normal rule of construction. [para 6, 12 and 29]

Regional Director, ESI Corpn. v. Ramanuja Match Industries, **1985 (2) SCR 119 = (1985) 1 SCC 218;**

Hemalatha Gargya v. Commissioner of Income Tax, ***A.P.*****,** **2002 (4) Suppl. SCR 382 =(2003) 9 SCC 510;** *Union of India v. Charak Pharmaceuticals (India) Ltd.,* **(2003) 11 SCC 689;** *Deepal Girishbhai Soni v. United India Insurance Co. Ltd.*, **(2004) 5 SCC 385;** *Maruti Udyog Ltd. v. Ram Lal*, **2005 (1) SCR 790 = (2005) 2 SCC 638;** *Pratap Singh v. State of Jharkhand*, **2005 (1) SCR 1019 =(2005) 3 SCC 551;** *Sushila Rani v. Commissioner of Income Tax*, **2002 (1) SCR 809 =(2002) 2 SCC 697;** *Killick Nixon Ltd., Mumbai v. Deputy Commissioner of Income Tax, Mumbai,* **2002 (4) Suppl. SCR 348 =(2003) 1 SCC 145;** *CIT v. Shatrusailya Digvijaysingh Jadeja*, **2005 (2) Suppl. SCR 1119 = (2005) 7 SCC 294; and** *Master Cables (P) Ltd. Vs. State of Kerala* **(2007) 5 SCC 416 – relied on.**

Speech of the Finance Minister dated 17.7.1998, **232 ITR 1998(14) – referred to.**

1.2 Further, the object of the Scheme and its application to Customs and Central Excise cases involving arrears of taxes has been explained in detail by the Trade Notice No. 74/98 dated 17.8.1998 issued by the Commissioner of Central Excise and Customs, Ahmedabad-I. It is a settled law that the Trade Notice, even if it is issued by the Revenue Department of any one State, is binding on all the other departments with equal force all over the country. The Trade Notice guides the traders and business community in relation to their business, and how to regulate it in accordance with the applicable laws or schemes. However, the Trade Notice, as such, is not binding on the courts but is certainly binding on the assessee and can be contested by him. [para 18, 19 and 21]

Steel Authority of India v. Collector of Customs, **(2001) 9 SCC 198; and** *Purewal Associates Ltd. v. CCE*, **1996 (7) Suppl. SCR 117 = (1996) 10 SCC 752;** *CCE v. Kores (India) Ltd.*, **(1997) 10 SCC 338;** *Union of India v. Pesticides Manufacturing and Formulators Association of India,* **2002 (3) Suppl. SCR 231 = (2002) 8 SCC 410; and** *CCE v. Jayant Dalal (P) Ltd.*, **(1997) 10 SCC 402) – relied on.**

1.3 The Scheme in s. 87 (m) (ii) defines the meaning of the expression 'tax arrear', in relation to indirect tax enactments. It would mean the determined amount of duties, as due and payable which would include drawback of duty, credit of duty or any amount representing duty, cess, interest, fine or penalty determined. The legislation, by using its prerogative power, has restricted the dues of duties quantified and payable as on 31st day of March, 1998 and remaining unpaid till a particular event has taken place, as envisaged under the Scheme. The date has relevance. The definition is inclusive definition. It also envisages instances where a Demand Notice or Show Cause Notice issued under indirect tax enactment on or before 31st day of March, 1998 but not complied with the demand made, to be treated as tax arrears by legal fiction. [para 28]

1.4 Thus, legislation has carved out two categories of assessees viz. where tax arrears are quantified but not paid, and where Demand Notice or Show Cause Notice issued but not paid. In both the circumstances, legislature has taken cut-off date as on 31st day of March 1998. It cannot be disputed that the legislation has the power to classify. [para 28]

2.1 It is now well settled by catena of decisions of this Court that a particular classification is proper if it is based on reason and is not purely arbitrary, capricious or vindictive. On the other hand, while there must be a reason for the classification, the reason need not be good one, and it is immaterial that the Statute is unjust. The test is not wisdom but good faith in the classification. The

tests adopted to determine whether a classification is reasonable or not are, that the classification must be founded on an intelligible differentia which distinguishes person or things that are grouped together from others left out of the groups and that the differentia must have a rational relation to the object sought to be achieved by Statute in question. [para 28 and 30]

2.2 The concept of Article 14 of the Constitution of India vis-a-vis fiscal legislation is explained by this Court in several decisions. It has been time and again observed by this Court that the Legislature has a broad discretion in the matter of classification. In taxation, 'there is a broader power of classification than in some other exercises of legislation'. When the wisdom of the legislation while making classification is questioned, the role of the courts is very much limited. It is not reviewable by the courts unless palpably arbitrary. It is not the concern of the courts whether the classification is the wisest or the best that could be made. However, a discriminatory tax cannot be sustained if the classification is wholly illusory. [para 28 and 30]

Amalgamated Tea Estates Co. Ltd. v. State of Kerala, **1974 (3) SCR 820 = (1974) 4 SCC 415;** *Anant Mills Co. Ltd. v. State of Gujarat*, **1975 (3) SCR 220 = (1975) 2 SCC 175;** *Jain Bros* v. *Union of India,* **1970 (3) SCR 253 = (1969) 3 SCC 311;** *Murthy Match Works v. CCE*, **1974 (3) SCR 121 = (1974) 4 SCC 428;** *R.K. Garg v. Union of India*, **1982 (1) SCR 947 = (1981) 4 SCC 675;** *Elel Hotels and Investments Ltd.* v. *Union of India,* **1989 (2) SCR 880 =(1989) 3 SCC 698;** *P.M. Ashwathanarayana Setty v. State of Karnataka,* **(1989) Supp. (1) SCC 696;** *Kerala Hotel and Restaurant Assn. v. State of Kerala*, **1990 (1) SCR 516 =(1990) 2 SCC 502;** *Spences Hotel (P) Ltd. v. State of W.B.*, **1991 (1) SCR 429 =(1991) 2 SCC 154;** *Venkateshwara Theatre* v. *State of A.P.*, **1993 (3) SCR 616 = (1993) 3 SCC 677;** *State of Kerala v. Aravind Ramakant Modawdakar*, **(1999) 7 SCC 400;** *State of U.P. v. Kamla Palace*, **1999 (5) Suppl. SCR 452 = (2000) 1 SCC 557;** *Aashirwad Films v. Union of India*, **2007 (7) SCR 310 = (2007) 6 SCC 624; and** *Jai Vijai Metal Udyog Private Limited, Industrial Estate, Varanasi v. Commissioner, Trade Tax, Uttar Pradesh, Lucknow*, **(2010) 6 SCC 705 – relied on**

2.3 However, it is well settled that the Legislature enjoys very wide latitude in the matter of classification of objects, persons and things for the purpose of taxation in view of inherent complexity of fiscal adjustment of diverse elements. The power of the Legislature to classify is of wide range and flexibility so that it can adjust its system of taxation in all proper and reasonable ways. Even so, large latitude is allowed to the State for classification upon a reasonable basis and what is reasonable is a question of practical details and a variety of factors which the court will be reluctant and perhaps ill-equipped to investigate. It has been laid down in a large number of decisions of this Court that a taxation Statute, for the reasons of functional expediency and even otherwise, can pick and choose to tax some assessees. A power to classify being extremely broad and based on diverse considerations of executive pragmatism, the Judicature cannot rush in where even the Legislature warily treads. All these operational restraints on judicial power must weigh more emphatically where the subject is taxation. [para 44]

2.4 Discrimination resulting from fortuitous circumstances arising out of particular situations, in which some of the tax payers find themselves, is not hit by Article 14 if the legislation, as such, is of general application and does not single them out for harsh treatment. Advantages or disadvantages to individual assessees are accidental and inevitable and are inherent

in every taxing Statute as it has to draw a line somewhere and some cases necessarily fall on the other side of the line. [para 45]

Khandige Sham Bhat vs. Agricultural Income Tax Officer, Kasaragod and Anr. **AIR 1963 SC 591 – relied on**

2.5 As regards the instant matters, the Legislature in relation to 'tax arrears' has classified two groups of assessees. The first one being those assessees in whose cases duty is quantified and not paid as on the 31st day of March, 1998 and those assessees who are served with Demand or Show Cause Notice issued on or before the 31st day of March, 1998. The Scheme is not made applicable to such of those assessees whose duty dues are quantified but Demand Notice is not issued as on 31st day of March, 1998 intimating the assessee's dues payable. The same is the case of the assessees who are not issued with the Demand or Show Cause Notice as on 31.03.1998. [para 30]

2.6 The Legislature, in its wisdom, has thought it fit to extend the benefit of the Scheme to such of those assessees whose tax arrears are outstanding as on 31.03.1998, or who are issued with the Demand or Show Cause Notice on or before 31st day of March, 1998, though the time to file declaration for claiming the benefit is extended till 31.01.1999. The classification made by the legislature appears to be reasonable for the reason that the legislature has grouped two categories of assesses, namely, the assessees whose dues are quantified but not paid and the assessees who are issued with the Demand and Show Cause Notice on or before a particular date. The Legislature has not extended this benefit to those persons who do not fall under this category or group. This position is made clear by s. 88 of the Scheme which provides for settlement or tax payable under the Scheme by filing declaration after 1st day of September, 1998 but on or before the 31st day of December, 1998 in accordance with s.89 of the Scheme, which date was extended upto 31.01.1999. The distinction so made cannot be said to be arbitrary or illogical which has no nexus with the purpose of legislation. [para 30]

2.7 In determining whether classification is reasonable, regard must be had to the purpose for which legislation is designed. Keeping in view the Scheme, the legislation is based on a reasonable basis which is firstly, the amount of duties, cesses, interest, fine or penalty must have been determined as on 31.03.1998 but not paid as on the date of declaration; and secondly, the date of issuance of Demand or Show Cause Notice on or before 31.03.1998, which is not disputed, but the duties remain unpaid on the date of filing of declaration. Therefore, the Scheme 1998 does not violate the equal protection clause where there is an essential difference and a real basis for the classification which is made. The mere fact that the line dividing the classes is placed at one point rather than another will not impair the validity of the classification. [para 30]

2.8 The findings and the conclusion reached by the High Court cannot be sustained. The impugned common judgment and order is set aside. [para 46]

Union of India v. M.V. Valliappan, **(1999) 6 SCC 259,** *Sudhir Kumar Consul v. Allahabad Bank*, **(2011) 3 SCC 486 and** *Government of Andhra Pradesh v. N. Subbarayudu,* **(2008) 14 SCC 702** *Government of India v. Dhanalakshmi Paper and Board Mills*, **1989 Supp. (1) SCC 596** *State of Jammu and Kashmir v. Triloki Naths Khosa*, **(1974) 1 SCC 19 – cited.**

Case Law Reference:

1985 (2) SCR 119	relied on	para 6
2002 (4) Suppl. SCR 382	relied on	para 7
(2003) 11 SCC 689	relied on	para 8
(2004) 5 SCC 385	relied on	para 9
2005 (1) SCR 790	relied on	para 19
2005 (1) SCR 1019	relied on	para 11
2002 (1) SCR 809	relied on	para 14
2002 (4) Suppl. SCR 348	relied on	para 15
2005 (2) Suppl. SCR 1119	relied on	para 16
(2007) 5 SCC 416	relied on	para 17
2001 (9) SCC 198	relied on	para 19
1996 (7) Suppl. SCR 117	relied on	para 20
1997 (10) SCC 338	relied on	para 21
2002 (3) Suppl. SCR 231	relied on	para 21
1997 (10) SCC 402	relied on	para 21
232 ITR 1998(14)	referred to	para 23
(1999) 6 SCC 259	cited	para 23
(2011) 3 SCC 486	cited	para 23
(2008) 14 SCC 702	cited	para 23
(1974) 1 SCC 19	cited	para 24
1989 Supp. (1) SCC 596	cited	para 24
1974 (3) SCR 820	relied on	para 31
1975 (3) SCR 220	relied on	para 32
1970 (3) SCR 253	relied on	para 33
1974 (3) SCR 121	relied on	para 34
1982 (1) SCR 947	relied on	para 35
1989 (2) SCR 880	relied on	para 36
1990 (1) SCR 516	relied on	para 37
(1989) Supp. (1) SCC 696	relied on	para 38
1991 (1) SCR 429	relied on	para 39
1993 (3) SCR 616	relied on	para 40
1999 (7) SCC 400	relied on	para 41
1999 (5) Suppl. SCR 452	relied on	para 42
2007 (7) SCR 310	relied on	para 43
2010 (6) SCC 705	relied on	para 44
AIR 1963 SC 591	relied on	para 45

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2960 of 2006 etc.

From the Judgment & Order dated 25.07.2005 of the High Court of Gujarat at Ahmedabadm, in Special Civil Application No. 735 of 1999.

WITH

C.A. Nos. 2961, 2962, 2963, 2964, 3659 & 5616 of 2006 and 990 of 2007.

R.P. Bhatt, Shalini Kumar, Arijit Prasad, Sunita Rani Singh, B. Krishna Prasad for the Appellants.

Prasas Kuhad, Hemant Sharma, Jitin Chaturvedi, Indu Sharma, Sheela Goel for the Respondents.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. The present batch of eight appeals arises out of the common Judgment and Order dated 25.07.2005 passed by the High Court of Gujarat at Ahmedabad in the Special Civil Application No.735 of 1999 and connected applications filed under Article 226 of the Constitution of India. Since these appeals involve common question of law, they are disposed of by this common Judgment and Order.

2. All the parties in these present appeals before us were duly served but none appeared for the respondents except one in Civil Appeal No. 5616 of 2006.

3. The High Court, *vide* its impugned Judgment and Order dated 25.07.2005, has declared that Section 87(m)(ii)(b) of Finance (No.2) Act, 1998 is violative of Article 14 of the Constitution of India insofar as it seeks to deny the benefit of the 'Kar Vivad Samadhana Scheme, 1998 (hereinafter referred to as "the Scheme") to those who were in arrears of duties etc., as on 31.03.1998 but to whom the notices were issued after 31.03.1998 and further, has struck down the expression "on or before the 31st day of March 1998" under Section 87(m)(ii)(b) of the Finance (No. 2) Act, 1998 as *ultra vires* of the Constitution of India and in particular, Article 14 of the Constitution on the ground that the said expression prescribes a cut-off date which arbitrarily excludes certain category of persons from availing the benefits under the Scheme. The High Court has further held that as per the definition of the 'tax arrears' in Section 87(m)(ii)(a) of the Act, the benefit of the Scheme was intended to be given to all persons against whom the amount of duties, cess, interest, fine or penalty were due and payable as on 31.3.1998. Therefore, this cut-off date in Section 87(m)(ii)(b) arbitrarily denies the benefit of the Scheme to those who were in arrears of tax as on 31.03.1998 but to whom notices were issued after 31.3.1998. This would result in unreasonable and arbitrary classification between the assessees merely on the basis of date of issuance of Demand Notices or Show Cause Notices which has no nexus with the purpose and object of the Scheme. In other words, the persons who were in arrears of tax on or before 31.03.1998 were classified as those, to whom Demand Notices or Show Cause Notices have been issued on or before 31.03.1998 and, those to whom such notices were issued after 31.3.1998. The High Court observed that this classification has no relation with the purpose of the Scheme to provide a quick and voluntary settlement of tax dues. The High Court further observed that this artificial classification becomes more profound in view of the fact that the Scheme came into operation with effect from 1.9.1998 which contemplates filing of declaration by all persons on or after 1.9.1998 but on or before 31.1.1999. The High Court further held that all persons who are in arrears of direct as well as indirect tax as on 31.3.1998 constitute one class, and any further classification among them on the basis of the date of issuance of Demand Notice or Show Cause Notice would be artificial and discriminatory. The High Court concluded by directing the Revenue to consider the claims of the respondents for grant of benefit under the Scheme, afresh, in terms of the Scheme. The relevant portions of the impugned judgment of the High Court is extracted below:

> "In the light of the above, we shall now consider whether definition of "tax arrears" contained in Section 87 (m)(ii)(b) is arbitrary, irrational or violative of the doctrine of equality enshrined under Article 14 of the Constitution and whether the petitioners are entitle to avail benefit under Scheme. A reading of the speech made by the Finance Minister and the objects set out in memorandum to Finance (No. 2) Bill, 1998 shows that the Scheme was introduced with a view

to quick and voluntary settlement of tax dues outstanding as on 31.3.1998 under various direct and indirect tax enactments by offering waiver of a part of the arrears of taxes and interest and providing immunity against prosecution and imposing of penalty. The definition of 'tax arrear' contained in Section 87 (m)(i) in the context of direct tax enactment also shows that the legislation was intended to give benefit of the scheme to the assessee who were in arrears of tax on 31.3.1998. The use of the words as on "31st day of March, 1998" in Section 87(m)(ii) also shows that even in relation to indirect tax enactments, the benefit of the scheme was intended to be given to those against whom the amount of duties, cess, interest, fine or penalty were due or payable upto 31.3.1998. Viewed in this context it is quite illogical to exclude the persons like the petitioners from whom the amount of duties, cess, interest, fine, penalty, etc. were due as on 31.3.1998 but to whom Demand Notices were issued after 31.3.1998. In our opinion, the distinction made between those who were in arrears of indirect taxes as on 31.3.1998 only on the basis of the date of issuance of notice is wholly arbitrary and irrational. The classification sought to be made between those Demand Notices or Show Cause Notices may have been issued on or before 31st day of March, 1998 and those to whom such notices were issued after 31.3.1998 is per se unreasonable and has no nexus with the purpose of the legislation, namely to provide a quick and voluntary settlement of tax dues outstanding as on 31.3.1998.

The irrationality of the classification becomes more pronounced when the issue is examined in the backdrop of the fact that the scheme was made applicable with effect from 1.9.1998, and in terms of Sections 88 (amended) a declaration was required to be filed on or after first day of September, 1998 but on or before 31.1.1999. In our opinion, all persons who were in arrears of direct or indirect taxes as on 31.3.1998 constituted one class and no discrimination could have been made among them by introducing an artificial classification with reference to the date of Demand Notice or Show Cause Notice. All of them should have been treated equally and made eligible for availing benefit under the Scheme subject to compliance of conditions contained in other provisions of the Scheme."

4. We will take Civil Appeal No. 2960 of 2006 as the lead matter. The facts of the case, in brief, are hereunder: The respondent is engaged in the manufacture of textile fabrics. The team of Preventive Officers of the Central Excise, Ahmedabad-I conducted a surprise inspection of the premises of the factory on 5.9.1997. The Revenue Officers examined the statutory Central Excise Records and physically verified the stocks at various stages of manufacturing in the presence of two independent panchas and respondent no. 2, under the Panchnama dated 5.9.1997. The Revenue Officers found that the respondents have cleared the Man Made Fabric admeasuring 38,726 l.m. of Rs. 5,38,449/- without the payment of excise duty of Rs. 84,290/-. In this regard, the Statement of respondent no. 2 was recorded on 5.9.1997 under Section 14 of the Central Excise Act, 1944 (hereinafter referred to as "the Excise Act"). The respondent no. 2, in his Statement has admitted the processing of the said fabric in his factory, after registering it in the lot register, and its subsequent clandestine removal without payment of the excise duty. Accordingly, a Show Cause Notice dated 06.01.1999 was issued to the respondents demanding a duty of Rs. 84,290/- under Section 11A of the Excise Act along with an equal amount of penalty under Section 11AC of the Excise Act, and further penalty under Rule 173 Q of the Central Excise Rules, 1944 [hereinafter referred to as "the Excise Rules"] and interest under Section 11AB of the Excise Act for non-payment of excise duty on clandestine clearance of the said fabrics. Further, the Respondent no. 2 was also asked to show cause as to why penalty under Section 209

A of the Excise Rules should not be imposed on him for his active involvement in acquiring, possession, removal, concealing, selling and dealing of the excisable goods, which are liable to be confiscated under the Excise Act. In the meantime, the Scheme was introduced by the Hon'ble Finance Minister through the 1998 Budget, which was contained in the Finance (No.2) Act of 1998. The Scheme was made applicable to tax arrears outstanding as on 31.3.1998 under the direct as well as indirect tax enactments. Originally, the benefits of the Scheme could be availed by any eligible assessee by filing a declaration of his arrears under Section 88 of the Act on or after 1.9.1998 and on or before 31.12.1998. However, the period for declaration under the Scheme was extended upto 31.1.1999 by the Ordinance dated 31.12.1998. However, the cut-off date prescribed by the Scheme under Section 87 (m) (ii) (a) and (b) of the Act for availing the benefits under the Scheme excluded the respondents from its ambit. Being aggrieved, the respondents filed a Special Civil Application before the High Court of Gujarat, *inter-alia,* seeking a writ to strike down the words "on or before the 31st day of March 1998" occurring in Section 87 (m) (ii) of the Finance Act, 1998. They had further prayed for issuance of an appropriate direction to the petitioner to give them benefit of the Scheme, 1998 in respect of tax arrears under tax enactments for which Show Cause Notices or Demand Notices were issued on or after 31.03.1998. The High Court, vide its impugned judgment and order dated 25.7.2005, struck down the expression "on or before the 31st day of March, 1998" in Section 87 (m) (ii) (b) as being unconstitutional. The High Court further directed the competent authority to entertain and decide the declarations made by the assessees in terms of the Scheme. Aggrieved by the Judgment and Order, the Revenue is before us in this appeal.

5. The Scheme was introduced by Finance (No.2) Act and is contained in Chapter IV of the Act. The Scheme is known as Kar Vivad Samadhana Scheme, 1998. It was in force between 1.9.1998 and 31.1.1999. Briefly, the Scheme permits the settlement of "tax arrear" as defined in Section 87(*m*) of the Act. It is necessary to extract the relevant provisions of the Scheme:

> "Section 87 – Definitions.
>
> In this Scheme, unless the context otherwise requires,
>
> ***
>
> h) "direct tax enactment" means the Wealth-tax Act, 1957 or the Gift-tax Act, 1958 or the Income-tax Act, 1961 or the Interest-tax Act, 1974 or the Expenditure-tax Act, 1987;
>
> (j) "indirect tax enactment" means the Customs Act, 1962 or the Central Excise Act, 1944 or the Customs Tariff Act, 1975 or the Central Excise Tariff Act, 1985 or the relevant Act and includes the rules or regulations made under such enactment;
>
> ***
>
> (m) "tax arrear" means,-
>
> (i) in relation to direct tax enactment, the amount of tax, penalty or interest determined on or before the 31st day of March, 1998 under that enactment in respect of an assessment year as modified in consequence of giving effect to an appellate order but remaining unpaid on the date of declaration;
>
> (ii) in relation to indirect tax enactment,-
>
> (a) the amount of duties (including drawback of duty, credit of duty or any amount representing duty), cesses, interest, fine or penalty determined as due or payable under that enactment as on the 31st day of March, 1998 but remaining unpaid as on the date of

making a declaration under section 88; or

(b) the amount of duties (including drawback of duty, credit of duty or any amount representing duty), cesses, interest, fine or penalty which constitutes the subject matter of a Demand Notice or a show-cause notice issued on or before the 31st day of March, 1998 under that enactment but remaining unpaid on the date of making a declaration under section 88,

but does not include any demand relating to erroneous refund and where a show-cause notice is issued to the declarant in respect of seizure of goods and demand of duties, the tax arrear shall not include the duties on such seized goods where such duties on the seized goods have not been quantified.

Explanation.—Where a declarant has already paid either voluntarily or under protest, any amount of duties, cesses, interest, fine or penalty specified in this sub-clause, on or before the date of making a declaration by him under section 88 which includes any deposit made by him pending any appeal or in pursuance of a Court order in relation to such duties, cesses, interest, fine or penalty, such payment shall not be deemed to be the amount unpaid for the purposes of determining tax arrear under this sub-clause;

Section 88 - Settlement of tax payable

Subject to the provisions of this Scheme, where any person makes, on or after the 1st day of September, 1998 but on or before the 31st day of December, 1998, a declaration to the designated authority in accordance with the provisions of section 89 in respect of tax arrear, then, notwithstanding anything contained in any direct tax enactment or indirect tax enactment or any other provision of any law for the time being in force, the amount payable under this Scheme by the declarant shall be determined at the rates specified hereunder, namely …"

6. The Scheme, as contained in Chapter IV of the Act, is a Code in itself and statutory in nature and character. While implementing the scheme, liberal construction may be given but it cannot be extended beyond conditions prescribed in the statutory scheme. In *Regional Director, ESI Corpn. v. Ramanuja Match Industries*, (1985) 1 SCC 218, this Court observed:

"10 … We do not doubt that beneficial legislations should have liberal construction with a view to implementing the legislative intent but where such beneficial legislation has a scheme of its own there is no warrant for the Court to travel beyond the scheme and extend the scope of the statute on the pretext of extending the statutory benefit to those who are not covered by the scheme."

7. In *Hemalatha Gargya v. Commissioner of Income Tax, A.P.*, (2003) 9 SCC 510, this Court has held:

"10. Besides, the Scheme has conferred a benefit on those who had not disclosed their income earlier by affording them protection against the possible legal consequences of such non-disclosure under the provisions of the Income Tax Act. Where the assessees seek to claim the benefit under the statutory scheme they are bound to comply strictly with the conditions under which the benefit is granted. There is no scope for the application of any equitable consideration when the statutory provisions of the Scheme are stated in such plain language."

8. In *Union of India v. Charak Pharmaceuticals* (India)

Ltd., (2003) 11 SCC 689, this Court has observed thus:

> "8. If benefit is sought under a scheme, like KVSS, the party must fully comply with the provisions of the Scheme. If all the requirements of the Scheme are not met then on principles of equity, courts cannot extend the benefit of that Scheme."

9. In *Deepal Girishbhai Soni v. United India Insurance Co. Ltd.*, (2004) 5 SCC 385, at page 404, this Court observed as :

> "53. Although the Act is a beneficial one and, thus, deserves liberal construction with a view to implementing the legislative intent but it is trite that where such beneficial legislation has a scheme of its own and there is no vagueness or doubt therein, the court would not travel beyond the same and extend the scope of the statute on the pretext of extending the statutory benefit to those who are not covered thereby. (See *Regional Director, ESI Corpn. v. Ramanuja Match Industries*)"

10. In *Maruti Udyog Ltd. v. Ram Lal*, (2005) 2 SCC 638, this Court has observed:

> "A beneficial statute, as is well known, may receive liberal construction but the same cannot be extended beyond the statutory scheme. (See *Deepal Girishbhai Soni v. United India Insurance Co. Ltd.*)"

11. In *Pratap Singh v. State of Jharkhand*, (2005) 3 SCC 551, this Court has held:

> *"93. We are not oblivious of the proposition that a beneficent legislation should not be construed so liberally so as to bring within its fore a person who does not answer the statutory scheme. (See Deepal Girishbhai Soni v. United India Insurance Co. Ltd.)"*

12. The object and purpose of the Scheme is to minimize the litigation and to realize the arrears of tax by way of Settlement in an expeditious manner. The object of the Scheme can be gathered from the Speech of the Finance Minister, whilst presenting the 1998-99 Budget:

> "Litigation has been the bane of both direct and indirect taxes. A lot of energy of the Revenue Department is being frittered in pursuing large number of litigations pending at different levels for long periods of time. Considerable revenue also gets locked up in such disputes. Declogging the system will not only incentivise honest taxpayers, it would enable the Government to realize its reasonable dues much earlier but coupled with administrative measures, would also make the system more user-friendly. I therefore, propose to introduce a new scheme called Samadhan. he scheme would apply to both direct taxes and indirect taxes and offer waiver of interest, penalty and immunity from prosecution on payment of arrears of direct tax at the current rates. In respect of indirect tax, where in recent years the adjustment of rates has been very sharp, an abatement of 50 per cent of the duty would be available alongwith waiver of interest, penalty and immunity from prosecution"

13. The Finance Minister, whilst replying to the debate after incorporating amendments to the Finance (No. 2) Bill, 1998, made a Speech dated 17.7.1998. The relevant portion of the Speech, which highlights the object or purpose of the Scheme, is extracted below:

> "The Kar Vivad Samadhan Scheme has evoked a positive response from a large number of organizations and tax professionals. Hon'ble Members of Parliament have also taken a keen interest in the scheme. The lack of clarity in regard to waiver of interest and penalty in relation to settlement of tax arrears under the indirect tax enactments

is being taken care of by rewording the relevant clauses of the Finance Bill. I have also carefully considered the suggestions emanating from various quarters including the Standing Committee on Finance to extend the scope of this scheme so as to included tax disputes irrespective of the fact whether the tax arrears are existing or not. As you have seen from the scheme, it has two connected limbs- "Kar" and "Vivad". Collection of tax arrears is as important as settlement of disputes. The scheme is not intended to settle disputes when there is no corresponding gain to the other party. The basic objective of the scheme cannot be altered."

14. This Court, in plethora of cases, has discussed the object and purpose of this Scheme. In *Sushila Rani v. Commissioner of Income Tax,* (2002) 2 SCC 697, this Court observed:

"5. KVSS was introduced by the Central Government with a view to collect revenues through direct and indirect taxes by avoiding litigation. In fact the Finance Minister while explaining the object of KVSS stated as follows:

"Litigation has been the bane of both direct and indirect taxes. A lot of energy of the Revenue Department is being frittered in pursuing large number of litigations pending at different levels for long periods of time. Considerable revenue also gets locked up in such disputes. Declogging the system will not only incentivise honest taxpayers, it would enable the Government to realize its reasonable dues much earlier but coupled with administrative measures, would also make the system more user-friendly…."

15. In *Killick Nixon Ltd., Mumbai v. Deputy Commissioner of Income Tax, Mumbai,* (2003) 1 SCC 145, this Court has held:

"9. The scheme of KVSS is to cut short litigations pertaining to taxes which were frittering away the energy of the Revenue Department and to encourage litigants to come forward and pay up a reasonable amount of tax payable in accordance with the Scheme after declaration thereunder."

16. In *CIT v. Shatrusailya Digvijaysingh Jadeja*, (2005) 7 SCC 294, this Court has observed:

"11. The object of the Scheme was to make an offer by the Government to settle tax arrears locked in litigation at a substantial discount. It provided that any tax arrears could be settled by declaring them and paying the prescribed amount of tax arrears, and it offered benefits and immunities from penalty and prosecution. In several matters, the Government found that a large number of cases were pending at the recovery stage and, therefore, the Government came out with the said Scheme under which it was able to unlock the frozen assets and recover the tax arrears.

12. In our view, the Scheme was in substance a recovery scheme though it was nomenclatured as a "litigation settlement scheme" and was not similar to the earlier Voluntary Disclosure Scheme. *As stated above, the said Scheme was a complete code by itself.* Its object was to put an end to all pending matters in the form of appeals, references, revisions and writ petitions under the IT Act/ WT Act."

17. In *Master Cables (P) Ltd. v. State of Kerala***,** (2007) 5 SCC 416**,** this Court has held:

"8. The Scheme was enacted with a view to achieve the purposes mentioned therein viz. recovery of tax arrears by way of settlement. It applies provided the conditions precedent therefor are satisfied."

18. Further, the object of the Scheme and its application to Customs and Central Excise cases involving arrears of taxes has been explained in detail by the Trade Notice No. 74/98 dated 17.8.1998 issued by the Commissioner of Central Excise and Customs, Ahmedabad-I. The relevant portion of the said Trade Notice has been extracted below:

Office of the Commissioner of Central Excise & Customs: Ahmedabad-1

Trade Notice No.: 74/98
Basic No.: 34/98

Sub: Kar Vivad Samadhan Scheme-1998

1. As a part of this year's Budget proposals, the Finance Minister had announced amongst others a scheme termed "Kar Vivad Samadhan Scheme" essentially to provide quick and voluntary settlement of tax dues. The basic aim of introducing this scheme has been to bring down the pending litigation/disputes between the Dept. and the assessees- both on the direct tax side and indirect tax side- as well as to speedily realize the arrears of taxes (including fines, penalties & interest) considered due from various parties which are locked up in various disputes.

2. Essentially, these disputed cases involving duties, cesses, fine, penalty and interest on Customs and Central Excise side are proposed to be settled – case by case – if the concerned party agrees to pay up in each case a particular amount (which may be termed settled amount) calculated as per provisions of the scheme, following the laid procedure. Whereas the department gets immediate revenue and it results in reduction in pending disputes which may be prolonged otherwise before final assessment, the party also gets significant benefit by way of reduced payments instead of the disputed liability and immunity from prosecution.

3…

3.1. The relevant extracts containing provisions of the Samadhan Scheme as incorporated in the enacted Finance (No. 2) Act, 98 (21 of 1998) are enclosed herewith. The salient features of the Samadhan Scheme in relation to Indirect Taxes are briefly discussed below:-

4. APPLICABILITY OF THE SCHEME

A. CATEGORY OF CASES TO WHICH SCHEME APPLICABLE

4.1. The Scheme is limited to Customs or Central Excise cases involving arrears of taxes (including duties, cesses, fine, penalty of (sic.) interest) which were not paid up as on 31.3.98 and are still in arrear and in dispute as on date of declaration (as envisaged in section 98 (sic.) of the aforesaid Act). The dispute and the case may be still at the stage of Show Cause Notice or Demand Notice (other than those of erroneous refunds) when party come (sic.) forward and makes a declaration for claiming the benefits of the scheme, or the duties, fine, penalty or interest after the issue of show cause/ Demand Notice may have been determined, but the assessee is disputing the same in appellate forums/courts etc and the amounts due have not been paid up.

……

4.3. *It is pertinent to note that when a party comes forward for taking the benefits of the Samadhan Scheme and makes suitable declaration as provided thereunder (discussed further later) there must be dispute pending between the party and the Dptt.* (Section 98(ii)(c) of Finanace Act refers). In other words, if in any case, there is no Show Cause Notice pending nor the party is in dispute at the appellate/revision stage nor there is an

admitted petition in the court of law where parties is contesting the stand of the Dptt., but certain arrears of revenue due in case, are pending payment, the benefits of the scheme will not be available in such case.

B. TYPES OF REVENUE ARREARS CASES COVERED BY THE SCHEME

4.4. The intention of the scheme is to cover almost all categories of cases involving revenue in arrears and in dispute on Customs and Central Excise side (with few exceptions mentioned specifically in section 95 of Finance Act). The cases covered may involved duty, cess, fine, penalty or interest – whether already determined as due or yet to be determined (in cases where show cause/ Demand Notice is yet to be decided). The term duty has been elaborated to include credit of duty, drawback of duty or any amount representing as duty. In other words, the scheme would extend not only disorted (sic.) cases of duties leviable under customs or Central Excise Acts and relevant tariff Acts or various specified Act….

4.5. The nature of cases covered will vary depending upon contraventions/offence involved, but essentially it must involve quantified duty/cess and or penalty, fine or interest. Simple Show Cause Notices which do not quantify any amount of duty being demanded and which propose only penal action – like confiscation of ceased goods and or imposition of penalty for violation of statutory provisions/ collusion/abetment etc. thus will not be covered by the scheme. However, whenever quantified amount of duties are demanded and penal action also proposed for various violations even at Show Cause Notice stage benefits under the scheme for such Show Cause Notices can be claimed.

19. In view of the aforementioned Trade Notice, it is clear that the object of the Scheme with reference to indirect tax arrears is to bring down the litigation and to realize the arrears which are considered due and locked up in various disputes. This Scheme is mutually beneficial as it benefits the Revenue Department to realize the duties, cess, fine, penalty or interest assessed but not paid in an expeditious manner and offers assessee to pay disputed liability at discounted rates and also afford immunity from prosecution. It is a settled law that the Trade Notice, even if it is issued by the Revenue Department of any one State, is binding on all the other departments with equal force all over the country. The Trade Notice guides the traders and business community in relation to their business as how to regulate it in accordance with the applicable laws or schemes. In *Steel Authority of India v. Collector of Customs,* (2001) 9 SCC 198, this Court has held:

> "3. Learned counsel for the Revenue submitted that this trade notice had been issued only by the Bombay Customs House. It is hardly to be supposed that the Customs Authorities can take one stand in one State and another stand in another State. *The trade notice issued by one Customs House must bind all Customs Authorities* and, if it is erroneous, it should be withdrawn or amended, which in the instant case, admittedly, has not been done."

20. In *Purewal Associates Ltd. v. CCE*, (1996) 10 SCC 752, this Court has held:

> "10. *We must take it that before issuing a trade notice sufficient care is taken by the authorities concerned as it guides the traders to regulate their business accordingly.* Hence whatever is the legal effect of the trade notice as contended by the learned Senior Counsel for the respondent, the last portion of the above trade notice cannot be faulted as it is in accordance with the views expressed by this Court. Though a trade notice as such is not binding on the Tribunal or the courts, it cannot be ignored when the authorities take a different stand for if it was erroneous, it would have been withdrawn."

21. However, the Trade Notice, as such, is not binding on the Courts but certainly binding on the assessee and can be contested by the assessee. (see *CCE v. Kores (India) Ltd*., (1997) 10 SCC 338; *Union of India v. Pesticides Manufacturing and Formulators Association of India,* (2002) 8 SCC 410; and *CCE v. Jayant Dalal (P) Ltd*., (1997) 10 SCC 402)

22. Shri. R.P. Bhatt, learned senior counsel, has appeared for the Revenue and the respondents in civil appeal no. 5616 of 2006 are represented by Shri. Paras Kuhad, learned senior counsel.

23. Learned senior counsel Shri. R.P. Bhatt, submits that an assessee can claim benefits under the Scheme only when his tax arrears are determined and outstanding, or a Show Cause Notice has been issued to him, prior to or on 31.3.1998 in terms of Section 87 (m) (ii) (a) and (b) of the Act. He further submits that the determination of the arrears can be arrived at by way of adjudication or by issuance of the Show Cause Notice to the assessee. He submits that once this condition is satisfied, then the assessee is required to submit a declaration under Section 88 of the Act on or after 1.9.1998 and on or before 31.1.1999, provided that the arrears are unpaid at the time of filing the declaration. He further submits that the present Scheme is statutory in character and its provision should be interpreted strictly and those who do not fulfill the conditions of eligibility contained in the Scheme are not allowed to avail the benefit under the Scheme. In support of his contention, he has relied on the Judgment of this Court in *Union of India v. Charak Pharmaceuticals (India) Ltd.,* (2003) 11 SCC 689. Learned senior counsel, relying on the, *Speech of the Finance Minister dated 17.7.1998*, [232 ITR 1998 (14)] asserts that the purpose or the basic object of the Scheme is the collection of tax and settlement of disputes and it is intended to be beneficial to both assessee as well as the Revenue. He further contends that the determination of arrears or issuance of Show Cause Notice before or on 31.3.1998 is a substantive requirement for eligibility under the Scheme and filing of declaration of unpaid arrears under Section 88 of the Act is the procedural formality for availing the benefits of the Scheme. Therefore, he submits that the extension of time to file declaration under the Scheme on or before 31.1.1999 is just a procedural formality and in no manner discriminatory, so as to violate the mandate of Article 14 of the Constitution. Learned senior counsel, on the strength of Trade Notice dated 17.8.1998 and the observations made by this Court in the case of *Charak Pharmaceuticals* (supra), further submits that, in cases of Central Excise and Customs, the Scheme is limited only to two categories of cases: firstly, the arrears of tax which are assessed as on 31.3.1998 and are still unpaid and in dispute on the date of filing of declaration; secondly, the arrears for which, the Show Cause Notice or Demand Notice has been issued by the Revenue as on 31.3.1998 and which are still unpaid and are in dispute on the date of filing of declaration. He submits that the said Trade Notice indicates that the concept of actual determination or assessment has been extended to the Show Cause Notice in order to grant the benefit of the Scheme to duty demanded in such Show Cause Notice. He submits that the Show Cause Notice is in the nature of tentative charge, which has been included in the ambit of the Scheme in order to realize the tax/duty dues but not yet paid. He submits that the Scheme contemplates the conferring of the benefits only on the quantified duty either determined by way of adjudication or demanded in a Show Cause Notice. Learned senior counsel contends that in the present case, the Show Cause Notice demanding the duty was issued to the respondents only on 6.1.1999 and, therefore, the duty was determined as quantified only on the issuance of the Show Cause Notice. Hence, respondents are not eligible to avail the benefit under this Scheme. Learned senior counsel submits that the cut-off date of on or before 31.3.1998 prescribed by Section 87 (m) (ii) (b) cannot be considered as discriminatory or unreasonable only

on the basis that it creates two classes of assessees unless it appears on the face of it as capricious or malafide. The cut-off date of 31.3.1998 in indirect tax enactments under the Scheme has been purposively chosen in order to maintain uniformity with direct tax enactments where assessment year ends on the said date. In support of his submission, learned senior counsel relies on *Union of India v. M.V. Valliappan,* (1999) 6 SCC 259*, Sudhir Kumar Consul v. Allahabad Bank*, (2011) 3 SCC 486 and *Government of Andhra Pradesh v. N. Subbarayudu*, (2008) 14 SCC 702. He further submits that the present Scheme extends the benefit of reduction of tax and does not deprive or withdraw any existing benefit to the assessees. He also submits that if certain section of assessees is excluded from its scope by virtue of cut-off date, they cannot challenge the entire Scheme merely on ground of their exclusion.

24. *Per contra*, Shri. Paras Kuhad, learned senior counsel, submits that the Scheme became effective from 1.09.1998 and remained operative till 31.1.1999. However, the arrears in question should relate to the period prior to or as on 31.3.1998 which is the essence of the Scheme or the qualifying condition. He submits that Section 87 (f) defines 'disputed tax' as the total tax determined and payable, in respect of an assessment year under any direct tax enactment but which remains unpaid as on the date of making the declaration under Section 88. In this regard, he submits that the factum of arrears exists even on the date of filing of declaration. He contends that the Finance Act uses the expression 'determination' instead of 'assessment' in order to include the cases of self assessment. He submits that in the case of direct tax and payment of advance tax, the process of determination arises before the assessment. He further argues that the purpose of the Scheme is to reduce litigation and recover revenue arrears in an expeditious manner. The classification should be in order to attain these objectives or purpose. The classification of assessees on the basis of date of issuance of Show Cause Notice or Demand Notice is unreasonable and has no nexus with the purpose of the legislation. He further submits that all the assessees who are in arrears of tax on or before 31.3.1998 formed one class but further classification among them just on the basis of issuance of Show Cause Notice is arbitrary and unreasonable. The criterion of date of issuance of Show Cause Notice is *per se* unreasonable as based on fortuitous circumstances. It is neither objective nor uniformly applicable. He further submits that the High Court has correctly struck down the words "on or before the 31st day of March 1998" in Section 87 (m) (ii) (b) and, thereby, created a right in favour of assessee to claim benefit under the Scheme for all arrears of tax arising as on 31.3.1998. He further submits that by application of the doctrine of severability, the Scheme can operate as a valid one for all purposes. Learned senior counsel submits that the carving out of sub-group only on the basis of whether Show Cause Notice has been issued or not and the Scheme being made effective from prospective date would render the operation or availability of Scheme variable or uncertain, depending on case to case. He further submits that this has no relation with the purpose of the Scheme which is beneficial in nature. He further submits that the date of issuance of Show Cause Notice is not controlled by the assessee. Therefore, it is fortuitous circumstance which is *per se* unreasonable. The objective of the doctrine of classification is that the unequal should not be treated equally in order to achieve equality. The basis for classification in terms of Article 14 should be intelligible criteria which should have nexus with the object of the legislation. He argues that the criterion of date of issuance of Show Cause Notice is just a fortuitous factor which is variable, uncertain, and fateful and cannot be considered as intelligible criteria for the purpose of Article 14 of the Constitution. He submits, however, criterion for classification is the prerogative of the Parliament but it should be certain and not vacillating like date of issuance of Show Cause Notice. He further submits that the hardships arising out of normal cut-off criteria is acceptable and justified but when injustice arises out of operation of the provision which prescribe

criteria which is variable for same class of persons for availing the benefit of the Scheme, is against the mandate of Article 14 of the Constitution. He relies on the decision of this Court in *State of Jammu and Kashmir v. Triloki Naths Khosa*, (1974) 1 SCC 19 in order to buttress his argument that the classification is a subsidiary rule to the Fundamental Right of Equal Protection of Laws and should not be used in a manner to submerge and drown the principle of equality. Learned senior counsel contends that the purpose of the Scheme is to end the dispute qua assessee, who is in arrears of taxes and has not paid such arrears. He further submits that in case of Central Excise, the excise duty is determined on removal of goods but the actual payment is made later and also, in case of self assessment, the tax arrears are determined before the actual payment or possible dispute. He submits that as per Rule 173 F of the Excise Rules, the assessee is required to determine the duty payable by self assessment of the excisable goods before their removal from the factory. He further submits that the methodology of re-assessment under Section 11 A of the Excise Act, rate of product approved before hand under Section 173B and *ad valorem* for value of goods under Section 173C contemplates the determination of duty payable by the assessee. In this regard, he submits that the word 'determined' has been used purposively and deliberately in the Scheme instead of 'assessment'. He further argues that in view of the object of the Scheme to collect revenue, the Scheme envisages two elements: first, the determination of the amount of tax due and payable on or before 31.3.1998 and, second, whether the tax so determined is in arrears on date of declaration under Section 88. In other words, he submits that the tax so determined on or before 31.3.1998 should be in arrears on the date of declaration under Section 88. Learned senior counsel, in support of his submissions, relies on the decision of this Court in *Government of India v. Dhanalakshmi Paper and Board Mills*, 1989 Supp. (1) SCC 596.

25. Taxation is a mode of raising revenue for public purposes. In exercise of the power to tax, the purpose always is that a common burden shall be sustained by common contributions, regulated by some fixed general rules, and apportioned by the law according to some uniform ratio of equality.

26. The word 'duty' means an indirect tax imposed on the importation or consumption of goods. 'Customs' are duties charged upon commodities on their being imported into or exported from a country.

27. The expression 'Direct Taxes' include those assessed upon the property, person, business, income, etc., of those who are to pay them, while indirect taxes are levied upon commodities before they reach the consumer, and are paid by those upon whom they ultimately fall, not as taxes, but as part of the market price of the commodity. For the purpose of the Scheme, indirect tax enactments are defined as Customs Act, 1962, Central Excise Act, 1944 or the Customs Tariff Act, 1985 and the Rules and Regulations framed thereunder.

28. The Scheme defines the meaning of the expression 'Tax Arrears', in relation to indirect tax enactments. It would mean the determined amount of duties, as due and payable which would include drawback of duty, credit of duty or any amount representing duty, cesses, interest, fine or penalty determined. The legislation, by using its prerogative power, has restricted the dues of duties quantified and payable as on 31st day of March, 1998 and remaining unpaid till a particular event has taken place, as envisaged under the Scheme. The date has relevance, which aspect we would elaborate a little later. The definition is inclusive definition. It also envisages instances where a Demand Notice or Show Cause Notice issued under indirect tax enactment on or before 31st day of March, 1998 but not complied with the demand made to be treated as tax arrears by legal fiction. Thus, legislation has carved out two categories of assessees viz. where tax arrears are quantified

but not paid, and where Demand Notice or Show Cause Notice issued but not paid. In both the circumstances, legislature has taken cut off date as on 31st day of March 1998. It cannot be disputed that the legislation has the power to classify but the only question that requires to be considered is whether such classification is proper. It is now well settled by catena of decisions of this Court that a particular classification is proper if it is based on reason and not purely arbitrary, caprice or vindictive. On the other hand, while there must be a reason for the classification, the reason need not be good one, and it is immaterial that the Statute is unjust. The test is not wisdom but good faith in the classification. It is too late in the day to contend otherwise. It is time and again observed by this Court that the Legislature has a broad discretion in the matter of classification. In taxation, `there is a broader power of classification than in some other exercises of legislation'. When the wisdom of the legislation while making classification is questioned, the role of the Courts is very much limited. It is not reviewable by the Courts unless palpably arbitrary. It is not the concern of the Courts whether the classification is the wisest or the best that could be made. However, a discriminatory tax cannot be sustained if the classification is wholly illusory.

29. Kar Vivad Samadhan Scheme is a step towards the settlement of outstanding disputed tax liability. The Scheme is a complete Code in itself and exhaustive of matter dealt with therein. Therefore, the courts must construe the provisions of the Scheme with reference to the language used therein and ascertain what their true scope is by applying the normal rule of construction. Keeping this principle in view, let us consider the reasoning of the High Court.

30. The tests adopted to determine whether a classification is reasonable or not are, that the classification must be founded on an intelligible differentia which distinguishes person or things that are grouped together from others left out of the groups and that the differentia must have a rational relation to the object sought to be achieved by Statute in question. The Legislature in relation to 'tax arrears' has classified two groups of assessees. The first one being those assessees in whose cases duty is quantified and not paid as on the 31st day of March, 1998 and those assessees who are served with Demand or Show Cause Notice issued on or before the 31st day of March, 1998. The Scheme is not made applicable to such of those assessees whose duty dues are quantified but Demand Notice is not issued as on 31st day of March, 1998 intimating the assessee's dues payable. The same is the case of the assessees who are not issued with the Demand or Show Cause Notice as on 31.03.1998. The grievance of the assessee is that the date fixed is arbitrary and deprives the benefit for those assessees who are issued Demand Notice or Show Cause Notice after the cut off date namely 31st day of March, 1998. The Legislature, in its wisdom, has thought it fit to extend the benefit of the scheme to such of those assessees whose tax arrears are outstanding as on 31.03.1998, or who are issued with the Demand or Show Cause Notice on or before 31st day of March, 1998, though the time to file declaration for claiming the benefit is extended till 31.01.1999. The classification made by the legislature appears to be reasonable for the reason that the legislature has grouped two categories of assessees namely, the assessees whose dues are quantified but not paid and the assessees who are issued with the Demand and Show Cause Notice on or before a particular date, month and year. The Legislature has not extended this benefit to those persons who do not fall under this category or group. This position is made clear by Section 88 of the Scheme which provides for settlement or tax payable under the Scheme by filing declaration after 1st day of September, 1998 but on or before the 31st day of December, 1998 in accordance with Section 89 of the Scheme, which date was extended upto 31.01.1999. The distinction so made cannot be said to be arbitrary or illogical which has no nexus with the purpose of legislation. In determining whether classification is

reasonable, regard must be had to the purpose for which legislation is designed. As we have seen, while understanding the Scheme of the legislation, the legislation is based on a reasonable basis which is firstly, the amount of duties, cesses, interest, fine or penalty must have been determined as on 31.03.1998 but not paid as on the date of declaration and secondly, the date of issuance of Demand or Show Cause Notice on or before 31.03.1998, which is not disputed but the duties remain unpaid on the date of filing of declaration. Therefore, in our view, the Scheme 1998 does not violate the equal protection clause where there is an essential difference and a real basis for the classification which is made. The mere fact that the line dividing the classes is placed at one point rather than another will not impair the validity of the classification. The concept of Article 14 vis-a-vis fiscal legislation is explained by this Court in several decisions.

31. In *Amalgamated Tea Estates Co. Ltd. v. State of Kerala*, (1974) 4 SCC 415, this Court has held:

> 8. It may be pointed out that the Indian Income Tax Act also makes a distinction between a domestic company and a foreign company. But that circumstance per se would not help the State of Kerala. The impugned legislation, in order to get the green light from Article 14, should satisfy the classification test evolved by this Court in a catena of cases. According to that test: (1) the classification should be based on an intelligible differentia and (2) the differentia should bear a rational relation to the purpose of the legislation.
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> 9. The classification test is, however, not inflexible and doctrinaire. It gives due regard to the complex necessities and intricate problems of government. Thus as revenue is the first necessity of the State and as taxes are raised for various purposes and by an adjustment of diverse elements, the Court grants to the State greater choice of classification in the field of taxation than in other spheres. According to Subba Rao, J.:
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> > "(T)he courts in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the Legislature in the matter of classification, so long as it adheres to the fundamental principles underlying the said doctrine. The power of the Legislature to classify is of wide range and flexibility so that it can adjust its system of taxation in all proper and reasonable ways." (Khandige Sham Bhat v. Agricultural Income Tax Officer, Kasargod; V. Venugopala Ravi Verma Rajah v. Union of India.)
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> > 10. Again, on a challenge to a statute on the ground of Article 14, the Court would generally raise a presumption in favour of its constitutionality. Consequently, one who challenges the statute bears the burden of establishing that the statute is clearly violative of Article 14. "The presumption is always in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there is a clear transgression of the constitutional principle." (See Charanjit Lal v. Union of India.)

32. In *Anant Mills Co. Ltd. v. State of Gujarat*, (1975) 2 SCC 175, this Court has observed:

> "25. It is well-established that Article 14 forbids class legislation but does not forbid classification. Permissible classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and the differentia must have a rational relation to the object sought to be achieved by the statute in question. In permissible classification mathematical nicety and perfect equality are

not required. *Similarity, not identity of treatment, is enough.* If there is equality and uniformity within each group, the law will not be condemned as discriminative, though due to some fortuitous circumstances arising out of a peculiar situation some included in a class get an advantage over others, so long as they are not singled out for special treatment. Taxation law is not an exception to this doctrine. But, in the application of the principles, the courts, in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the Legislature in the matter of classification so long as it adheres to the fundamental principles underlying the said doctrine. The power of the Legislature to classify is of wide range and flexibility so that it can adjust its system of taxation in all proper and reasonable ways (see Ram Krishna Dalmia v. Justice S.R. Tendolkar and Khandige Sham Bhat v. Agricultural Income Tax Officer, Kasaragod) Keeping the above principles in view, we find no violation of Article 14 in treating pending cases as a class different from decided cases. It cannot be disputed that so far as the pending cases covered by clause (i) are concerned, they have been all treated alike."

33. In *Jain Bros v. Union of India,* (1969) 3 SCC 311, the issue before this Court was whether the clause (*g*) of Section 297(2) of the Income Tax Act, 1961 is violative of Article 14 of the Constitution inasmuch as in the matter of imposition of penalty, it discriminated between two sets of assessees with reference to a particular date, namely, those whose assessment had been completed before 1st day of April 1962 and others whose assessment was completed on or after that date. Whilst upholding the validity of the above provision, this Court has observed:

"Now the Act of 1961 came into force on first April 1962. It repealed the prior Act of 1922. Whenever a prior enactment is repealed and new provisions are enacted the Legislature invariably lays down under which enactment pending proceedings shall be continued and concluded. Section 6 of the General Clauses Act, 1897, deals with the effect of repeal of an enactment and its provisions apply unless a different intention appears in the statute. It is for the Legislature to decide from which date a particular law should come into operation. It is not disputed that no reason has been suggested why pending proceedings cannot be treated by the Legislature as a class for the purpose of Article 14. The date first April, 1962, which has been selected by the Legislature for the purpose of clauses (f) and (g) of Section 297(2) cannot be characterised as arbitrary or fanciful."

34. In *Murthy Match Works v. CCE*, (1974) 4 SCC 428, this Court has observed:

"15. Certain principles which bear upon classification may be mentioned here. It is true that a State may classify persons and objects for the purpose of legislation and pass laws for the purpose of obtaining revenue or other objects. Every differentiation is not a discrimination. But classification can be sustained only it it is founded on pertinent and real differences as distinguished from irrelevant and artificial ones. The constitutional standard by which the sufficiency of the differentia which form a valid basis for classification may be measured, has been repeatedly stated by the Courts. If it rests on a difference which bears a fair and just relation to the object for which it is proposed, it is constitutional. To put it differently, the means must have nexus with the ends. Even so, a large latitude is allowed to the State for classification upon a reasonable basis and what is reasonable is a question of practical details and a variety of factors which the Court will be reluctant and perhaps ill-equipped to investigate. In this imperfect world perfection even in grouping is an ambition hardly ever accomplished. In this context, we have

to remember the relationship between the legislative and judicial departments of Government in the determination of the validity of classification. Of course, in the last analysis Courts possess the power to pronounce on the constitutionality of the acts of the other branches whether a classification is based upon substantial differences or is arbitrary, fanciful and consequently illegal. At the same time, the question of classification is primarily for legislative judgment and ordinarily does not become a judicial question. A power to classify being extremely broad and based on diverse considerations of executive pragmatism, the Judicature cannot rush in where even the Legislature warily treads. All these operational restraints on judicial power must weigh more emphatically where the subject is taxation.

…

19. It is well-established that the modern state, in exercising its sovereign power of taxation, has to deal with complex factors relating to the objects to be taxed, the quantum to be levied, the conditions subject to which the levy has to be made, the social and economic policies which the tax is designed to subserve, and what not. In the famous words of Holmes, J. in Bain Peanut Co. v. Pinson[2]:

"We must remember that the machinery of Government would not work if it were not allowed a little play in its joints."

35. In *R.K. Garg v. Union of India*, (1981) 4 SCC 675, this Court has held:

7. Now while considering the constitutional validity of a statute said to be violative of Article 14, it is necessary to bear in mind certain well established principles which have been evolved by the courts as rules of guidance in discharge of its constitutional function of judicial review. The first rule is that there is always a presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. This rule is based on the assumption, judicially recognised and accepted, that the legislature understands and correctly appreciates the needs of its own people, its laws are directed to problems made manifest by experience and its discrimination are based on adequate grounds. The presumption of constitutionality is indeed so strong that in order to sustain it, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.

"8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because *it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved.*"

36. In *Elel Hotels and Investments Ltd.* v. *Union of India,* (1989) 3 SCC 698*,* this Court has held:

"20. It is now well settled that a very wide latitude is

available to the legislature in the matter of classification of objects, persons and things for purposes of taxation. It must need to be so, having regard to the complexities involved in the formulation of a taxation policy. Taxation is not now a mere source of raising money to defray expenses of Government. It is a recognised fiscal tool to achieve fiscal and social objectives. The differentia of classification presupposes and proceeds on the premise that it distinguishes and keeps apart as a distinct class hotels with higher economic status reflected in one of the indicia of such economic superiority."

37. In *P.M. Ashwathanarayana Setty v. State of Karnataka,* (1989) Supp. (1) SCC 696, this Court has held:

"... the State enjoys the widest latitude where measures of economic regulation are concerned. These measures for fiscal and economic regulation involve an evaluation of diverse and quite often conflicting economic criteria and adjustment and balancing of various conflicting social and economic values and interests. It is for the State to decide what economic and social policy it should pursue and what discriminations advance those social and economic policies."

38. In *Kerala Hotel and Restaurant Assn. v. State of Kerala*, (1990) 2 SCC 502, this Court has observed:

"24. The scope for classification permitted in taxation is greater and unless the classification made can be termed to be palpably arbitrary, it must be left to the legislative wisdom to choose the yardstick for classification, in the background of the fiscal policy of the State...."

39. In *Spences Hotel (P) Ltd. v. State of W.B.*, (1991) 2 SCC 154, this Court has observed:

"26. What then 'equal protection of laws' means as applied to taxation? Equal protection cannot be said to be denied by a statute which operates alike on all persons and property similarly situated, or by proceedings for the assessment and collection of taxes which follows the course usually pursued in the State. It prohibits any person or class of persons from being singled out as special subject for discrimination and hostile legislation; but it does not require equal rates of taxation on different classes of property, nor does it prohibit unequal taxation so long as the inequality is not based upon arbitrary classification. Taxation will not be discriminatory if, within the sphere of its operation, it affects alike all persons similarly situated. It, however, does not prohibit special legislation, or legislation that is limited either in the objects to which it is directed, or by the territory within which it is to operate. In the words of Cooley: It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. The rule of equality requires no more than that the same means and methods be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. Nor does this requirement preclude the classification of property, trades, profession and events for taxation — subjecting one kind to one rate of taxation, and another to a different rate. "The rule of equality of taxation is not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, may impose different specific taxes upon different trades and professions." "It cannot be said that it is intended to compel the State to adopt an iron rule of equal taxation." In the words of Cooley :[21]

"Absolute equality is impossible. Inequality of taxes means substantial differences. Practical equality is

constitutional equality. There is no imperative requirement that taxation shall be absolutely equal. If there were, the operations of government must come to a stop, from the absolute impossibility of fulfilling it. The most casual attention to the nature and operation of taxes will put this beyond question. No single tax can be apportioned so as to be exactly just and any combination of taxes is likely in individual cases to increase instead of diminish the inequality."

27. "Perfect equality in taxation has been said time and again, to be impossible and unattainable. Approximation to it is all that can be had. Under any system of taxation, however, wisely and carefully framed, a disproportionate share of the public burdens would be thrown on certain kinds of property, because they are visible and tangible, while others are of a nature to elude vigilance. It is only where statutes are passed which impose taxes on false and unjust principle, or operate to produce gross inequality, so that they cannot be deemed in any just sense proportional in their effect on those who are to bear the public charges that courts can interpose and arrest the course of legislation by declaring such enactments void." "Perfectly equal taxation", it has been said, "will remain an unattainable good as long as laws and government and man are imperfect." 'Perfect uniformity and perfect equality of taxation', in all the aspects in which the human mind can view it, is a baseless dream."

40. In *Venkateshwara Theatre v. State of A.P.,* (1993) 3 SCC 677, this Court has held:

"21. Since in the present case we are dealing with a taxation measure it is necessary to point out that in the field of taxation the decisions of this Court have permitted the legislature to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes."

41. In *State of Kerala v. Aravind Ramakant Modawdakar*, (1999) 7 SCC 400, this Court has held:

"Coming to the power of the State in legislating taxation law, the court should bear in mind that the State has a wide discretion in selecting the persons or objects it will tax and thus a statute is not open to attack on the ground that it taxes some persons or objects and not others. It is also well settled that a very wide latitude is available to the legislature in the matter of classification of objects, persons and things for the purpose of taxation. While considering the challenge and nature that is involved in these cases, the courts will have to bear in mind the principles laid down by this Court in the case of Murthy Match Works v. CCE[2] wherein while considering different types of classifications, this Court held: (AIR Headnote)

"[T]hat a pertinent principle of differentiation, which was visibly linked to productive process, had been adopted in the broad classification of power-users and manual manufacturers. It was irrational to castigate this basis as unreal. The failure however, to mini-classify between large and small sections of manual match manufacturers could not be challenged in a court of law, that being a policy decision of Government dependent on pragmatic wisdom playing on imponderable forces at work. Though refusal to make rational classification where grossly dissimilar subjects are treated by the law violates the mandate of Article 14, even so, as the limited classification adopted in the present case was based upon a relevant differentia which had a nexus to the legislative end of taxation, the Court could not strike down the law on the score that there was room for further classification."

42. In *State of U.P. v. Kamla Palace*, (2000) 1 SCC 557, this Court has observed:

> 11. Article 14 does not prohibit reasonable classification of persons, objects and transactions by the legislature for the purpose of attaining specific ends. To satisfy the test of permissible classification, it must not be "arbitrary, artificial or evasive" but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislature. (See Special Courts Bill, 1978, Re, seven-Judge Bench; R.K. Garg v. Union of India, five-Judge Bench.) It was further held in R.K. Garg case that laws relating to economic activities or those in the field of taxation enjoy a greater latitude than laws touching civil rights such as freedom of speech, religion etc. Such a legislation may not be struck down merely on account of crudities and inequities inasmuch as such legislations are designed to take care of complex situations and complex problems which do not admit of solutions through any doctrinaire approach or straitjacket formulae. Their Lordships quoted with approval the observations made by Frankfurter, J. in Morey v. Doud:
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> > "In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the Judges have been overruled by events — self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."
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> 12. The legislature gaining wisdom from historical facts, existing situations, matters of common knowledge and practical problems and guided by considerations of policy must be given a free hand to devise classes — whom to tax or not to tax, whom to exempt or not to exempt and whom to give incentives and lay down the rates of taxation, benefits or concessions. In the field of taxation if the test of Article 14 is satisfied by generality of provisions the courts would not substitute judicial wisdom for legislative wisdom.

43. In *Aashirwad Films v. Union of India*, (2007) 6 SCC 624, this Court has held:

> 14. It has been accepted without dispute that taxation laws must also pass the test of Article 14 of the Constitution of India. It has been laid down in a large number of decisions of this Court that a taxation statute for the reasons of functional expediency and even otherwise, can pick and choose to tax some. Importantly, there is a rider operating on this wide power to tax and even discriminate in taxation that the classification thus chosen must be reasonable. The extent of reasonability of any taxation statute lies in its efficiency to achieve the object sought to be achieved by the statute. Thus, the classification must bear a nexus with the object sought to be achieved. (See Moopil Nair v. State of Kerala, East India Tobacco Co. v. State of A.P., N. Venugopala Ravi Varma Rajah v. Union of India, Asstt. Director of Inspection Investigation v. A.B. Shanthi and Associated Cement Companies Ltd. v. Govt. of A.P.)

44. In *Jai Vijai Metal Udyog Private Limited, Industrial Estate, Varanasi v. Commissioner, Trade Tax, Uttar Pradesh, Lucknow*, (2010) 6 SCC 705, this Court held:

> 19. Now, coming to the second issue, it is trite that in view of the inherent complexity of fiscal adjustment of diverse elements, a wider discretion is given to the Revenue for

the purpose of taxation and ordinarily different interpretations of a particular tariff entry by different authorities as such cannot be assailed as violative of Article 14 of the Constitution. Nonetheless, in our opinion, two different interpretations of a particular entry by the same authority on same set of facts, cannot be immunised from the equality clause under Article 14 of the Constitution. It would be a case of operating law unequally, attracting Article 14 of the Constitution.

45. To sum up, Article 14 does not prohibit reasonable classification of persons, objects and transactions by the Legislature for the purpose of attaining specific ends. To satisfy the test of permissible classification, it must not be "arbitrary, artificial or evasive" but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the Legislature. The taxation laws are no exception to the application of this principle of equality enshrined in Article 14 of the Constitution of India. However, it is well settled that the Legislature enjoys very wide latitude in the matter of classification of objects, persons and things for the purpose of taxation in view of inherent complexity of fiscal adjustment of diverse elements. The power of the Legislature to classify is of wide range and flexibility so that it can adjust its system of taxation in all proper and reasonable ways. Even so, large latitude is allowed to the State for classification upon a reasonable basis and what is reasonable is a question of practical details and a variety of factors which the Court will be reluctant and perhaps ill-equipped to investigate. It has been laid down in a large number of decisions of this Court that a taxation Statute, for the reasons of functional expediency and even otherwise, can pick and choose to tax some. A power to classify being extremely broad and based on diverse considerations of executive pragmatism, the Judicature cannot rush in where even the Legislature warily treads. All these operational restraints on judicial power must weigh more emphatically where the subject is taxation. Discrimination resulting from fortuitous circumstances arising out of particular situations, in which some of the tax payers find themselves, is not hit by Article 14 if the legislation, as such, is of general application and does not single them out for harsh treatment. Advantages or disadvantages to individual assesses are accidental and inevitable and are inherent in every taxing Statute as it has to draw a line somewhere and some cases necessarily fall on the other side of the line. The point is illustrated by two decisions of this Court. In *Khandige Sham Bhat vs. Agricultural Income Tax Officer, Kasaragod and Anr.* (AIR 1963 SC 591). Travancore Cochin Agricultural Income Tax Act was extended to Malabar area on November 01, 1956 after formation of the State of Kerala. Prior to that date, there was no agricultural income tax in that area. The challenge under Article 14 was that the income of the petitioner was from areca nut and pepper crops, which were harvested after November in every year while persons who grew certain other crops could harvest before November and thus escape the liability to pay tax. It was held that, that was only accidental and did not amount to violation of Article14. In *Jain Bros. vs. Union of India* (supra), Section 297(2)(g) of Income Tax Act, 1961 was challenged because under that Section proceedings completed prior to April, 1962 was to be dealt under the old Act and proceedings completed after the said date had to be dealt with under the Income Tax Act, 1961 for the purpose of imposition of penalty. April 01, 1962 was the date of commencement of Income Tax Act, 1961. It was held that the crucial date for imposition of Penalty was the date of completion of assessment or the formation of satisfaction of authority that such act had been committed. It was also held that for the application and implementation of the new Act, it was necessary to fix a date and provide for continuation of pending proceedings. It was also held that the mere possibility that some officer might intentionally delay the disposal of a case could hardly be a ground for striking down the provision as discriminatory.

46. In view of the above discussion, we cannot agree with

the findings and the conclusion reached by the High Court for which, we have made reference earlier. We have also not discussed in detail the individual issues raised by the learned senior counsel for the respondent, since those were the issues which were canvassed and accepted by the High Court. Accordingly, the appeals are allowed. The impugned common judgment and order is set aside. Costs are made easy.

N.J. Appeals allowed.

MRS. ANITA MALHOTRA

v.

APPAREL EXPORT PROMOTION COUNCIL & ANR.

(Criminal Appeal No. 2033 of 2011)

NOVEMBER 8, 2011

[P. SATHASIVAM AND JASTI CHELAMESWAR, JJ.]

Code of Criminal Proc3edure, 1973:

s.482 – Petition by a non-executive Director of a company for quashing of criminal proceedings against her for dishonour of cheques – On the ground that the alleged cheques were issued by the Company after she had resigned from the directorship – The petition dismissed by High Court – HELD: The copy of the statutory Form 32 filed with the Registrar of Companies, which was placed before the High Court, makes it evident that the petitioner had ceased to be a Director of the Company before the cheques were issued on its behalf – Besides, the certified copy of the annual return of the Company showing the details of its Directors and clearly showing that the petitioner was not its Director on the relevant date, was also placed before the High Court – High Court erred in ignoring the public documents – It ought to have exercised its jurisdiction u/s 482 and quashed the proceedings against the petitioner who has made out a case that she cannot be held responsible for dishonour of the stated cheques, as she had resigned from the directorship of the Company before the cheques were issued – Consequently, the criminal proceedings in so far as the petitioner is concerned, are quashed – Negotiable Instruments Act, 1881 – s.138 – Companies Act, 1956 – ss. 159, 163 and 610, Form 32 – Evidence Act, 1872 – s.74.

Evidence Act, 1872:

s.74(2) – "Public records kept in any State of private documents" – HELD: A certified copy of annual return is a public document – Companies Act, 1956 – ss.159, 163 and 610 – Negotiable Instruments Act, 1881 – s.138.

Negotiable Instruments Act, 1881:

s.138 – Complaint against a Director of a Company for dishonour of cheque – HELD: Such a complaint should specifically spell out how and in what manner the Director was in charge of or was responsible to the accused Company for conduct of its business; and mere bald statement, as in the instant case, that she was in charge of and was responsible to the company for conduct of its business is not sufficient.

The appellant, who had been a non-executive Director on the Board of a Company and had resigned from the directorship w.e.f. 31.08.1998 was issued a notice dated 10.12.2004 by the respondents regarding dishonour of certain cheques issued on behalf of the Company. The appellant, by letter dated 15.12.2004, informed the respondents that she had resigned from the directorship of the Company long back in 1998. The respondents filed a complaint u/s 138 of the Negotiable Instruments Act in the Court of ACMM against the Company arraying the appellant as accused No.3. The appellant filed a petition before the High Court for quashing of the complaint pending in the Court of ACMM, but the same was dismissed.

Allowing the appeal, the Court

HELD: 1.1 Inasmuch as the reply to the statutory notice contains specific information that the appellant had resigned from the Company in 1998, the complainant was not justified in not referring the same in the complaint and in arraying her as accused No.3 in the complaint filed in the year 2005. [para 7]

1.2 A perusal of statutory Form-32 (Annexure-P2) filed with the Registrar of Companies, makes it clear that with effect from 31.08.1998, the appellant ceased to be a Director since she had resigned from the directorship of the Company. Though the appellant was unable to produce certified copy of the Form 32 as it was not available with the ROC, copy of Form 32 was placed before the High Court along with the receipt of filing with the Registrar of Companies. The High Court has ignored the said fact. [para 9]

1.3 A reading of the provisions of ss.159, 163 and s.610 of the Companies Act, 1956, makes it clear that there is a statutory requirement u/s 159 of the said Act that every Company having a share capital shall have to file with the Registrar of Companies an annual return which includes details of the existing Directors. The provisions of the Companies Act require annual return to be made available by a company for inspection [s.163]. The provisions also entitle any person to inspect documents kept by the Registrar of Companies[s.610]. The High Court committed an error in ignoring s.74 of the Evidence Act, 1872. Sub-s. (1) of s.74 refers to public documents; and sub-s. (2) provides that public documents include "public records kept in any State of private documents". A conjoint reading of ss.159, 163 and 610(3) of the Companies Act, 1956 read with sub-s. (2) of s.74 of the Evidence Act makes it clear that a certified copy of annual return dated 30.09.1999, which provides the details about the existing Directors clearly showing that the appellant was not a Director at the relevant time, is a public document and the contrary conclusion arrived at by the High Court cannot be sustained. Consequently, the appellant cannot be held responsible for dishonour of the cheques issued in the year 2004. [para 11 and 14]

DCM Financial Services Limited vs. J.N. Sareen and Another, **2008 (8) SCR 603 = (2008) 8 SCC 1; and** *Harshendra Kumar D. vs. Rebatilata Koley and Others*, **2011 (2) SCR 670 = (2011) 3 SCC 351 – relied on.**

1.4 Though it is not proper for the High Court to consider the defence of the accused or conduct a roving enquiry in respect of merit of the accusation, but if on the face of the document placed by the accused, which is beyond suspicion or doubt, the accusation against him/ her cannot stand, in such a matter, in order to prevent injustice or abuse of process, it is incumbent on the High Court to look into those documents which have a bearing on the matter even at the initial stage and grant relief to the person concerned by exercising jurisdiction u/s 482 of the Code of Criminal Procedure, 1973. [para 13]

1.5 This Court has repeatedly held that in the case of a Director, the complaint should specifically spell out how and in what manner the Director was in charge of or was responsible to the accused Company for conduct of its business; and mere bald statement that he or she was in charge of and was responsible to the company for conduct of its business is not sufficient. In the case on hand, except the mere bald and cursory statement with regard to the appellant and except reproduction of the statutory requirements, the complainant has not specified her role in the day to day affairs of the company. [para 15]

National Small Industries Corporation Limited vs. *Harmeet Singh Paintal and Anr.* **2010 (2) SCR 805 = (2010) 3 SCC 330 – relied on.**

1.6. In the facts of the case, the appellant has established that she had resigned from the Company as a Director in 1998, well before the relevant date, namely, in the year 2004, when the cheques were issued. The High Court, in the light of the acceptable materials such as certified copy of annual return dated 30.09.1999 and Form 32, ought to have exercised its jurisdiction u/s.482 and quashed the criminal proceedings. The appellant has made out a case for quashing the criminal proceedings. Consequently, the criminal complaint No. 993/1 of 2005 on the file of ACMM, New Delhi, insofar as the appellant (A3) is quashed. [para 16]

Case Law Reference:

2008 (8) SCR 603	**relied on**	**para 12**
2011 (2) SCR 670	**relied on**	**para 13**
2010 (2) SCR 805	**relied on**	**para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2033 of 2011.

From the Judgment & Order dated 16.12.2009 of the High Court of Delhi, in Crl. MC No. 1238 of 2007.

Akhil Sibbal, Deepak Khurana, Archit Birmani, Umesh Kumar Khaitan for the Appellant.

G.L. Rawal, Ashwani Kumar for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is filed against the final judgment and order dated 16.12.2009 passed by the High Court of Delhi at New Delhi in Crl. Misc. Petition No. 1238 of 2007 wherein the learned single Judge of the High Court dismissed the petition filed by the appellant herein for quashing of Criminal Complaint being No. 993/1 of 2005 filed against her under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the Act") in the Court of ACMM, New Delhi.

3. **Brief facts:**

(a) The appellant, who was a non-executive Director on the Board of M/s Lapareil Exports (P) Ltd. (hereinafter referred to as "the Company"), resigned from the Directorship w.e.f. 31.08.1998. On 20.11.1998, recording the resignation of the appellant, the Company filed statutory Form 32 with the Registrar of Companies. A notice dated 10.12.2004 was issued to the appellant regarding dishonour of alleged cheques under Section 138 of the Act by the respondents. The appellant, vide letter dated 15.12.2004, replied to the said notice informing the respondents that she had resigned from the Directorship of the Company long back in 1998. By letter dated 17.12.2004, the respondents sought for certain information/documents from the appellant relating to the Company. On 18.12.2004, the appellant replied to the aforesaid letter reiterating that after her resignation she had nothing to do with the Company and as such she was not in a position to give the information sought for.

(b) The Respondents filed a complaint under Section 138 of the Act being Complaint No. 993/1 of 2005 in the Court of ACMM, New Delhi against the Company arraying the appellant herein as accused No.3. The appellant herein also filed a petition being Criminal Misc. (Main) Petition No. 1238 of 2007 before the High Court of Delhi for quashing of the complaint pending in the Court of ACMM, New Delhi. The High Court, by impugned judgment dated 16.12.2009, dismissed her petition.

(c) Aggrieved by the said judgment, the appellant has filed this appeal by way of special leave before this Court.

4. Heard Mr. Akhil Sibal, learned counsel for the appellant and Mr. G.L. Rawal, learned senior counsel for the respondent No.1.

5. The only point for consideration in this appeal is whether the appellant has made out a case for quashing the criminal complaint filed by the respondents under Section 138 of the Act.

6. In the complaint filed by the respondents before the ACMM, New Delhi, the appellant herein was shown as A3. Apparel Export Promotion Council-Complainant No.1 therein is a Company duly registered under Section 25 of the Companies Act, 1956 and has been sponsored by the Government of India through Ministry of Textiles and has been looking after all the matters relating to export of readymade garments from India to various parts of the world and also administer Garments Export Policy (GEP) issued by the Government of India from time to time. Complainant No.2 is the Joint Director and is otherwise a Principal Officer in the Apparel Export Promotion Council. Accused No.1 is a Company incorporated under the Companies Act, 1956 and in the complaint it was stated that accused Nos. 2 and 3 are its Directors. Insofar as the role of A2 and A3 are concerned, it was stated in the complaint that they are the Directors of the Company and are responsible for the conduct of the business and also responsible for day to day affairs of the Company. It was further stated that all the accused persons, who were in charge of and were responsible to the Company for the conduct of its business at the time the offence was committed shall be deemed to be guilty of the offence. It is further seen from the complaint that on 01.06.2004, the Company had issued certain cheques in favour of the complainant for the purpose of allocation of quota and revalidation and utilization thereof. All the cheques mentioned in para 5 of the complaint were sent for encashment but the same were bounced/dishonoured by the drawee Bank, namely, the Punjab & Sind Bank for the reason "funds insufficient". The complaint further shows that the said fact was informed to the accused. Thereafter, the complainant intended to take action under Section 138 of the Act and the complainant got issued a statutory notice dated 10.12.2004. It was specifically stated in the complaint that the notices were sent by Regd. AD post on 15.12.2004 and through courier on 13.12.2004 which were duly served on the accused.

7. Mr. Akhil Sibal, learned counsel for the appellant, by drawing our attention to the reply sent by the appellant to the aforesaid notice vide her letter dated 15.12.2004 informing the complainant that she had resigned from the Directorship of the Company long back in 1998, submitted that the complainant having received such reply dated 15.12.2004 suppressed the same both in the complaint as well as before the courts below. In the said reply dated 15.12.2004, the appellant has highlighted that she had resigned from the Directorship of the Company long back in 1998. It is the grievance of the appellant that in spite of specific assertion that she ceased to be a Director from 1998 she was arrayed as accused No.3 purportedly in her capacity as a Director of the Company and her reply to the statutory notice was willfully suppressed. When this aspect was confronted to Mr. G.L. Rawal, learned senior counsel for the respondent, he fairly admitted that the complaint does not refer to the reply dated 15.12.2004. He further stated that the said omission at the instance of an undertaking of the Government of India has to be ignored. We are unable to accept the said contention. Inasmuch as the reply to the statutory notice contains specific information that she had resigned from the Company in 1998, the complainant was not justified in not referring the same in the complaint and arrayed her as accused No.3 in the complaint filed in the year 2005. No doubt, whether the appellant has furnished the required documents in support of her claim for resignation from the Company in 1998 is a different aspect which we are going to discuss in the subsequent paras. The

reading of the complaint proceeds that on the date of issuance of cheques, that is, on 01.06.2004, the appellant was a Director of the Company and in charge of all the acts and deeds of the Company and also responsible for the day to day affairs, funding monies etc. This assertion cannot be sustained in the light of her reply dated 15.12.2004 intimating that she had resigned from the Company in 1998.

8. Mr. Akhil Sibal, learned counsel for the appellant, by drawing our attention to a certified copy of Annual Return of the Company dated 30.09.1999 filed with the Registrar of Companies, which was placed on record before the High Court, contended that it is a public document in terms of Section 74(2) of the Indian Evidence Act, 1872 and the High Court ought to have accepted the same as a valid document and quashed the criminal proceedings insofar as the appellant is concerned. The High Court, in the impugned order, after recording the statement of counsel for the petitioner therein (appellant herein) that Form-32 is not available in the record of the Registrar of Companies and finding that Form-32 is the only authentic document and annual return dated 30.09.1999 filed by the accused-Company is not a public document rejected the claim of the appellant and dismissed the petition filed for quashing the complaint.

9. As regards the reference made by the High Court as to the statement said to have been made by the counsel for the petitioner therein that Form-32 is not available in the record of the Registrar of Companies, learned counsel for the appellant submitted that no such statement was ever made by the counsel before the High Court and he placed on record copy of Form-32 as Annexure-P2. A perusal of the document makes it clear that with effect from 31.08.1998, the appellant Smt. Anita Malhotra ceased to be a Director since she resigned from the Directorship of the Company, i.e., Lapareil Exports (P) Ltd. The High Court proceeded that Form-32 is the only authentic document and in the absence of the same, reliance on Annual Return is not permissible. The High Court has further held that annual return is not a public document. It is the assertion of the appellant that no such statement was ever made or could have been made as the petition itself enclosed copies of Form 32 and the receipt of filing of the same. Though the appellant (petitioner before the High Court) was unable to produce certified copy of the said Form 32 as it was not available with the ROC, copy of Form 32 was placed before the High Court. In that event, we are of the view that the High Court has ignored the fact that the appellant has placed on record copy of Form 32 filed by the Company reporting the cessation of Directorship of the appellant along with the receipt of filing with the Registrar of Companies.

10. Mr. Akhil Sibal by taking us through the relevant provisions of the Companies Act, 1956, particularly, Sections 159, 163 and 610(3) contended that the Annual Return dated 30.09.1999 is a public document and the same is reliable and legally acceptable insofar as the contents of the same are concerned. The said Sections are reproduced hereunder:

> **159. Annual return to be made by company having a share capital.—** (1) Every company having a share capital shall within sixty days from the day on which each of the annual general meetings referred to in section 166 is held, prepare and file with the Registrar a return containing the particulars specified in Part I of Schedule V, as they stood on that day, regarding—
>
> (a) its registered office,
>
> (b) the register of its members,
>
> (c) the register of its debenture-holders,
>
> (d) its shares and debentures,
>
> (e) its indebtedness,
>
> (f) its members and debenture-holders, past and present,

and

(g) its directors, managing directors, managers and secretaries, past and present:

Provided that any of the five immediately preceding returns has given as at the date of the annual general meeting with reference to which it was submitted, the full particulars required as to past and present members and the shares held and transferred by them, the return in question may contain only such of the particulars as relate to persons ceasing to be or becoming members since that date and to shares transferred since that date or to changes as compared with that date in the number of shares held by a member.

Xxx xxxx"

163. Place of keeping and inspection of, registers and returns.—

(1) The register of members commencing from the date of the registration of the company, the index of members, the register and index of debenture-holders, and copies of all annual returns prepared under sections 159 and 160, together with the copies of certificates and documents required to be annexed thereto under sections 160 and 161, shall be kept at the registered office of the company:

Xxx xxxx"

610. Inspection, production and evidence of documents kept by Registrar.

Xxxx xxx

Xxxx xxx

(3) A copy of, or extract from, any document kept and registered at any of the officers for the registration of companies under this Act, certified to be a true copy under the hand of the Registrar (whose official position it shall not be necessary to prove), shall, in all legal proceedings, be admissible in evidence as of equal validity with the original document."

11. A reading of the above provisions make it clear that there is a statutory requirement under Section 159 of the Companies Act that every Company having a share capital shall have to file with the Registrar of Companies an annual return which include details of the existing Directors. The provisions of the Companies Act require annual return to be made available by a company for inspection (S. 163) as well as Section 610 which entitles any person to inspect documents kept by the Registrar of Companies. The High Court committed an error in ignoring Section 74 of the Indian Evidence Act, 1872. Sub-section (1) of Section 74 refers to public documents and sub-section (2) provides that public documents include "public records kept in any State of private documents". A conjoint reading of Sections 159, 163 and 610(3) of the Companies Act, 1956 read with sub-section (2) of Section 74 of the Indian Evidence Act, 1872 make it clear that a certified copy of annual return is a public document and the contrary conclusion arrived at by the High Court cannot be sustained. Annual Return dated 30.09.1999 which provides the details about the existing Directors clearly show that the appellant was not a Director at the relevant time. Had the High Court considered the contents of the certified copy of the annual return dated 30.09.1999 filed by the Company which clearly shows that the appellant herein (A3) has not been shown as Director of the Company, it could have quashed the criminal proceedings insofar as A3 is concerned.

12. In *DCM Financial Services Limited vs. J.N. Sareen and Another,* (2008) 8 SCC 1, this Court, while considering Sections 138 and 141 of the Act came to the following

conclusion which is relevant for our purpose:

> **"21.** The cheque in question was admittedly a post-dated one. It was signed on 3-4-1995. It was presented only sometime in June 1998. In the meantime the first respondent had resigned from the directorship of the Company. The complaint petition was filed on or about 20-8-1998. Intimation about his resignation was given to the complainant in writing by the first respondent on several occasions. The appellant was, therefore, aware thereof. Despite having the knowledge, the first respondent was impleaded as one of the accused in the complaint as a Director in charge of the affairs of the Company on the date of commission of the offence, which he was not. If he was proceeded against as a signatory to the cheques, it should have been disclosed before the learned Judge as also the High Court so as to enable him to apply his mind in that behalf. It was not done. Although, therefore, it may be that as an authorised signatory he will be deemed to be person in-charge, in the facts and circumstances of the case, we are of the opinion that the said contention should not be permitted to be raised for the first time before us. A person who had resigned with the knowledge of the complainant in 1996 could not be a person in charge of the Company in 1998 when the cheque was dishonoured. He had no say in the matter of seeing that the cheque is honoured. He could not ask the Company to pay the amount. He as a Director or otherwise could not have been made responsible for payment of the cheque on behalf of the Company or otherwise. [See also *Saroj Kumar Poddar* v. *State (NCT of Delhi)*, *Everest Advertising (P) Ltd.* v. *State, Govt. of NCT of Delhi* and *Raghu Lakshminarayanan* v. *Fine Tubes*."

13. In *Harshendra Kumar D. vs. Rebatilata Koley and Others,* (2011) 3 SCC 351, while considering the very same provisions coupled with the power of the High Court under Section 482 of the Code of Criminal Procedure, 1973 (in short 'the Code') for quashing of the criminal proceedings, this Court held:

> **"25.** In our judgment, the above observations cannot be read to mean that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of summons or taking cognizance, materials relied upon by the accused which are in the nature of public documents or the materials which are beyond suspicion or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction under Section 482 or for that matter in exercise of revisional jurisdiction under Section 397 of the Code. It is fairly settled now that while exercising inherent jurisdiction under Section 482 or revisional jurisdiction under Section 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the documents — which are beyond suspicion or doubt — placed by the accused, the accusations against him cannot stand, it would be travesty of justice if the accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage."

As rightly stated so, though it is not proper for the High Court to consider the defence of the accused or conduct a roving enquiry in respect of merit of the accusation, but if on the face of the document which is beyond suspicion or doubt placed by the accused and if it is considered the accusation against her cannot stand, in such a matter, in order to prevent injustice or abuse of process, it is incumbent on the High Court to look into

those document/documents which have a bearing on the matter even at the initial stage and grant relief to the person concerned by exercising jurisdiction under Section 482 of the Code.

14. Inasmuch as the certified copy of the annual return dated 30.09.1999 is a public document, more particularly, in view of the provisions of the Companies Act, 1956 read with Section 74(2) of the Indian Evidence Act, 1872, we hold that the appellant has validly resigned from the Directorship of the Company even in the year 1998 and she cannot be held responsible for the dishonour of the cheques issued in the year 2004.

15. This Court has repeatedly held that in case of a Director, complaint should specifically spell out how and in what manner the Director was in charge of or was responsible to the accused Company for conduct of its business and mere bald statement that he or she was in charge of and was responsible to the company for conduct of its business is not sufficient. [Vide *National Small Industries Corporation Limited vs. Harmeet Singh Paintal and Another,* (2010) 3 SCC 330]. In the case on hand, particularly, in para 4 of the complaint, except the mere bald and cursory statement with regard to the appellant, the complainant has not specified her role in the day to day affairs of the Company. We have verified the averments as regard to the same and we agree with the contention of Mr. Akhil Sibal that except reproduction of the statutory requirements the complainant has not specified or elaborated the role of the appellant in the day to day affairs of the Company. On this ground also, the appellant is entitled to succeed.

16. In the light of the above discussion and of the fact that the appellant has established that she had resigned from the Company as a Director in 1998, well before the relevant date, namely, in the year 2004, when the cheques were issued, the High Court, in the light of the acceptable materials such as certified copy of annual return dated 30.09.1999 and Form 32 ought to have exercised its jurisdiction under Section 482 and quashed the criminal proceedings. We are unable to accept the reasoning of the High Court and we are satisfied that the appellant has made out a case for quashing the criminal proceedings. Consequently, the criminal complaint No. 993/1 of 2005 on the file of ACMM, New Delhi, insofar as the appellant herein (A3) is quashed and the appeal is allowed.

R.P. Appeal allowed.

M/S. ESSEL PROPACK LTD.

v.

COMMISSIONER OF CENTRAL EXCISE, MUMBAI-III

(Civil Appeal Nos.5043-5045 of 2003)

NOVEMBER 09, 2011

[A.K. PATNAIK AND ANIL R. DAVE, JJ.]

Central Excise Act, 1944:

s.4 – Plastic caps put on plastic tubes – Inclusion of its value in the plastic tubes manufactured and cleared from the factory of the assessee – Held: If the caps are manufactured separately and not in the same factory in which tubes are being manufactured, the caps cannot form part of the assessable value of the tubes manufactured and cleared from the factory – In the instant case, assessee manufacturing tubes on orders received from their customers and fixing plastic caps to the tubes in which case the value of the tubes fixed with caps are included in the assessable value of tubes, but in case such caps are supplied by the customers free of cost, such tubes are cleared without including the value of caps in assessable value of the tubes – Commissioner did not record any clear finding as to whether for the tubes that were cleared by the appellant during the relevant periods in respect of which show cause notices were issued, the caps were supplied free of cost by the customers of the assessee

and such caps were fitted to the tubes manufactured in the factory of the assessee – Matter remitted to the Commissioner to record clear finding as to whether for the tubes cleared during the three relevant periods, the caps were supplied by the customers of the appellant free of cost and accordingly pass a fresh order.

Collector v. Metal Box of India Ltd. **1990 (45) E.L.T. A33 (SC) – relied on.**

Col. Tubes (P) Ltd. v. Collector **1994 (72) E.L.T. 342 (T) – approved.**

Union of India v. J.G. Glass Industries Ltd. **1998 (97) E.L.T. 5 (SC);** *Metal Box of India Ltd., Calcutta v. Collector of Central Excise, Calcutta* **1983 (13) E.L.T. 956 (T) – referred to.**

Case Law Reference:

1990 (45) E.L.T. A33 (SC)	**relied on**	**Paras 4, 8**
1994 (72) E.L.T. 342 (T),	**approved**	**Para 4**
1998 (97) E.L.T. 5 (SC)	**referred to**	**Paras 3, 6**
1983 (13) E.L.T. 956 (T)	**referred to**	**Paras 4, 8**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5043-5045 of 2003.

From the Judgment & Order dated 30.01.2003 of the Customs Excise & Gold (Control) Appellate Tribunal, West Zonal Bench, Mumbai in appeal nos. E/383V to 385/V/98-Mum.

A.R. Madhav Rao, Alok Yadav, Krishna Rao, Krishna Mohan Menon, Rajesh Kumar for the Appellant.

Aruna Gupta, Sukumar Pattjoshi, P. Parmeswaran for the Respondent.

The following order of the Court was delivered

ORDER

1. These appeals are filed under Section 35L(b) of the Central Excise Act, 1944 (for short "the Act"), against the order dated 30th January, 2003 of the Customs, Excise & Gold (Control) Appellate Tribunal (for short "the Tribunal"), West Zonal Bench at Mumbai.

2. The appellant manufactured plastic tubes in its factory and supplied the same to M/s Colgate Palmolive (I) Ltd. (for short "Colgate"). After considering the reply to the show cause notices, the Commissioner of Central Excise, Mumbai III, passed an order dated 17th July, 1997, confirming the demand of excise duty amounting to Rs.54,30,713/- and imposing a penalty of Rs.41,00,000/- under Rule 173-Q of the Central Excise Rules, 1944 and also directing the appellant to pay interest at the rate of 20% under Section 11-AB of the Act, on delayed payment of duty for the relevant periods, saying that the plastic caps, which were put on the plastic tubes, were not included in the assessable value of the plastic tubes manufactured and cleared from the factory of the appellant.

3. Aggrieved, the appellant filed appeals before the Tribunal and by the impugned order, the Tribunal confirmed the demand of duty and modified the penalty and interest imposed by the Commissioner. The reason given by the Tribunal in the impugned order is that this Court in *Union of India versus J.G. Glass Industries Ltd.,*[1998 (97) E.L.T. 5 (S.C.)], had held that printing carried out on plain glass bottles in a different factory would not amount to "manufacture" under Section 2(f) of the Act, but, if manufacture of bottles and printing thereon are carried out within the same factory, then the ultimate product, which happens to be excisable item at the factory gate, is the printed

bottle. Applying the decision of this Court in *J.G. Glass Industries Ltd.* (supra), the Tribunal took the view that where the plastic caps are fitted to the tubes before removal from the appellant's factory, duty is to be paid on the total value of the tubes including the value of the plastic caps.

4. Mr. A.R. Madhav Rao, learned counsel appearing for the appellant, submitted that the plastic caps, which are fitted to the tubes manufactured and removed from the appellant's factory, are not actually manufactured by the appellant in its factory and these are being supplied by Colgate to the appellant and are fitted to the tubes before removal of the same from the factory of the appellant. He relied upon the decision in *Metal Box of India Ltd., Calcutta versus Collector of Central Excise, Calcutta* [1983 (13) E.L.T. 956 (C.E.G.A.T)], in which the Tribunal has held that where the caps made of plastic had been separately manufactured for the aluminium collapsible tubes and were not part of the manufacturing process of Metal Box of India Limited, such caps have to be treated separately while charging the weight based portion of the duty of excise on aluminium as envisaged in Item 27 of the Central Excise Tariff. He submitted that although an appeal was preferred against the aforesaid decision of the Tribunal to this Court, the appeal was dismissed on 20th November, 1989, as reported in *Collector versus Metal Box of India Ltd.* [1990 (45) E.L.T. A33(S.C.). He submitted that in *Col. Tubes (P) Ltd. versus Collector* [1994 (72) E.L.T. 342 (Tribunal)], the Col. Tubes (P) Ltd., which was manufacturing aluminium collapsible tubes, was clearing its product from its factory along with a plastic cap manufactured elsewhere and the Tribunal, by a majority decision, held that cost of plastic cap, a bought-out item and labour charges for fixing it are not includible in the assessable value of the aluminium collapsible tube under Section 4 of the Act. He submitted that the Collector, Central Excise preferred an appeal to this Court, but the appeal was dismissed following its decision in *Collector versus Metal Box of India Ltd.* (supra).

5. Mr. Rao further submitted that considering these authorities, in the very case of the appellant, for a subsequent period, the Tribunal has now taken a view that the caps, not being integral part of a toothpaste tube, cannot be included in the assessable value of the toothpaste tube removed by the appellant from the factory.

6. He submitted that in its decision, for a later period, the Tribunal has distinguished the case of the appellant from the case in *J.G. Glass Industries Ltd.* (supra), saying that in that case printing on the bottles was integral to the bottles whereas in the case of the appellant, the cap was not integral to the tubes but was only an accessory.

7. Ms. Aruna Gupta, learned counsel appearing for the respondent, on the other hand, submitted that it is not clear from the facts as found by the Tribunal whether the plastic caps are manufactured in the factory premises of the appellant or are being supplied by Colgate and in the absence of any finding on this aspect, it is difficult for this Court to take the view that the plastic caps were not manufactured in the factory of the appellant and were supplied by Colgate and, therefore, were not an integral part of the tube and could not be includible in the assessable value of the tubes.

8. We have considered the submissions made by learned counsel for the parties and we find that the consistent view of the Tribunal as well as this Court has been that if the caps are manufactured separately and not in the same factory in which the tubes are being manufactured, the caps cannot form integral part of the assessable value of the tubes, manufactured and cleared from the factory. This is the view that the Tribunal and this Court have been taking in *Metal Box of India Ltd., Calcutta* (supra) and *Col. Tubes (P) Ltd.* (supra). Thus, if in the present case, the caps are not manufactured in the factory of the appellant but are being supplied by the customers of the appellant, the value of the caps will not form part of the

assessable value of the tubes manufactured by the appellant.

9. On a reading of the reply to the show cause notice in the present case, we find that the appellant has stated in Para 3.3 that the appellant manufactures tubes on orders received from their customers and whenever the customers order, the appellant fixes plastic caps to the tubes and in such cases the value of the tubes fixed with caps are also included in the assessable value of tubes, but in case such caps are supplied by the customers free of cost, such tubes are cleared without including the value of the caps in the assessable value of the tubes. The Commissioner has not recorded any clear finding as to whether for the tubes that were cleared by the appellant during the relevant periods in respect of which show cause notices were issued, the caps were supplied free of cost by the customers of the appellant and such caps were fitted to the tubes manufactured in the factory of the appellant. As we have already held, in respect of the tubes for which caps have been supplied by the customers free of cost, the assessable value of the tubes will not include the value of the caps. The Commissioner, therefore, will have to record a clear finding as to whether for the tubes cleared during the three relevant periods, the caps were supplied by the customers of the appellant free of cost and accordingly pass a fresh order.

10. In the result, the appeals are allowed to the extent indicated above; the impugned order of the Tribunal as well as the original order passed by the Commissioner are set aside. The matter is remanded to the Commissioner for fresh decision in accordance with the observations made in this order. No costs.

D.G. Appeals allowed.