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 delayed refund – 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] [10-G-H; 11-A-E]

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. Thus 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] [11-F; 13-E-F; 15-B-D]

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

1. (2008) 9 SCC 515.

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

2. 2009 (243) E.L.T. A27 (S.C.).

3. 2004 (170) E.L.T. 4.

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

4. [1991] 1 K.B. 64.

5. (2010) 8 SCC 739.

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] [23-G-H; 24-A-C]

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] [24-E-H; 25-A-D]

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] [25-E-F]

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] [44-F; 46-F; 60-A-B]

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] [49-F; 52-D-F; 53-E]

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] [58-H; 59-A-C]

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] [59-C-D]

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] [59-C-G; 60-C-D]

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] [59-F-H; 61-F]

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 45] [73-F-H; 74-A-C]

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] [74-C-D]

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] [60-C-F]

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] [60-F-H; 61-A-C]

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] [61-C-F]

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] [75-C]

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**	A
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**	B
AIR 1963 SC 591	**relied on**	**para 45**	

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2960 of 2006.

From the Judgment & Order dated 25.07.2005 of the High Court of Gujarat at Ahmedabadm, in Special Civil Application No. 735 of 1999. C

WITH

C.A. Nos. 2961, 2962, 2963, 2964, 3659 & 5616 of 2006 and 990 of 2007. D

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. E

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. F G

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. H

A 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 B 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 C 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 D 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 E 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 F 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 G 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 H 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.
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> 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,

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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;

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(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.

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.:

> "(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.)

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)
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> "[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 Procedure, 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] [83-D-E]

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] [84-E-H]

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] [86-G-H; 87-A-D; 89-G-H]

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] [89-E-F]

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] [90-A-C]

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] [90-E-G]

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, at New 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.

H.G. RANGANGOUD

v.

M/S. STATE TRADING CORPORATION OF INDIA LIMITED & ORS.

(Criminal Appeal Nos. 2056-2059 of 2011)

NOVEMBER 11, 2011

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

CONTEMPT OF COURTS ACT, 1971:

s. 2(c)(ii) – Criminal contempt – Interference with due course of judicial processing — Order passed by single Judge of High Court in writ petition – Writ petitioner moved the State Government to implement the said order – Writ appeal filed subsequently – Meanwhile State Government processed the matter – Division Bench of the High Court initiated suo motu contempt proceedings against the writ petitioner and the Officer of the State Government – HELD: In the instant case, even before filing of the appeal the appellant had brought to the notice of the State Government the order passed by the Single Judge and sought its implementation – In the representation he had not voiced and could not have voiced any opinion on the appeal as the same was not filed till then – The order of the Single Judge was not stayed – Further, mere filing of the appeal would not operate as a stay of the order appealed from – The act alleged in no way prejudices or interferes or tends to interfere with the due course of any judicial proceeding – The proceeding initiated against the appellant as also the Officer is not just and appropriate but is an abuse of the process of the Court – Constitution of India, 1950 – Article 215.

CONSTITUTION OF INDIA, 1950:

Article 136 read with Article 142 –Benefit of order in

appeal to non-appellant — Appeal by writ petitioner challenging the order of Division Bench of the High Court initiating suo motu contempt proceedings against him and an Officer of the State Government – Officer not filing any appeal – Appeal of writ petitioner allowed – Held: It shall be too technical to deny the officer the relief by Supreme Court, which has jurisdiction for doing complete justice in any cause or matter pending before it – Therefore, the Officer shall also be entitled to the same relief as the appellant – Contempt of Courts Act, 1971 – s. 2(c).

The appellant applied on 16.4.2003 for grant of mining lease for iron ore. The State Government, by its letter dated 9.2.2004, recommended to the Central Government for grant of mining lease in favour of the appellant to an extent of 16.8 hectares. But, before any decision could be taken in the matter, the Central Government issued notification dated 27.6.2005 and reserved iron ore deposits for exploitation by the respondent-State Trading Corporation of India Ltd., a public sector undertaking. On the writ petition filed by the appellant, the single Judge of the High Court quashed the said notification. The appellant represented to the State Government to consider his application for grant of mining lease. Subsequently, the respondent filed a writ appeal before the Division Bench of the High Court challenging the order of the single Judge. No interim order was passed. The appeal was heard and judgment was reserved. Meanwhile, the respondent-Corporation brought to the notice of the Division Bench of the High Court that the State Government had sent a communication to the Union of India for grant of mining lease in favour of the writ petitioner. The High Court observed that it amounted to interference with the due course of judicial process and initiated suo motu criminal contempt proceedings against the appellant and the Under Secretary to the Government of Karnataka, Commerce and Industries

Department. Aggrieved, the writ petitioner filed the appeals.

Allowing the appeals, the Court

HELD: 1. This Court seldom interferes with an order initiating a contempt proceeding and ordinarily relegates the person charged with contempt, to file a show cause before the court which had initiated the proceeding. But this is not an absolute rule and in the facts of a given case when this Court comes to the conclusion that the allegation made, even when not denied do not constitute contempt, it interfere with the order initiating contempt proceeding so as to avoid unnecessary harassment to the person served with contempt notice. [para 5] [103-G-H; 104-A]

2.1 The expression "criminal contempt" has been defined u/s 2 (c) of the Contempt of Courts Act, 1971 and in the instant case s. 2 (c) (ii), is relevant, which makes it evident that an act which prejudices or interferes or tends to interfere with the due course of judicial proceeding comes within the mischief of criminal contempt. The proceeding has been initiated against the appellant for criminal contempt on the ground that the act done by him amounts to interference with the due course of judicial process. [para 6] [104-C-G-H; 105-A]

2.2 The power to punish for contempt is inherent in courts of record and described as a necessary incident to every court of justice. This power though inherent to the High Court is given a constitutional status by Article 215 of the Constitution. In the instant case, even before filing of the appeal the appellant had brought to the notice of the State Government the order passed by the Single Judge and sought its implementation. In the representation he had not voiced and could not have voiced any opinion on the appeal as the same was not

filed till then. The Under Secretary while making recommendation also did not voice any opinion on the pending appeal. The order of the Single Judge was not stayed. Further, mere filing of the appeal would not operate as a stay of the order appealed from. [para 6 & 7] [104-G-H; 105-A-F]

2.3 The act alleged in no way prejudices or interferes or tends to interfere with the due course of any judicial proceeding. The proceeding initiated against the appellant as also the Under Secretary to the Government of Karnataka, Commerce and Industries Department is not just and appropriate but is an abuse of the process of the court. The impugned order is set aside. [para 8] [105-G-H; 106-A]

3. True it is that the Under Secretary to the Government of Karnataka, Commerce and Industries Department against whom the contempt proceeding has been initiated by the impugned order has not chosen to file any petition before this Court, but in the facts and circumstances of the case, it shall be too technical to deny him the relief by this Court, which has jurisdiction for doing complete justice in any cause or matter pending before it. Therefore, he shall also be entitled to the same relief as that of the appellant. [para 9] [106-B-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2056-2059 of 2011.

From the Judgment & Order dated 29.11.2007 of the High Court of Karnataka at Bangalore in Writ Appeal No. 1778 of 2007 C/w WA No. 1780 of 2007 and 1781 of 2007.

P. Vishwanatha Shetty, Udaya Kumar Sagar, Bina Madhavan, Shashi Kiran Shetty, Vinita Sasidharan (for Lawyers'S Knit & Co.) for the Appellant.

B. Subramanya Prasad, Nandeesh Patil, Anirudh

Sanganeria (for V.N. Raghupathy), Anitha Shenoy for the Respondents.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. Petitioner, aggrieved by the order passed by the Division Bench of the Karnataka High Court initiating proceeding for contempt in exercise of its *suo motu* power, has preferred these special leave petitions.

2. Leave granted.

3. Bereft of unnecessary details the facts giving rise to the present appeals are that the appellant applied on 16th of April, 2003 for grant of mining lease for iron ore over an area of 350 acres in Yeshawanthnagar Range of the Kumarswamy Reserve Forest Area within Sandur Taluk in Bellary District of the State of Karnataka. The State Government processed the request and in exercise of powers under Section 5 (1) of the Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as 'the Act') by its letter dated 9th of February, 2004 recommended to the Central Government for grant of mining lease in favour of the appellant to the extent of 16.8 hectares. However before any decision could be taken, the Central Government issued notification dated 27th of June, 2005 in exercise of the power under Section 17 A (1A) of the Act and reserved iron ore deposits in the area in question for exploitation by State Trading Corporation of India Limited, a public sector undertaking. In view of the aforesaid reservation the Central Government returned the proposal of the State Government to grant mining lease to the appellant by its letter dated 21st of July, 2005**.** Aggrieved by the aforesaid notification appellant preferred WP No. 19339 of 2005 (H.G. Rangangoud v. Minister of Coal & Mines, represented by the Secretary & Ors.) before the Karnataka High Court, inter alia praying for quashing the notification reserving the iron ore deposits in favour of the State Trading Corporation of India

Limited. The writ petition filed by the appellant was heard along with another writ petition filed by Salgaocar Mining Industries Private Limited and the learned Single Judge by its judgment and order dated 14th of August, 2007 quashed the aforesaid notification dated 27th of June, 2005. Armed with the order of the High Court, appellant represented to the State Government to consider his application for grant of mining lease by its representation dated 18th of September, 2007. After one day of filing of the representation i.e. on 20th of September, 2007 the State Trading Corporation, aggrieved by the order of the learned Single Judge preferred appeal before the High Court. Said appeal was posted for consideration on 3rd of October, 2007 and the Division Bench of the High Court taking into consideration the 'enormity' of the case and finding that all the parties have been served and represented, directed for its final disposal on 11th of October, 2007. However, no interim order was passed. As directed, the matter was heard and reserved for judgment but before the judgment could be pronounced the State Trading Corporation, the appellant before the High Court, brought to its notice that "when the matter was in the hearing process, Government of Karnataka has sent a communication to the Union of India for mining lease in favour of the writ petitioners". The Division Bench of the High Court, when informed about the aforesaid fact "called upon the Government Advocate to explain this situation". The explanation was furnished in which it was inter alia stated that "as there was no interim order granted in the writ appeal and keeping in view the fact that if the mining area is not sanctioned to the writ petitioners the existing mining operation would be forced to close down and keeping in view the jeopardy to the workmen, such recommendation has been made." The explanation put forth by the State Government did not find favour with the High Court and on its prima facie finding that the aforesaid conduct "amounts to interference with the due course of judicial process" initiated *suo motu* criminal contempt proceedings against the appellant herein and K. Jayachandra, Under Secretary to the Government of Karnataka, Commerce and Industries

Department. While doing so the High Court observed as follows:

> "……..On going through the affidavit as well as the records, prima facie it appears to us that there is a clear attempt on the part of the writ petitioner Mr. H.G. Rangangoud and the concerned official to take such action when the grant of lease/licence itself was seized and was under consideration by this Court thereby cause on the merit or decision of this court."

4. Mr. P. Vishwanatha Shetty, Senior Advocate appearing on behalf of the appellant submits that the appellant had filed the representation in the light of the order of the learned Single Judge even before the appeal was filed against the judgment of the learned Single Judge and hence it cannot be said that the appellant in any way interfered with the due course of judicial process. Accordingly he submits that the order initiating the proceeding for criminal contempt deserves to be set aside. Ms. Anitha Shenoy appears on behalf of the State of Karnataka and submits that the act of filing the representation by the appellant and the recommendation made by the Under Secretary in no way interferes with the due course of judicial process and in such a state of affairs she is not in a position to defend the order of the High Court. At the same breath she reminds us that contempt is a matter between the court and the contemnor and this Court may take the view which it considers just and proper.

5. We have given our most anxious consideration to the submissions advanced and at the outset we may observe that this Court seldom interferes with an order initiating a contempt proceeding and ordinarily relegates the person charged with contempt to file a show cause before the court which had initiated the proceeding. But this is not an absolute rule and in the facts of a given case when this Court comes to the conclusion that the allegation made, even when not denied do not constitute contempt, interferes with the order initiating

contempt proceeding so as to avoid unnecessary harassment to the person served with contempt notice. We proceed to consider the present appeal bearing in mind the aforesaid principle.

6. It is relevant here to state that the proceeding has been initiated against the appellant for criminal contempt on the ground that the act done by the appellant amounts to interference with the due course of judicial process. The expression "criminal contempt" has been defined under Section 2 (c) of the Contempt of Courts Act, 1971 and in the present case we are concerned with Section 2 (c) (ii), the same reads as follows:

> "**2. Definitions.** – In this Act, unless the context otherwise requires, -
>
> xxx xxx xxx
>
> (c) "criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which –
>
> xxx xxx xxx
>
> (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
>
> xxx xxx xxx."

From a plain reading of the aforesaid provision it is evident that an act which prejudices or interferes or tends to interfere with the due course of judicial proceeding comes within the mischief of criminal contempt. The power to punish for contempt is inherent in Courts of record and described as a necessary incident to every court of justice. The power is inalienable attribute of court and inheres in every Court of record. This power though inherent to the High Court is given

a constitutional status by Article 215 of the Constitution. It is to secure public respect and confidence in the judicial process. Rule of law is the basic rule of governance of any civilized democratic polity. It is only through the courts that rule of law unfolds its contours and establishes its concept. For the judiciary to carry out its obligations effectively and true to the spirit with which it is sacredly entrusted the task, constitutional courts have been given the power to punish for contempt, but greater the power; higher the responsibility.

7. In the present case, even before filing of the appeal the appellant has brought to the notice of the State Government the order passed by the learned Single Judge and sought its implementation. In the representation he had not voiced and could not have voiced any opinion on the appeal as the same was not filed till then. The Under Secretary while making recommendation also did not voice any opinion on the pending appeal. It has to be borne in mind that any attempt to influence the outcome of the matter pending before the court to prejudice the parties therein may prejudice or interfere with the due course of any judicial proceeding but in our opinion, mere filing of the representation and making recommendation thereon in no way prejudices or interferes or tends to interfere with the due course of any judicial proceeding. In our opinion, it is criminal contempt to voice opinion on a case pending in court as that would seem to influence the outcome of the matter and to prejudice the parties therein. However, we hasten to add that fair reporting of court proceedings and fair comments on the legal issues do not amount to contempt. The order of the learned Single Judge was not stayed. Further, mere filing of the appeal would not operate as a stay of order appealed from.

8. When tested on the aforesaid anvil we are of the opinion that the act alleged in no way prejudices or interferes or tends to interfere with the due course of any judicial proceeding. From the conspectus of the discussion aforesaid we have no doubt in our mind that the proceeding initiated

against the appellant as also the Under Secretary to the Government of Karnataka, Commerce and Industries Department is not just and appropriate and an abuse of the process of the court. This being so, we are duty bound to interfere at this stage itself.

9. True it is that Under Secretary to the Government of Karnataka, Commerce and Industries Department against whom the contempt proceeding has been initiated by the impugned order, not chosen to file any petition before this Court but in view of what has been observed above we are of the opinion that it shall be too technical to deny him the relief by this Court, which has jurisdiction for doing complete justice in any cause or matter pending before it. Therefore, he shall also be entitled to the same relief as that of the appellant.

10. Accordingly, these appeals are allowed, the impugned judgment and order is set aside.

R.P. Appeals allowed.

ORISSA PRIVATE MEDICAL & DENTAL COLLEGES ASSOCIATION, THROUGH ITS CHAIRMAN
v.
CHAIRMAN, ORISSA JOINT ENTRANCE EXAMINATION-2011 AND ORS.
(Civil Appeal No. 9690 of 2011)

NOVEMBER 11, 2011

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

Education/Educational Institutions:

Medical and Dental Colleges – Orissa Joint Entrance Examination-2011(OJEE-11) – Chairman, OJEE-11 directed to conduct further counseling for the 624 OJEE-11qualified candidates in the waiting list to fill up the eight seats, that are still vacant in the Private Medical College/Colleges, which are the members of the appellant Association on or before 24.11.2011, subject to the rules and regulations applicable for admissions – The appellant shall also furnish the list of candidates admitted to the appropriate authority on or before 30.11.2011.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9690 of 2011.

From the Judgment & Order dated 07.09.2011 of the High Court of Judicature for Orissa at Cuttack in Writ Appeal No. 429 of 2011.

L. Nageswara Rao, Amitabh Bagchi, S.K. Das (for Ajay Choudhary) for the Appellant.

Milind Kumar for the Respondents.

The Order of the Court was delivered by

O R D E R

H. L. DATTU, J. 1. Leave granted.

2. The appellant – Orissa Private Medical and Dental Colleges Association in this appeal is impugning the Judgment and Order passed by Orissa High Court in W.A. No. 429 of 2011 dated 07.09.2011.

3. For the purpose of disposal of this appeal, we need not notice in detail the facts and issues raised in this appeal, since the submission made by the learned counsel at the time of hearing lie in a narrow compass.

4. Sri. L. Nageshwara Rao, learned senior counsel, submits that in view of the Reply Affidavit filed by Chairman, Orissa Joint Entrance Examination – 2011 (for short, "OJEE-11") – Respondent No. 1, a direction may be issued to them to conduct further counseling from among 624 OJEE-11 qualified candidates, who are in the waiting list to fill up eight vacant seats in the Private Medical Colleges, which are members of the appellant Association.

5. The learned counsel for the respondent OJEE-11 does not object to the reasonable request made by the learned senior counsel for the appellant.

6. In the result, we order that Respondent No. 1 will conduct further counseling for the 624 OJEE-11 qualified candidates in the waiting list to fill up the eight seats, that are still vacant in the Private Medical College/Colleges, which are the members of the appellant Association on or before 24.11.2011, subject to the rules and regulations applicable for admissions. The appellant shall also furnish the list of candidates admitted to the appropriate authority on or before 30.11.2011.

7. The appeal is disposed of accordingly.

D.G. Appeal disposed of.

MAKERS DEVELOPMENT SERVICES PVT. LTD.

v.

M. VISVESVARAYA INDUSTRIAL RESEARCH AND DEVELOPMENT CENTRE

(Civil Appeal No. 9709 of 2011)

NOVEMBER 14, 2011.

[P. SATHASIVAM AND JASTI CHELAMESWAR, JJ.]

Code of Civil Procedure, 1908:

Or.39, rr. 1 and 2 – Temporary injunction – Grant of – Basic principles to be considered – Explained.

O. 39 – rr. 1 and 2 – Prayer for temporary injunction – Agreement between the parties stated to have been entered into for construction of a hotel and for grant of its lease – After construction was raised upto 80' dispute between parties – Suit for mandatory injunction – Temporary injunction restraining the defendant from obstructing the construction etc. prayed – Single Judge and Division Bench of High Court granting limited interim order restraining the defendant from in any manner selling, transferring or creating third party interests in the suit property – HELD: The single Judge was fully justified in granting the limited relief – The Division Bench was also fully justified in confirming the said limited order – As rightly observed by the single Judge as well as Division Bench, if other reliefs were granted and the plaintiff was allowed to proceed with the construction on the suit land, in the event of dismissal of suit, the defendant cannot use the land in a different manner with the structure without undertaking an enormous exercise of demolishing the same.

On 4.8.2007, the appellant in C.A. No. 9709 of 2011 filed a suit in the City Civil Court for injunction against the respondent. The case of the plaintiff-appellant was that

on 10.11.1980 and agreement was entered into between the parties for construction of a composite hotel complex and for granting the plaintiff would be granted lease of the Hotel (exclusive of the Convention and Exhibition Centre) in favour of the plaintif-appellant for 60 years with an option of renewal of lease. Pursuant to the agreement, the respondent put the appellant in possession of the suit land on 16.07.1990. Since the appellant could not complete the work due to disputes and differences, the respondent, on 31.07.2007, affixed a notice on the premises notifying all concerned including the appellant to move out of the property and instructed its security persons not to permit the appellant to enter upon the said property. By order dated 06.08.2007, the trial court held that till the substantive suit was filed by the appellant, the impugned notice dated 31.07.2007 would not be acted upon by the defendants up to and inclusive of 17.09.2007. On 10.09.2007, the appellant moved a Notice of Motion No. 3499 of 2007 in a Ssuit bearing No. 2618 of 2007 before the Single Judge of the High Court for a decree of specific performance, inter alia, praying for a permanent injunction restraining the respondent from dispossessing the appellant. By *ad-interim* order dated 14.09.2007, the assurance given in the City Civil Court was directed to be observed and the respondent was directed not to create any third party rights pending the Notice of Motion. During the pendency of the suit, by letter dated 19.11.2007, the respondent terminated the said Agreement. The single Judge, rejected prayers mentioned in clauses (a) to (f) of the Notice of Motion and granted limited interim relief in favour of the appellant with regard to prayer clause (g), namely, pending the hearing and final disposal of the suit, the defendant-respondent would not, in any manner, sell, transfer or create any third party rights or interests in the suit property. The appeals filed by the parties were dismissed by the Division Bench of the High Court.

In the instant appeals filed by the parties, the questions for consideration before the Court were: (i) "whether the appellant/plaintiff has made out a case for grant of injunction in its entirety, i.e. prayer clauses (a) to (g)" and (ii) "whether learned the single Judge as well as the Division Bench of the High Court committed an error in granting limited relief in respect of clause (g)".

Dismissing the appeals, the Court

HELD: 11.1 It is settled law that while passing an interim order of injunction under O. 39, rr. 1 and 2 of the Code of Civil Procedure, 1908, the court is required to consider three basic principles, namely, (a) prima facie case, (b) balance of convenience and inconvenience and (c) irreparable loss and injury. In addition to these three basic principles, a court, while granting injunction must also take into consideration the conduct of the parties. It is also established law that the court should not interfere only because the property is a very valuable one. Grant or refusal of injunction has serious consequences depending upon the nature thereof; and in dealing with such matters the court must make all endeavours to protect the interests of the parties. [Para 6] [116-D-F]

1.2 Inasmuch as the main suit is pending, it would not be proper for this Court to delve into the matter and arrive at a categorical finding one way or the other. The finding of the single Judge about the construction of the building to the height of 80 ft. on the suit land by the appellant cannot be ignored. However, whether the defendant permitted the appellant to enter on the suit land and to carry on construction are all matters to be decided in the main suit. [paras 10 & 11] [119-E-F]

1.3 What was claimed by the plaintiff was not a mere prohibitory order but prayed for positive mandatory

injunction which, as rightly observed by the Division Bench, would permit the plaintiff to alter the status quo on the suit land on the date of the suit. The single Judge as well as the Division Bench on appreciation of entire materials rendered the factual finding that the balance of convenience is not in favour of granting such mandatory interim order as claimed in prayer clauses (a) to (f). As rightly observed by the single Judge as well as the Division Bench, if other reliefs were granted and the appellant was allowed to proceed with the construction on the suit land, in the event of dismissal of the suit, the defendant cannot use the land in a different manner with the structure without undertaking an enormous exercise of demolishing the same. It is relevant to point out that though the appellant had stated that it had started construction in the year 1996, even after the information by the defendant to the appellant in 2002 that the BEST had given their 'no objection' for the demolition of temporary receiving station and the appellant can proceed with the demolition, however, the fact remains, the height of the construction was only 80 ft. which shows that from the year 2001 to 2007, the appellant had not carried on construction and there was no obstruction from the side of the defendant. In view of all these factual aspects and in the light of the stand of the defendant disputing the existence of the agreement, as rightly observed by the single Judge as well as the Division Bench, further permission for construction or ancillary works cannot be granted during the pendency of the suit. The single Judge was fully justified in granting limited relief in respect of prayer clause (g) and in declining the other reliefs in clauses (a) to (f). The Division Bench was also fully justified in confirming the said limited order. Both the parties are directed to cooperate with the court for early conclusion of the hearing of Suit No. 2618 of 2007 pending before the single Judge of the High Court. [Para 12] [120-C-H; 121-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9709 of 2011.

From the Judgment & Order dated 28.06.2011 of the High Court of Judicature at Bombay in Appeal No. 280 of 2008 in Notice of Motion No. 3499 of 2007 in Suit No. 2618 of 2007.

WITH

C.A. No. 9710 of 2011.

Shyam Divan, F. Pooniwala, Sandeep H. Junarkar, Pratap Venugopal, Mumtaz Bandurwala, Surekha Raman, Namrata Sood, Anuj Sarma, K.J. John & Co. for the Appellant.

Mukul Rohtagi, Praveen Samdani, Ajay Khatla Walia, Mahesh Agarwal, Radhika Gautam, Pratibha Mehta, E.C. Agrawala for the Respondent.

P. SATHASIVAM, J. 1. Leave granted in both the Special Leave Petitions. Both these appeals were heard together as they arose out of the same set of facts and common questions of law were involved.

2. SLP (C) No. 22276 of 2011 has been filed by the Makers Development Services Pvt. Ltd. against the order dated 28.06.2011 passed by the Division Bench of the Bombay High Court in Appeal No. 280 of 2008 challenging the order dated 25.04.2008 passed by the learned Single Judge in Notice of Motion No. 3499 of 2007 in Suit No. 2618 of 2007 declining the reliefs claimed in prayer clauses (a) to (f) pending final disposal of the Suit and SLP (C) No. 25972 of 2011 has been filed by M. Visvesvaraya Industrial Research and Development Centre against the same order in Appeal No. 289 of 2008 in Notice of Motion No. 3499 of 2007 in Suit No. 2618 of 2007 granting relief in terms of prayer clause (g).

3. **Brief facts**:

a) Makers Development Services Pvt. Ltd.-the appellant

herein (Original Plaintiff) is a Company registered under the Companies Act, 1956 engaged in the business of development, building, including the construction and management of hotels and developments pertaining to other hospitality services and management of properties. M. Visvesvaraya Industrial Research and Development Centre-the respondent herein (Original Defendant) is a Company incorporated under the Companies Act, 1956 and is engaged, inter alia, in promoting, establishing, conducting and undertaking scientific research.

b) The Government of Maharashtra, by Resolutions dated 16.10.1970 and 18.11.1974, had granted lease of certain plots of land to the defendant-Company at Backbay Reclamation, Cuffe Parade, Mumbai, who was entitled and authorized to enter into transactions with third parties in respect of the said land. A portion of that land admeasuring 13,326 sq. mts. which forms a part of the larger land held by the defendant-Company is the subject-matter of the present case.

c) An agreement dated 10.11.1980 was entered into between the parties for construction of a composite hotel complex consisting of a Hotel Building, a Convention Centre and an Exhibition Centre on the Suit Land (Tower No.2) and the plaintiff would be granted lease of Hotel (exclusive of the Convention and Exhibition Centre) for 60 years with an option of renewal of lease. This agreement came to be modified from time to time.

d) Pursuant to the Agreement, the respondent put the appellant in possession of the Suit Land on 16.07.1990, which continues to remain with the appellant till date.

e) Since the appellant could not complete the work and due to disputes and differences, the respondent, on 31.07.2007, affixed a notice on the premises notifying all concerned including the appellant to move out of the property

and instructed its security persons not to permit the appellant to enter upon the said property.

f) On 04.08.2007, the appellant filed a suit for injunction before the City Civil Court, Mumbai seeking interim and final reliefs restraining the respondent from taking any illegal steps. By order dated 06.08.2007, the learned Judge held that till the substantive suit is filed by the appellant, the impugned notice dated 31.07.2007 will not be acted upon by the defendants upto and inclusive of 17.09.2007.

g) On 10.09.2007, the appellant moved a Notice of Motion No. 3499 of 2007 in a Suit being No. 2618 of 2007 before the learned Single Judge of the Bombay High Court for a decree of specific performance, inter alia*, praying for a permanent injunction restraining the respondent from dispossessing the appellant. By* ad-interim *order dated 14.09.2007, the assurance given in the City Civil Court was directed to be observed and the respondent was directed not to create any third party rights pending the Notice of Motion. During the pendency of the suit, by letter dated 19.11.2007, the respondent terminated the said Agreement. The learned single Judge, after referring the documents and affidavits on record, rejected prayer clauses (a) to (f) of the Notice of Motion and granted limited interim relief with regard to prayer clause (g) in favour of the appellant.*

h) Aggrieved by the order of the learned single Judge, the appellant preferred an appeal being Appeal No. 280 of 2008 before the Division Bench of the High Court. With regard to the limited relief granted by the learned single Judge, the respondent also filed an appeal being Appeal No. 289 of 2008 before the Division Bench of the High Court.

i) The Division Bench, by a common judgment, upheld the order of the learned single Judge and dismissed both the appeals. Challenging the order of the Division Bench of the

High Court, the appellant and the respondent filed separate special leave petitions before this Court.

4. Heard Mr. Shyam Divan, learned senior counsel for the appellant and Mr. Mukul Rohatgi & Mr. Praveen Samdani, learned senior counsel for the respondent.

5. The points for consideration in these appeals are:-

a) Whether the appellant/plaintiff has made out a case for grant of injunction in its entirety, i.e. prayer clauses (a) to (g)?

b) Whether learned single Judge as well as Division Bench of the High Court committed an error in granting limited relief in respect of clause (g)?

6. It is settled law that while passing an interim order of injunction under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908, the Court is required to consider three basic principles, namely, a) prima facie case, b) balance of convenience and inconvenience and c) irreparable loss and injury. In addition to the above mentioned three basic principles, a court, while granting injunction must also take into consideration the conduct of the parties. It is also established law that the Court should not interfere only because the property is a very valuable one. Grant or refusal of injunction has serious consequences depending upon the nature thereof and in dealing with such matters the court must make all endeavours to protect the interest of the parties.

7. With the above principles, let us consider the claim of both the parties.

8. The appellant/plaintiff, who filed Suit No. 2618 of 2007 on the file of original side of the High Court of Bombay prayed for the following interim reliefs pending hearing and final disposal of the said suit:

"(a) That pending the hearing and final disposal of the Suit, the Defendant be ordered and directed to do, sign, execute, deliver and register all such acts, deeds, matters writings, documents, authorities papers, plans, sanctions and things as may be necessary to enable the Plaintiff to continue construction on the Suit Land in terms of the Suit Contract;

(b) That pending the hearing and final disposal of the Suit, the Defendant by itself, its servants and agents or any person or persons claiming by, from, through or under them be restrained by an order and injunction of this Court from dispossessing the Plaintiff or removing the authorized representatives, employees, staff, workers and labourers of the Plaintiff and their respective family member or their belongings and articles or the construction materials, equipment and other belongings of the Plaintiff from the Suit Land;

(c) That pending the hearing and final disposal of the Suit, it be ordered and decreed that the Defendant to allow the Plaintiff to continue construction on the Suit Land and unhindered access to the Suit Land and allow ingress to and egress from the Suit Land, by the Plaintiff, its representatives, employees and contract labour as also for all construction materials and equipment without in any manner, directly or indirectly, obstructing or hindering the Plaintiff.

(d) That pending the hearing and final disposal of the Suit, the Defendant by itself, its servants and agents or any person or persons claiming by, from, though or under them be restrained by an order and injunction of this Court from in any manner restraining, preventing impending or obstructing implementation of the Suit Contract or construction on the Suit Land or access to and ingress to and egress from the Suit Land, of the Plaintiff or its authorized representatives, employees, workers, labourers

and their respective family members or preventing, impeding or obstructing construction material or equipment of the Plaintiff from being brought on to the Suit land or in any manner, directly or indirectly, by any act of omission or commission, withholding or causing to be withheld essential utilities such as power and water supply to the Suit Land for construction by the Plaintiff;

(e) That pending the hearing and final disposal of the Suit, the Defendant by itself, its servants and agents or any person or persons claiming by, from, through or under them be restrained by an order and injunction of this Court from in any manner, whether directly or indirectly, revoking or acting on any purported revocation of the Letter of Authority granted by the Defendant to the Plaintiff or in any manner, whether directly or indirectly, hindering, impeding or obstructing construction on the Suit Land in terms of the Suit Land in terms of the Suit Contract;

(f) That pending the hearing and final disposal of the Suit, the Defendant by itself, its servants and agents or any person or persons claiming by, from, through or under them be restrained by an order and injunction of this Court from in any manner committing unlawful trespass or from in any manner intimidating the Plaintiff, its employees, workers, labourers and other agencies appointed by the Plaintiff;

(g) That pending the hearing and final disposal of the Suit, the Defendant by itself, its servants and agents or any person or persons claiming by, from, through or under them be restrained by an order and injunction of this Court from, in any manner, selling transferring, dealing with, disposing of, alienating encumbering or creating any third party rights or interest in, or entering into any agreement or arrangement with any one else in respect of the Suit Land or any part thereof;"

9. Among the above prayers for interim reliefs, the learned

single Judge granted relief only in respect of prayer clause (g) that too with a condition, namely, except the words "dealing with". The learned single Judge on satisfying himself and after thorough scrutiny of the materials placed rejected the relief insofar as prayer clauses (a) to (f), which resulted in filing of above two appeals by the appellant and the defendant. It is the claim of the appellant/plaintiff that on the basis of the contract between the parties, the learned single Judge and the Division Bench should have granted an order permitting the appellant to carry on further construction especially when construction of about 80 ft. had already been raised by the appellant on the suit land. On the other hand, it is the case of the defendant that there is no existing agreement between the parties and the only point is that the parties have agreed to enter into an agreement and, therefore, the learned single Judge as well as the Division bench were not justified even in granting interim order in terms of prayer (g).

10. Inasmuch as the main suit is pending, it would not be proper for this Court to delve into the matter and arrive at a categorical finding one way or other. Accordingly, we have to find out whether there is prima facie case and 'balance of convenience' in terms of principles mentioned above.

11. The finding of the learned single Judge about the construction of the building to the height of 80 ft. on the suit land by the appellant cannot be ignored. However, whether the defendant permitted the appellant to enter on the suit land and to carry on construction are all matters to be decided in the main suit**.** The limited relief granted in clause (g) by the learned single Judge is quite understandable, otherwise, it could be possible for the defendant to deal with the suit land with third parties or encumber it before the final disposal of the suit. However, as rightly observed by the learned single Judge as well as Division Bench, if other reliefs which we have already extracted above are granted, in the event of dismissal of a suit, undoubtedly, it would create enormous difficulties for the

defendant using the plot or land freely and without any difficulty. In other words, if the appellant was allowed to proceed with the construction on the suit land, in the event of dismissal of suit, the defendant cannot use the land in a different manner with the structure without undertaking an enormous exercise of demolishing the same. Further, what was claimed by the plaintiff was not a mere prohibitory order but prayed for positive mandatory injunction which, as rightly observed by the Division Bench, would permit the plaintiff to alter the status quo on the suit land on the date of the suit.

12. The learned single Judge as well as Division Bench on appreciation of entire materials rendered the factual finding that the balance of convenience is not in favour of granting such mandatory interim order as claimed in prayer clauses (a) to (f). It is relevant to point out that though the appellant had stated that it had started construction in the year 1996, even after the information by the defendant to the appellant in 2002 that the BEST had given their 'no objection' for the demolition of temporary receiving station and the appellant can proceed with the demolition, however, the fact remains, the height of the construction was only 80 ft. which shows that from the year 2001 to 2007, the appellant had not carried on construction and there was no obstruction from the side of the defendant. In view of all these factual aspects and in the light of the stand of the defendant disputing the existence of the agreement, as rightly observed by the learned single Judge as well as Division Bench, further permission for construction or ancillary works cannot be granted during the pendency of the suit. We are satisfied that the learned single Judge was fully justified in granting limited relief in respect of prayer clause (g) and declined the other reliefs in clauses (a) to (f). The Division Bench was also fully justified in confirming the said limited order. Though learned senior counsel for the respondent has prayed for certain directions such as execution of a mortgage deed etc., for the same reasons mentioned above, we are not inclined

to grant such relief as claimed. As observed earlier, at this stage, it is not desirable to go into all the details and render a specific finding which would undoubtedly affect the claim of both the parties in the main suit. On the other hand, we are in entire agreement with the prima facie conclusion arrived at by the learned single Judge and the Division Bench.

13. Inasmuch as, as early as on 25.04.2008, the learned single Judge directed hearing of the suit be expedited, taking note of various other aspects/impediments highlighted by both the parties including construction of a protection/security wall on the sea side, we request the learned single Judge of the High Court to dispose of the suit being No. 2618 of 2007 as early as possible preferably within a period of nine months from the date of the receipt of the copy of this judgment. We also direct both the parties to cooperate with the court for early conclusion of the hearing as directed above.

14. In the light of the above discussion and reasonings, we find no merit in both the appeals, consequently, they are dismissed with no order as to costs.

R.P. Appeals dismissed.

POWERTECH WORLD WIDE LIMITED

v

DELVIN INTERNATIONAL GENERAL TRADING LLC

(Arbitration Petition (Civil) No. 5 of 2010)

NOVEMBER 14, 2011

[SWATANTER KUMAR, J.]

Arbitration and Conciliation Act, 1996 – s. 11(6) – Appointment of an arbitrator – Petition u/s. 11(6) – Indian Company (petitioner) entered into a purchase contract with a foreign Company (respondent) – Contract contained an arbitration clause – Supply of goods by the petitioner – Repeated request by the petitioner for payment of outstanding dues not acceded to by the respondent – Notice by the petitioner to the respondent invoking arbitration proceedings to adjudicate the said dispute and nomination of an arbitrator – No response from respondent – Petition u/s. 11(6) by the petitioner before the Supreme Court – Arbitration agreement as contained in the Purchase Contract that 'any disputes arising out of the Purchase Contract shall be settled amicably between both the parties or through an arbitrator in India/ abroad – Enforceability of, in terms of s.11(6) – Held: It is clear from a reading of the arbitration clause that the parties were ad idem to amicably settle their disputes or settle the disputes through an arbitrator in India/abroad – There was apparently some ambiguity caused by the language of the arbitration clause – However, once the correspondence between the parties and attendant circumstances are read conjointly with the petition of the petitioner and with particular reference to the purchase contract, it becomes evident that the parties had an agreement in writing and were ad idem in their intention to refer these matters to an arbitrator in accordance with the provisions of the Act – Respondent had admitted the existence of an arbitration agreement between the parties and

consented to the idea of appointing a common/sole arbitrator to determine the disputes between the parties – Thus, any ambiguity in the arbitration clause contained in the purchase contract stood extinct by the correspondence between the parties and the consensus ad idem in relation to the existence of an arbitration agreement and settlement of disputes through arbitration became crystal clear – Thus, the arbitration petition is allowed and the arbitrator nominated by the petitioner is appointed as Sole Arbitrator to adjudicate upon the disputes.

Arbitration – Binding arbitration agreement – Pre-requisites of – Explained.

Jagdish Chander v. Ramesh Chander & Ors. **(2007) 5 SCC 719;** *Wellington Associates Ltd. v. Kirit Mehta* **AIR 2000 SC 1379;** *K.K. Modi v. K.N. Modi & Ors.* **(1998) 3 SCC 573;** *Smita Conductors Ltd. v. Euro Alloys Ltd.* **(2001) 7 SCC 728;** *Bihar State Mineral Development Corporation v. Encon Builders* **(2003) 7 SCC 418;** *Rickmers Verwaltung GMBH v. Indian Oil Corp. Ltd.* **(1999) 1 SCC 1;** *Unissi (India) Pvt. Ltd. v. Post Graduate Institute of Medical Education and Research* **(2009) 1 SCC 107;** *Shakti Bhog Foods Ltd. v. Kola Shipping Ltd.* **(2009) 2 SCC 134;** *VISA International Ltd. v. Continental Resources* **(USA) Ltd. (2009) 2 SCC 55 – referred to.**

CIVIL ORIGINAL JURISDICTION : Arbitration Petition (Civil) NO. 5 of 2010.

Arbitration and Conciliation Act, 1966.

C.N. Sreekumar, T.G. Narayanan Nair, K.N. Madhusoodhanan, Resmitha R. Chandran for the Petitioner.

The Order of the Court was delivered by

SWATANTER KUMAR, J. 1. M/s. Powertech World Wide Limited, the petitioner, is a limited company registered under

the Companies Act, 1956, having its registered office at 202, Krishna Chambers, 59, New Marine Lines, Churchgate, Mumbai and has filed the present petition through its authorized representative under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act') praying for appointment of an Arbitrator. M/s. Delvin International General Trading LLC, the respondent, is also a company, which has been incorporated under the laws of Dubai (UAE) having its registered office in Dubai and is stated to be engaged in the business of importing and selling of various commodities. The respondent was desirous of purchasing and the petitioner was willing to sell various articles in the course of their international trade, for which their negotiations in November 2006 finally resulted in a purchase contract dated 1st December, 2006 executed between the parties. This contract specifically noticed that after satisfactory discussions between the respondent and the petitioner, the respondent agreed to join hands and work with the petitioner on the terms and conditions provided in the contract. This contract was to be operative and valid for a period of one year subject to the terms and the conditions mentioned therein and became effective w.e.f. 1st December, 2006. The contract also contained an arbitration clause which reads as under: -

> "Any disputes arising out of this Purchase Contract shall be settled amicably between Both the parties or through an Arbitrator in India/UAE."

2. In furtherance to this contract, the goods were sold and supplied by the petitioner and are stated to have been duly received by the respondent, without any demur in relation to the quantity and quality of the goods. The bills raised by the petitioner were sent through petitioner's bankers. The documents were accepted by the negotiating bankers. It is the case of the petitioner that initially the respondent was prompt in payments for the consignments sold and supplied to it in conformity with the purchase order, i.e. within 60/90 days of the

acceptance of the consignments. However, in April 2007, a request was made by the respondent to the petitioner to supply more goods as per its requirements, without insisting for the outstanding payments in respect of some previous consignments received at its end. Considering the good business relationship existed between the parties, the goods were supplied though the payments were not made. The requests made by the petitioner for payments of the outstanding dues were not acceded to by the respondent, despite repeated oral and written requests.

3. On 30th March, 2008, the respondent through its advocates, sent a notice to the petitioner claiming a sum of AED 4,00,000/- and also repelled the threat extended by the petitioner to initiate proceedings before the Export Credit Guarantee Corporation of India Limited (for short 'ECGC') for imposing of sanctions etc. The notice also contained averments that the threat advanced by the petitioner in relation to obtaining sanctions, or otherwise taking proceedings against the respondent was without any basis. Through this notice, the advocates of the respondent informed the petitioner that they should make the payments within seven days, failing which, a law suit would be instituted for recovering the appropriate amount, compensation and costs. The respondent also informed the petitioner that no threat should be extended for taking out the proceedings etc. which was otherwise undesirable.

4. This notice dated 30th March, 2008 was responded to by the petitioner through its advocates, vide letter dated 4th April, 2008 wherein besides stating the facts afore-noticed, it reiterated that the goods were supplied as per specifications and the allegations in the notice were baseless, while claiming a sum of US$ 63,86,005.56 as the amount payable by the respondent to the petitioner. It also claimed interest on the said amount till the date of payment and notified the respondent as under:

> "11. In the event Delvin fails to comply with the requisitions contained in Paragraph 10 above and pay the amounts due within a period of seven (7) days from the receipt of this notice, Powertech will be constrained to initiate appropriate legal proceedings entirely at the risk of Delvin, as to costs with consequences."

5. Having failed to receive any response to this letter, the petitioner sent another notice dated 30th May, 2008 to the respondent through its advocates invoking the arbitration proceedings to adjudicate the disputes regarding the Purchase Contract dated 1st December, 2006. The relevant part of the said notice reads as under:

> "The Contract provides for the resolution of all disputes arising thereunder between the parties by way of Arbitration to be held in India. Powertech now desires to exercise its right under the contract to invoke Arbitration proceedings to resolve the dispute with Delvin.
>
> Powertech hereby nominates Mr. Justice D.R. Dhanuka (Retired) Judge, Bombay High Court) as their arbitrator and the venue being Mumbai, India for resolution of the disputes that have arisen under the Contract. You are hereby requested to concur to the appointment of Mr. Justice D.R. Dhanuka (Retired) Judge, Bombay High Court) as the sole arbitrator for resolution of the disputes that have arisen under the Contract or nominee an arbitrator within thirty (30) days from receipt of this notice.
>
> Please note that if Delvin fails to concur to the nomination of Mr. Justice D.R. Dhanuka (Retired Judge, Bombay High Court) or nominate an arbitrator within thirty (30) days from the receipt of this notice. Powertech shall take out appropriate legal proceedings for appointment of arbitrator for resolution of the disputes that have arisen under the Contract."

6. This notice invoking the arbitration proceedings was responded to by the respondent through it advocates vide its reply dated 27th June, 2008 and it will be useful to reproduce the relevant portion of the said letter:

> "In the meantime, you are requested not to approach or adopt Legal Proceedings for appointment of Arbitrator as telephonically we are instructed to suggest some other name as an Arbitrator subject to your consent."

7. According to the petitioner, thereafter and till date, the respondent has neither concurred to the appointment of the said Arbitrator nor has it settled the disputes. Treating it to be inaction or refusal to act on the part of the respondent, the petitioner filed the present petition under Section 11(6) of the Act on 20th March, 2010.

8. As the respondent could not be served in the normal course, a Registrar of this Court vide order dated 28th April, 2011 permitted the petitioner to serve the respondent by substituted service. The Registrar vide order dated 11th June, 2011 noticed that the proof of publication of notice had been produced and the sole respondent stood served by substituted service. As no one appeared on behalf of the respondent despite service, vide order dated 25th July, 2011, the suit was ordered to be proceeded *ex parte* and the matter was heard accordingly.

9. When the matter was being heard, a question had been raised as to whether the arbitration agreement as contained in the Purchase Contract and reproduced supra, was a binding arbitration agreement enforceable in terms of Section 11(6) of the Act?

10. The learned counsel appearing for the petitioner contended that from the language of the arbitration clause itself, it is unambiguously clear that there is a binding arbitration agreement between the parties. The respondent having failed

to act despite notice, the petitioner is entitled to the relief prayed for. It is further the contention of the petitioner that the words 'shall' and 'or' appearing in the arbitration clause have to be given their true meaning. The expression 'shall' has to be construed mandatorily while the expression 'or' has to be read as disjunctive. Upon taking this as the correct approach, the arbitration agreement would be binding upon the parties as the expression 'settled amicably between both the parties' cannot be construed as a condition precedent to the invocation of the arbitration agreement and the reference to arbitration being an alternative and agreed remedy, the petitioner may unequivocally be allowed to invoke the arbitration agreement.

11. The aforesaid contentions have been raised by the advocates for the petitioner in view of the judgment of this Court in the case of *Jagdish Chander v. Ramesh Chander & Ors.* [(2007) 5 SCC 719] wherein this Court had taken the view that such an arbitration clause would not have satisfied the pre-requisites of a valid arbitration reference. In that case, this Court was concerned with Clause 16 of the contract between the parties that read as under:

> "(16) If during the continuance of the partnership or at any time afterwards any dispute touching the partnership arises between the partners, the same shall be mutually decided by the partners or *shall be referred for arbitration if the parties so determine*." (emphasis supplied)

12. The Court felt that the main attribute of an arbitration agreement, namely, *consensus ad idem* to refer the disputes to arbitration, is missing in Clause 16 relating to settlement of disputes. Therefore, it is not an arbitration agreement as defined under Section 7 of the Act. In absence of an arbitration agreement, the question of exercising power under Section 11 of the Act to appoint an arbitrator does not arise.

13. A similar view was expressed by this Court in the case

of *Wellington Associates Ltd. v. Kirit Mehta* [AIR 2000 SC 1379] though the arbitration clause in that case was different.

14. Now, I may refer to the pre-requisites of a valid and binding arbitration agreement leading to an appropriate reference under the Act. Section 2(1)(b) defines 'arbitration agreement' to be an agreement referred to in Section 7. Section 7 of the Act states that an 'arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. The arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement and shall be an agreement in writing. An arbitration agreement is in writing if it is contained in any of the clauses i.e. clauses (a) to (c) of Sub-section (4) of Section 7 of the Act. Once these ingredients are satisfied, there would be a binding arbitration agreement between the parties and the aggrieved party would be in a capacity to invoke the jurisdiction of this Court under Section 11(6) of the Act.

15. In the case of *K.K. Modi v. K.N. Modi & Ors.* [(1998) 3 SCC 573], this Court, while differentiating an 'arbitration agreement' from a 'reference to an expert' for decision, contained in an MOU recording a family settlement, enumerated the essential attributes of a valid arbitration agreement:

> "1. The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,
>
> 2. that the jurisdiction of the tribunal to decide the rights of parties must be derived either from the consent of the parties or from an order of the Court or from a statute, the terms of which make it clear that the process is to be an arbitration,
>
> 3. the agreement must contemplate that substantive rights

> of parties will be determined by the agreed tribunal,
>
> 4. that the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,
>
> 5. that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,
>
> 6. the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal."

16. Also in the case of *Smita Conductors Ltd. v. Euro Alloys Ltd.* [(2001) 7 SCC 728], where no contract, letter or telegram confirming the contract containing the arbitration clause as such was there, but certain correspondences which indicated a reference to the contract containing arbitration clause for opening the letter of credit addressed to the bank, were there. There was also no correspondence between the parties disagreeing either with the terms of the contract or the arbitration clause. The two contracts also stood affirmed by reason of their conduct as indicated in the letters exchanged between the parties. This Court construed it to be an arbitration agreement in writing between the parties and referred to Article II Para 2 of the New York Convention, which is *pari materia* to Section 7 of the Act and observed as under:

> "what needs to be understood in this context is that the agreement to submit to arbitration must be in writing. What is an agreement in writing is explained by Para 2 of Article II. If we break down Para 2 into elementary parts, it consists of four aspects. It includes an arbitral Clause (1) in a contract containing an arbitration clause signed by the parties, (2) an arbitration agreement signed by the parties, (3) an arbitral clause in a contract contained in exchange

of letters or telegrams, and (4) an arbitral agreement contained in exchange of letters or telegrams. If an arbitration clause falls in any one of these four categories, it must be treated as an agreement in writing."

17. This Court, in the case of *Bihar State Mineral Development Corporation v. Encon Builders* [(2003) 7 SCC 418] has also taken the view that the parties must agree in writing to be bound by the decision of such Tribunal and they must be *ad idem*.

18. The next question that falls for consideration is what should be the approach of the Court while construing a contract between the parties containing an arbitration agreement. In the case of *Rickmers Verwaltung GMBH v. Indian Oil Corp. Ltd.* [(1999) 1 SCC 1], this Court took the view that 'it is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of minds between the parties, which could create a binding contract between them. Unless from the correspondence, it can unequivocally and clearly emerge that the parties were *ad idem* to the terms, it cannot be said that an agreement had come into existence between them through correspondence.' Still in the case of *Unissi (India) Pvt. Ltd. v. Post Graduate Institute of Medical Education and Research* [(2009) 1 SCC 107], where the appellant had given his tender offer which was accepted by the respondent and the tender contained an arbitration clause, this Court, considering the facts of the case, the provisions of Section 7 of the Act and the principles laid down by it, took the view that though no formal agreement was executed but in view of the tender documents containing the arbitration clause, the reference to arbitration was proper. In the case of *Shakti Bhog Foods Ltd. v. Kola Shipping Ltd.* [(2009) 2 SCC 134], this Court held that from the provisions made under Section 7 of the Act, the existence of an arbitration agreement can be inferred from a document signed by the parties or exchange of e-mails, letters, telex, telegram or other means of telecommunication, which provide a record of the agreement.

19. In a recent judgment of this Court in the case of *VISA International Ltd. v. Continental Resources* (USA) Ltd. [(2009) 2 SCC 55], this Court was concerned with an arbitration clause contained in the memorandum of understanding that read as under:

> "Any dispute arising out of this agreement and which cannot be settled amicably shall be finally settled in accordance with the Arbitration and Conciliation Act, 1996."

20. The disputes having arisen between the parties, the respondent, instead of challenging the existence of a valid arbitration clause, took the stand that the arbitration would not be cost effective and will be pre-mature. In view of the facts, this Court held that there was an arbitration agreement between the parties and the petitioner was entitled to a reference under Section 11 of the Act and observed:

> "No party can be allowed to take advantage of inartistic drafting of arbitration clause in any agreement as long as clear intention of parties to go for arbitration in case of any future disputes is evident from the agreement and the material on record, including surrounding circumstances."

21. It is in light of these provisions, one has to construe whether the clause in the present case, reproduced above, in Para 1, constitutes a valid and binding agreement. It is clear from a reading of the said clause that the parties were *ad idem* to amicably settle their disputes or settle the disputes through an arbitrator in India/UAE. There was apparently some ambiguity caused by the language of the arbitration clause. If the clause was read by itself without reference to the correspondence between the parties and the attendant circumstances, may be the case would clearly fall within the judgment of this Court in the case of *Jagdish Chander* (supra). But once the correspondence between the parties and

attendant circumstances are read conjointly with the petition of the petitioner and with particular reference to the purchase contract, it becomes evident that the parties had an agreement in writing and were *ad idem* in their intention to refer these matters to an arbitrator in accordance with the provisions of the Act. Vide their letter dated 30th March, 2008, the respondent had raised certain claims upon the petitioner and had also repelled the threat extended by the petitioner to take steps before the ECGC. This notice had been responded to by the petitioner vide letter dated 4th April, 2008 wherein it had raised its claims demanding payment of money within seven days and also stated that any default thereto would constrain it to take legal action. Finally, vide letter dated 30th May, 2008, the petitioner had invoked arbitration clause between the parties and, in fact, had even nominated an arbitrator calling upon the respondent to concur to the said appointment. Replying to this letter vide letter dated 27th June, 2008, the respondent had neither denied the existence nor the binding nature of the arbitration clause. On the contrary, it had requested the petitioner not to take any legal action for appointment of an arbitrator, as they wanted to suggest some other name as an arbitrator, that too, *subject to consent of the petitioner.* This letter conclusively proves that the respondent had admitted the existence of an arbitration agreement between the parties and consented to the idea of appointing a common/sole arbitrator to determine the disputes between the parties. However, thereafter there had been complete silence from its side, necessitating the filing of present petition under Section 11(6) of the Act by the petitioner. Thus, any ambiguity in the arbitration clause contained in the purchase contract stood extinct by the correspondence between the parties and the consensus *ad idem* in relation to the existence of an arbitration agreement and settlement of disputes through arbitration became crystal clear. The parties obviously had committed to settle their disputes by arbitration, which they could not settle, as claims and counter claims had been raised in the correspondence exchanged between them. In view of the above, even the pre-

condition for invocation of an arbitration agreement stands satisfied. The arbitration agreement does not provide for any specific mode/methodology to be adopted while appointing an arbitrator. The learned counsel appearing for the petitioner contended that keeping in view the extent of claims, it will be highly expensive if an Arbitral Tribunal consisting of two arbitrators and a presiding arbitrator is constituted. He further contented that the parties in their correspondence have already agreed to the appointment of a sole arbitrator. He prayed for appointment of a sole arbitrator as both the parties in their respective letters had agreed to appoint an arbitrator with common concurrence. Thus, in the afore-mentioned circumstances, this petition is allowed and Mr. Justice D.R. Dhanuka (Retired) Judge, Bombay High Court, is appointed as Sole Arbitrator to adjudicate upon the disputes. The parties are at liberty to file claims/counter claims before the appointed Arbitrator, which shall be decided in accordance with law.

No orders as to costs.

N.J. Arbitration Petition allowed.

SHIJI @ PAPPU AND ORS.
v.
RADHIKA AND ANR.
(Criminal Appeal No.2094 of 2011)

NOVEMBER 14, 2011

[CYRIAC JOSEPH AND T.S. THAKUR, JJ.]

Code of Criminal Procedure, 1973 – ss. 482 and 320 – Criminal proceedings against appellants alleging commission of offence punishable u/ss. 354 and 394 IPC – Compromise between the parties – Petition u/s. 482 for quashing the criminal proceedings – Dismissed by High Court – On appeal held: An offence punishable u/s. 354 IPC is in terms of s. 320 compoundable at instance of the woman against whom the offence is committed and as such the proceedings thereunder can be quashed – However, offence punishable u/s. 394 IPC is not compoundable with or without the permission of the court concerned but the High Court may quash the prosecution even in such cases – High Court is to exercise the power u/s. 482 with utmost care and caution – It must be for securing the ends of justice and only in cases where refusal to exercise that power may result in the abuse of the process of law – The instant case has its origin in the civil dispute between the parties, which has apparently been resolved by them – It was not a case of broad day light robbery for gain – Complainant as also two alleged eye witnesses, who are closely related to the complainant, are no longer supporting the prosecution version – Thus, the continuance of the proceedings is nothing but an empty formality – s. 482 could be justifiably invoked by the High Court to prevent abuse of the process of law and thereby preventing a wasteful exercise by the courts below – Order passed by the High Court is set aside and the prosecution pending before the Magistrate is quashed – Penal Code, 1850 – ss. 354 and 394.

Criminal proceedings were initiated against the appellants in the FIR alleging commission of offences punishable under Sections 354 and 394 IPC. During the pendency, it appears that the parties amicably settled the matter among themselves. A criminal petition under Section 482 Cr.P.C. was filed before the High Court for quashing of the complaint pending before the Judicial Magistrate on basis of amicable settlement of civil and criminal disputes between the parties. It was alleged that there was a land dispute between the parties as a result altercation took place between the appellants, and the husband and brother of the respondent. The High Court dismissed the petition holding that the offences with which the appellants were charged, are not personal in nature. Therefore, the appellants filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 Section 320 Cr.P.C. enlists offences that are compoundable with the permission of the Court before whom the prosecution is pending and those that can be compounded even without such permission. An offence punishable under Section 354 IPC is in terms of Section 320(2) of the Code compoundable at the instance of the woman against whom the offence is committed. To that extent, therefore, there is no difficulty in either quashing the proceedings or compounding the offence under Section 354, of which the appellants are accused, having regard to the fact that the alleged victim of the offence settled the matter with the alleged assailants. An offence punishable under Section 394 IPC is not, however, compoundable with or without the permission of the Court concerned. [Para 5] [142-A-D]

12. It is manifest that simply because an offence is not compoundable under Section 320 Cr.P.C is by itself no reason for the High Court to refuse exercise of its

power under Section 482 Cr.P.C. That power can be exercised in cases where there is no chance of recording a conviction against the accused and the entire exercise of a trial is destined to be an exercise in futility. There is a subtle distinction between compounding of offences by the parties before the trial court or in appeal on one hand and the exercise of power by the High Court to quash the prosecution under Section 482 Cr.P.C. on the other. While a court trying an accused or hearing an appeal against conviction, may not be competent to permit compounding of an offence based on a settlement arrived at between the parties in cases where the offences are not compoundable under Section 320, the High Court may quash the prosecution even in cases where the offences with which the accused stand charged are non-compoundable. The inherent powers of the High Court under Section 482 Cr.P.C. are not for that purpose controlled by Section 320 Cr.P.C. The plenitude of the power under Section 482 Cr.P.C. by itself, makes it obligatory for the High Court to exercise the same with utmost care and caution. The width and the nature of the power itself demands that its exercise is sparing and only in cases where the High Court is, for reasons to be recorded, of the clear view that continuance of the prosecution would be nothing but an abuse of the process of law. It is neither necessary nor proper to enumerate the situations in which the exercise of power under Section 482 may be justified. It can be said that the exercise of power must be for securing the ends of justice and only in cases where refusal to exercise that power may result in the abuse of the process of law. The High Court may be justified in declining interference if it is called upon to appreciate evidence for it cannot assume the role of an appellate court while dealing with a petition under Section 482 Cr.P.C. Subject to the above, the High Court will have to consider the facts and

circumstances of each case to determine whether it is a fit case in which the inherent powers may be invoked. [Para 13] [148-G-H; 149-A-F]

1.3 In the instant case, the incident in question had its genesis in a dispute relating to the access to the two plots which are adjacent to each other. It was not a case of broad day light robbery for gain. It was a case which has its origin in the civil dispute between the parties, which dispute has, it appears, been resolved by them. That being so, continuance of the prosecution where the complainant is not ready to support the allegations which are now described by her as arising out of some "misunderstanding and misconception" would be a futile exercise that would serve no purpose. Also the two alleged eye witnesses, who are closely related to the complainant, are also no longer supportive of the prosecution version. The continuance of the proceedings is thus, nothing but an empty formality. Section 482 Cr.P.C. could, in such circumstances, be justifiably invoked by the High Court to prevent abuse of the process of law and thereby preventing a wasteful exercise by the Courts below. The impugned order passed by the High Court is set aside and the prosecution pending in the Court of Judicial Magistrate is quashed. [Paras 14 and 15] [149-G-H; 150-A-G]

Madan Mohan Abbot v. State of Punjab **(2008) 4 SCC 582;** *Ram Lal and Anr. v. State of J & K* **(1999) 2 SCC 213;** *Y. Suresh Babu v. State of Andhra Pradesh* **JT (1987) 2 SC 361;** *Mahesh Chand v. State of Rajasthan* **1990 Supp. SCC 681;** *Ishwar Singh v. State of Madhya Pradesh* **(2008) 15 SCC 667;** *State of Karnataka v. L. Muniswamy & Ors.* **(1977) 2 SCC 699;** *Madhavrao Jiwajirao Scindia and Ors. v. Sambhajirao Chandrojirao Angre* ***and*** *Ors.* **(1988) 1 SCC 692;** *B.S Joshi and Ors. v. State of Haryana* **(2003) 4 SCC**

675; *Madhu Limaye v. The State of Maharashtra* **(1977) 4 SC 551;** *Nikhil Merchant v. CBI* **2008(9) SCC 677;** *Manoj Sharma v. State and Ors*. **(2008) 16 SCC 1 – referred to.**

Case Law Reference:

(2008) 4 SCC 582	**Referred to**	**Para 7**
(1999) 2 SCC 213	**Referred to**	**Para 7**
JT (1987) 2 SC 361	**Referred to**	**Para 7**
1990 Supp. SCC 681	**Referred to**	**Para 7**
(2008) 15 SCC 667	**Referred to**	**Para 7**
(1977) 2 SCC 699	**Referred to**	**Para 7**
(1988) 1 SCC 692	**Referred to**	**Para 9**
(2003) 4 SCC 675	**Referred to**	**Para 10**
(1977) 4 SC 551	**Referred to**	**Para 10**
2008(9) SCC 677	**Referred to**	**Para 12**
(2008) 16 SCC 1	**Referred to**	**Para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2094 of 2011.

From the Judgment & Order dated 28.09.2010 of the High Court of Kerala at Ernakulam in Crl. M.C. No. 3715 of 2010.

Dr. Sumant Bhardwaj, Sqahil Garg, Arti Sharma, Mridula Ray Bharadwaj, P.A. Noor Muhamed, Giffara S. Ajith Krishnan, Rameshwar Prasad Goyal, R. Anand padmanabhan, Prithvi Raj B.N., Shashi Bhushan Kumar for the Appellants.

C.D. Singh, Sunny Chaudhary, Anitha Shenoy, Jogy Scaria, P. Sureshan for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Leave granted.

2. This appeal arises out of an order passed by the High Court of Kerala at Ernakulam, whereby Criminal M.C. no. 3715 of 2010 filed under Section 482 of the Code of Criminal Procedure, 1973, with a prayer for quashing criminal proceedings in FIR No.6/2010 alleging commission of offences punishable under Sections 354 and 394 of the IPC, has been dismissed. The High Court has taken the view that the offences with which the appellants stand charged, are not 'personal in nature' so as to justify quashing the pending criminal proceedings on the basis of a compromise arrived at between the first informant-complainant and the appellants. The only question that, therefore, arises for consideration is whether the criminal proceedings in question could be quashed in the facts and circumstances of the case having regard to the settlement that the parties had arrived at.

3. Respondent-Radhika filed an oral complaint in the Police Station at Nemom in the State of Kerala, stating that she had accompanied her husband to see a site which the latter had acquired at Punjakari. Upon arrival at the site, her husband and brother Rajesh went inside the plot while she waited for them near the car parked close by. Three youngsters at this stage appeared on a motorbike, one of whom snatched the purse and mobile phone from her hands while the other hit her on the cheek and hand. She raised an alarm that brought her husband and brother rushing to the car by which time the offenders escaped towards Karumam on a motorcycle. The complainant gave the registration number of the motorbike to the police and sought action against the appellants who were named by her in the statement made before the Additional Police Sub-Inspector attached to the Nemom Police Station. FIR No.6/2010 was, on the basis of that statement, registered in the police station and investigation started. A charge sheet was, in due course, filed against the appellants before the

Judicial Magistrate First Class, Neyyattinkara, eventually numbered CC 183/2010.

4. During the pendency of the criminal proceedings aforementioned, the parties appear to have amicably settled the matter among themselves. Criminal M.C. No.3715 of 2010 under Section 482 Cr.P.C. was on that basis filed before the High Court of Kerala at Ernakulam for quashing of the complaint pending before the Judicial Magistrate First Class, Neyyattinkara. That prayer was made primarily on the premise that appellant No.1 Shiji @ Pappu who also owns a parcel of land adjacent to the property purchased by the respondent-Radhika, had some dispute in regard to the road leading to the two properties. An altercation had in that connection taken place between the appellants on the one hand and the husband and brother of the respondent on the other, culminating in the registration of the FIR mentioned above. The petition further stated that all disputes civil and criminal between the parties had been settled amicably and that the respondent had no grievance against the appellants in relation to the access to the plots in question and that the respondent had no objection to the criminal proceedings against the appellants being quashed by the High Court in exercise of its power under Section 482 Cr.P.C. The petition further stated that the disputes between the parties being personal in nature the same could be taken as settled and the proceedings put to an end relying upon the decision of this Court in *Madan Mohan Abbot v. State of Punjab* (2008) 4 SCC 582. An affidavit sworn by the respondent stating that the matter stood settled between the parties was also filed by the appellants before the High Court. The High Court has upon consideration declined the prayer made by the appellants holding that the offences committed by the appellants were not of a personal nature so as to justify quashing of the proceedings in exercise of its extra-ordinary jurisdiction under Section 482 Cr.P.C.

5. We have heard learned counsel for the parties and

perused the impugned order. Section 320 of the Cr.P.C. enlists offences that are compoundable with the permission of the Court before whom the prosecution is pending and those that can be compounded even without such permission. An offence punishable under Section 354 of the IPC is in terms of Section 320(2) of the Code compoundable at the instance of the woman against whom the offence is committed. To that extent, therefore, there is no difficulty in either quashing the proceedings or compounding the offence under Section 354, of which the appellants are accused, having regard to the fact that the alleged victim of the offence has settled the matter with the alleged assailants. An offence punishable under Section 394 IPC is not, however, compoundable with or without the permission of the Court concerned. The question is whether the High Court could and ought to have exercised its power under Section 482 Cr.P.C. for quashing the prosecution under the said provision in the light of the compromise that the parties have arrived at.

6. Learned counsel for the appellants submitted that the first informant-complainant had, in the affidavit filed before this Court, clearly admitted that the complaint in question was lodged by her on account of a misunderstanding and misconception about the facts and that the offences of which the appellants stand accused are purely personal in nature arising out of personal disputes between the parties. It was also evident that the complainant was no longer supporting the version on which the prosecution rested its case against the appellants. According to the learned counsel there was no question of the Trial Court recording a conviction against the appellants in the light of what the complainant had stated on affidavit. That was all the more so, when the other two prosecution witnesses were none other than the husband and the brother of the complainant who too were not supporting the charges against the appellants. Such being the case, continuance of criminal trial against the appellants was nothing but an abuse of the process of law and waste of valuable time

of the Courts below. Exercise of power by the High Court under Section 482 Cr.P.C. to prevent such abuse is perfectly justified, contended the learned counsel. Reliance in support was placed by the learned counsel upon the decision of this Court in *Madan Mohan Abbot's* case (supra).

7. This Court has, in several decisions, declared that offences under Section 320 Cr.P.C. which are not compoundable with or without the permission of the Court cannot be allowed to be compounded. In *Ram Lal and Anr. v. State of J & K* (1999) 2 SCC 213, this Court referred to Section 320(9) of the Cr.P.C. to declare that such offences as are made compoundable under Section 320 can alone be compounded and none else. This Court declared two earlier decisions rendered in *Y. Suresh Babu v. State of Andhra Pradesh,* JT (1987) 2 SC 361 and *Mahesh Chand v. State of Rajasthan,* 1990 Supp. SCC 681, to be per incuriam in as much as the same permitted composition of offences not otherwise compoundable under Section 320 of the Cr.P.C. What is important, however, is that in *Ram Lal's* case (supra) the parties had settled the dispute among themselves after the appellants stood convicted under Section 326 IPC. The mutual settlement was then sought to be made a basis for compounding of the offence in appeal arising out of the order of conviction and sentence imposed upon the accused. This Court observed that since the offence was non-compoundable, the court could not permit the same to be compounded, in the teeth of Section 320. Even so, the compromise was taken as an extenuating circumstance which the court took into consideration to reduce the punishment awarded to the appellant to the period already undergone. To the same effect is the decision of this Court in *Ishwar Singh v. State of Madhya Pradesh* (2008) 15 SCC 667; where this Court said:

> **"14.** In our considered opinion, it would not be appropriate to order compounding of an offence not compoundable under the Code ignoring and keeping aside statutory

> provisions. In our judgment, however, limited submission of the learned counsel for the appellant deserves consideration that while imposing substantive sentence, the factum of compromise between the parties is indeed a relevant circumstance which the Court may keep in mind."

8. There is another line of decisions in which this Court has taken note of the compromise arrived at between the parties and quashed the prosecution in exercise of powers vested in the High Court under Section 482 Cr.P.C. In *State of Karnataka v. L. Muniswamy & Ors.* (1977) 2 SCC 699 this Court held that the High Court was entitled to quash the proceedings if it came to the conclusion that the ends of justice so required. This Court observed:

> "…..Section 482 of the new Code, which corresponds to Section 561-A o the Code of 1898, provides that:
>
> > "Nothing in this Code shall be deemed to limit, or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."
>
> In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the

proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects it would be impossible to appreciate the width and contours of that salient jurisdiction."

9. In *Madhavrao Jiwajirao Scindia and Ors. v. Sambhajirao Chandrojirao Angre and Ors.* (1988) 1 SCC 692, this Court held that the High Court should take into account any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue or quash the prosecution where in its opinion the chances of an ultimate conviction are bleak. This Court observed:

> **"7.** *The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."*

10. In *B.S Joshi and Ors. v. State of Haryana,* (2003) 4

SCC 675, the question that fell for consideration before this Court was whether the inherent powers vested in the High Court under Section 482 Cr.P.C. could be exercised to quash non-compoundable offences. The High Court had, in that case relying upon the decision of this Court in *Madhu Limaye v. The State of Maharashtra,* (1977) 4 SC 551, held that since offences under Sections 498-A and 406 IPC were not compoundable, it was not permissible in law to quash the FIR on the ground that there has been a settlement between the parties. This Court declared that the decisions in *Madhu Limaye's* case (supra) had been misread and misapplied by the High Court and that the judgment of this Court in *Madhu Limaye's* case (supra) clearly supported the view that nothing contained in Section 320(2) can limit or affect the exercise of inherent power of the High Court if interference by the High Court was considered necessary for the parties to secure the ends of justice. This Court observed:

> "8. It is, thus, clear that *Madhu Limaye case* (1977) 4 SC 551 does not lay down any general proposition limiting power of quashing the criminal proceedings or FIR or complaint as vested in Section 482 of the Code or extraordinary power under Article 226 of the Constitution of India. We are, therefore, of the view that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, Section 320 would not be a bar to the exercise of power of quashing. It is, however, a different matter depending upon the facts and circumstances of each case whether to exercise or not such a power.
>
> 15. In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code."

11. That brings to the decision of this Court in *Madan*

Mohan Abbot' case (supra) whereby the High Court had declined the prayer for quashing of the prosecution for offences punishable under Sections 379, 406, 409, 418, 506/34 IPC despite a compromise entered into between the complainant and the accused. The High Court had taken the view that since the offence punishable under Section 406 was not compoundable the settlement between the parties could not be recognized nor the pending proceedings quashed. This Court summed up the approach to be adopted in such cases in the following words:

> **"6.** We need to emphasise that it is perhaps advisable that in disputes where the question involved is of a purely personal nature, the court should ordinarily accept the terms of the compromise even in criminal proceedings as keeping the matter alive with no possibility of a result in favour of the prosecution is a luxury which the courts, grossly overburdened as they are, cannot afford and that the time so saved can be utilised in deciding more effective and meaningful litigation. This is a common sense approach to the matter based on ground of realities and bereft of the technicalities of the law.
>
> **7.** We see from the impugned order that the learned Judge has confused compounding of an offence with the quashing of proceedings. The outer limit of Rs 250 which has led to the dismissal of the application is an irrelevant factor in the later case. We, accordingly, allow the appeal and in the peculiar facts of the case direct that FIR No. 155 dated 17-11-2001 PS Kotwali, Amritsar and all proceedings connected therewith shall be deemed to be quashed."

12. To the same effect is the decision of this Court in *Nikhil Merchant v. CBI* 2008(9) SCC 677 where relying upon the decision in *B.S. Joshi* (supra), this Court took note of the settlement arrived at between the parties and quashed the criminal proceedings for offences punishable under Sections

420, 467, 468 and 471 read with Section 120-B of IPC and held that since the criminal proceedings had the overtone of a civil dispute which had been amicably settled between the parties it was a fit case where technicality should not be allowed to stand in the way of quashing of the criminal proceedings since the continuance of the same after the compromise arrived at between the parties would be a futile exercise. We may also at this stage refer to the decision of this Court in *Manoj Sharma v. State and Ors.* (2008) 16 SCC 1. This court observed:

> "8. In our view, the High Court's refusal to exercise its jurisdiction under Article 226 of the Constitution for quashing the criminal proceedings cannot be supported. The first information report, which had been lodged by the complainant indicates a dispute between the complainant and the accused which is of a private nature. It is no doubt true that the first information report was the basis of the investigation by the police authorities, but the dispute between the parties remained one of a personal nature. Once the complainant decided not to pursue the matter further, the High Court could have taken a more pragmatic view of the matter. xxxxxxxxxxxxx
>
> 9. As we have indicated hereinbefore, the exercise of power under Section 482 CrPC of Article 226 of the Constitution is discretionary to be exercised in the facts of each case. In the facts of this case we are of the view that continuing with the criminal proceedings would be an exercise in futility….."

13. It is manifest that simply because an offence is not compoundable under Section 320 IPC is by itself no reason for the High Court to refuse exercise of its power under Section 482 Cr.P.C. That power can in our opinion be exercised in cases where there is no chance of recording a conviction against the accused and the entire exercise of a trial is destined to be an exercise in futility. There is a subtle distinction between compounding of offences by the parties before the trial Court

or in appeal on one hand and the exercise of power by the High Court to quash the prosecution under Section 482 Cr.P.C. on the other. While a Court trying an accused or hearing an appeal against conviction, may not be competent to permit compounding of an offence based on a settlement arrived at between the parties in cases where the offences are not compoundable under Section 320, the High Court may quash the prosecution even in cases where the offences with which the accused stand charged are non-compoundable. The inherent powers of the High Court under Section 482 Cr.P.C. are not for that purpose controlled by Section 320 Cr.P.C. Having said so, we must hasten to add that the plenitude of the power under Section 482 Cr.P.C. by itself, makes it obligatory for the High Court to exercise the same with utmost care and caution. The width and the nature of the power itself demands that its exercise is sparing and only in cases where the High Court is, for reasons to be recorded, of the clear view that continuance of the prosecution would be nothing but an abuse of the process of law. It is neither necessary nor proper for us to enumerate the situations in which the exercise of power under Section 482 may be justified. All that we need to say is that the exercise of power must be for securing the ends of justice and only in cases where refusal to exercise that power may result in the abuse of the process of law. The High court may be justified in declining interference if it is called upon to appreciate evidence for it cannot assume the role of an appellate court while dealing with a petition under Section 482 of the Criminal Procedure Code. Subject to the above, the High Court will have to consider the facts and circumstances of each case to determine whether it is a fit case in which the inherent powers may be invoked.

14. Coming to the case at hand we are of the view that the incident in question had its genesis in a dispute relating to the access to the two plots which are adjacent to each other. It was not a case of broad day light robbery for gain. It was a case which has its origin in the civil dispute between the parties,

which dispute has, it appears, been resolved by them. That being so, continuance of the prosecution where the complainant is not ready to support the allegations which are now described by her as arising out of some "misunderstanding and misconception" will be a futile exercise that will serve no purpose. It is noteworthy that the two alleged eye witnesses, who are closely related to the complainant, are also no longer supportive of the prosecution version. The continuance of the proceedings is thus nothing but an empty formality. Section 482 Cr.P.C. could, in such circumstances, be justifiably invoked by the High Court to prevent abuse of the process of law and thereby preventing a wasteful exercise by the Courts below.

15. We accordingly allow this appeal, set aside the impugned order passed by the High Court and quash the prosecution in CC 183/2010 pending in the Court of Judicial Magistrate, First Class, Neyyattinkara.

N.J. Appeal allowed.

BIRBAL B. CHOUHAN & ANR. ETC. ETC.
v.
STATE OF CHHATTISGARH ETC. ETC.
(Criminal Appeal Nos. 2025-2028 of 2011)

NOVEMBER 14, 2011

[DR. B.S. CHAUHAN AND T.S. THAKUR, JJ.]

PENAL CODE, 1860:

ss. 399 and 402 – Accused-appellants found guilty of assembling and preparing for committing dacoity – Conviction and sentence of 5 years RI imposed by trial court, affirmed by High Court – Held: The orders under challenge do not suffer from any legal infirmity nor do they suffer from any perversity in appreciation of evidence on record – However, in the facts and circumstances of the case, the sentence is reduced to 3 years RI under both the counts – Sentence/Sentencing.

The appellants along with six others were prosecuted for commission of offences punishable u/ss 399 and 402 IPC. The prosecution case was that on 10.2.1992, when PW1 along with his friend was going on a motorbike late in the evening, they saw 8-10 persons holding sticks, who tried to stop and then chased the duo. However, they escaped and went straight to the police station and reported the incident. PW 5, the Sup-Inspector of Police, recorded the report and informed the Kotwali. The appellants and others were apprehended along with arms, eatables and liquor. Some of the miscreants escaped. The trial court convicted the appellants and two others of the offences charged and sentenced each of them to under rigorous imprisonment for five years under each of the two counts. The other four accused were acquitted on benefit of doubt. The High

Court declined to interfere. Aggrieved, the convicts approached the Supreme Court. Two of them did not surrender and their special leave petitions were dismissed.

Disposing of the appeals, the Court

HELD: 1.1 The High Court in appeal reappraised the evidence adduced by the prosecution and the defence and affirmed the findings recorded by the trial court holding that the appellants who were residents of different villages had gathered with lethal arms at an unearthly hour in a desolate place under a tree with no explanation for their conduct whatsoever much less an acceptable one. The High Court was of the view that the evidence adduced by the prosecution was cogent and acceptable leaving no room for interference with the order of conviction and sentence recorded by the trial court. [Para 5] [154-F-G]

1.2 No error of fact or law has been pointed out in the orders passed by the courts below. Even otherwise, the orders under challenge do not suffer from any legal infirmity nor do they suffer from any perversity in the appreciation of evidence adduced by the parties. In that view, therefore, the courts below were justified in recording an order of conviction against the appellants. However, in the facts and circumstance of the case, the sentence imposed upon the appellants is somewhat harsh and needs to be suitably reduced. Accordingly, the sentence of 5 years RI awarded by the trial court as affirmed by the High Court, is reduced to rigorous imprisonment for a period of three years only on both counts. [Para 7] [155-C-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2025-2028 of 2011.

From the Judgment & Order dated 09.07.2010 of the High

Court of Chhattisgarh, Bilaspur in Criminal Appeal Nos. 603, 634, 881, 1172, 1173 & 1174 of 1993.

Garvesh Kabra, Nikita Kabra, Pooja Kabra, Abhishek Jaju for the Appellant.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. The appellants in these appeals were tried by the Second Additional Session Judge, Raipur for offences punishable under Sections 399 and 402 of the Indian Penal Code, 1860 in Sessions Trial No.103/92, convicted and sentenced to undergo rigorous imprisonment for a period of five years on both counts. Criminal Appeals No.603/1993, 634/1993, 881/1993, 1172/1993, 1173/1993 and 1174/1993 filed by the appellants having been dismissed by the High Court of Chhattisgarh, Bilaspur by its order dated 9th July, 2010, the present appeals have been filed to assail the correctness of the said judgment and order.

2. Briefly stated, the prosecution case against the appellants was that on 10th February, 1992, (PW1) Lokesh Agarwal was travelling from Pusaur to Raigarh on a motorbike with his friend Rashid late in the evening when he saw eight to ten persons at Kota Tarai near airport holding sticks in their hands. They tried to stop and then chase the duo who fled from the spot and went straight to Raigarh Police to report about the incident. Sub-Inspector A.K. Khan (PW5) recorded the report and informed Stations Incharge at Kotwali Raigarh and Pusaur with a request to them to reach the spot. The police constituted four smaller groups to approach the place where the appellants were said to be sitting under a tree with lethal weapons in their hands. The appellants were surrounded and asked to surrender whereupon they tried to escape from the spot but the police party apprehended the appellants along with the arms they were carrying besides eatables and liquor. Some of those assembled on the spot, made their escape good under the cover of darkness.

3. On completion of investigation into the case a charge sheet was filed against eleven persons for offences punishable under Sections 399 and 402 IPC. The jurisdictional Magistrate soon thereafter committed the appellants to stand trial before the Sessions Judge, Raigarh, who made over the case to the Second Additional Sessions Judge, Raigarh.

4. Before the trial Court, the prosecution examined nine witnesses while five witnesses were examined in defence. The prosecution also relied upon the seizure of weapons like a Sword, Daggers, a betel axe and sticks from the appellants including a torch, bottle of liquor, some eatables and a candle. The trial Court eventually found the appellants guilty of the offences with which they were charged and sentenced them to undergo imprisonment for five years on each count as already mentioned above. Four of the accused persons namely, Jageshwar, Shani Rawat, Palu Ram and Hiravan @ Ahiravan were, however, given the benefit of doubt and acquitted by the trial Court. The trial Court held that the accused persons had gathered at a desolate place, at the dead of night tried to stop Lokesh Agarwal (PW1) and being armed with lethal weapons were preparing to commit offences which act was punishable under Sections 399 and 402 of the IPC.

5. The High Court in appeal reappraised the evidence adduced by the prosecution and defence and affirmed the findings recorded by the trial Court holding that the appellants before the High Court who were residents of different villages had gathered with lethal arms at an unearthly hour in a desolate place under a tree with no explanation for their conduct whatsoever much less an acceptable one. The High Court was of the view that the evidence adduced by the prosecution was cogent and acceptable leaving no room for interference with the order of conviction and sentence recorded by the Trial Court. The present appeals assail the correctness of the above judgment of the High Court as noticed earlier.

6. Along with the Special Leave Petitions the appellants

made a prayer for exemption from surrender by them which was declined by the Judge-in-Chamber by order dated 8th November, 2011. Eight of the convicts then surrendered while Paharia @ Goverdhan and Goverdhan Khasia, petitioners in SLP No.21927 and 21929 did not. Special Leave Petitions filed by the said two convicts were, therefore, dismissed by an order of this Court dated 10th February, 2011.

7. We have heard learned counsel for the parties for the remaining eight appellants and perused the orders under challenge. Learned counsel for the appellants has not been able to point out any error of fact or law in the order passed by the Courts below. Even otherwise the orders under challenge do not suffer from any legal infirmity nor do they suffer from any perversity in the appreciation of evidence adduced by the parties. In that view, therefore, we have no hesitation in holding that the Courts below were justified in recording an order of conviction against the appellants. We, however, feel that in the facts and circumstance of the case the sentence imposed upon the appellants is somewhat harsh and needs to be suitably reduced. We accordingly modify the sentence recorded by the trial Court as affirmed by the High Court to the extent that instead of five years the appellants shall stand sentenced to undergo rigorous imprisonment for a period of three years only on both counts. Sentences awarded shall run concurrently.

8. Appeals are disposed of with the above modification.

R.P. Appeals disposed of.

LEELA HOTELS LTD.

v.

HOUSING & URBAN DEVELOPMENT CORPORATION LTD.

(Civil Appeal No. 9763 of 2011)

NOVEMBER 15, 2011

[ALTAMAS KABIR, CYRIAC JOSEPH AND SURINDER SINGH NIJJAR, JJ.]

ARBITRATION:

Award – Principal and interest payable under award – Appropriation of by creditor – Debtor depositing Rs.89.78 crores with the assertion that it represented the net principal amount due and payable to the creditor — According to the calculation sheets of the creditor, the said sum deposited was appropriated towards the interest due under the award – Held: Admittedly, there was no agreement between the parties as to how the amounts to be paid in terms of the award were to be appropriated by the creditor – Accordingly, in terms of the well settled principle that in such cases it was for the creditor to appropriate such payment firstly against the interest payable, would be squarely attracted to the facts of the case – The deposit made by the debtor with the assertion that it was towards the principal amount, was accepted by the creditor without prejudice to its rights and contentions in the proceedings – Accordingly, the creditor cannot be denied its dues on a unilateral stipulation that the amount of Rs.89.78 crores was being deposited as against the principal sum due in terms of the award – Since the said amount was accepted by the creditor on protest, it would be entitled to appropriate the same against the interest which was due and payable till that date on the principal amount, as has been asserted by it – Section 59 of the Contract Act was not attracted in the case – Contract Act, 1872 – ss. 59 and 60.

Arbitration and Conciliation Act, 1996:

s. 36 – Award of arbitrator – Enforcement of – HELD: Such an award has to be enforced under the Code of Civil Procedure in the same manner as it were a decree of the court.

Consequent upon cancellation of a lease agreement for construction of a Five-Star Hotel, the dispute between the parties was referred to the arbitrator, who allowed the claims of the appellant and rejected the counter-claim made by the respondent-HUDCO. The arbitrator held that the appellant was entitled to recover and HUDCO was obliged to pay, inter alia, the amounts received by it from the appellant along with 20% interest thereon for the period the amount(s) remained with HUDCO till the date of the Award. HUDCO filed its objections u/s 34 of the Arbitration and Conciliation Act, 1996, which was dismissed by the Single Judge of the High Court on 20-1-2003. Before the said petition was dismissed, HUDCO undertook to deposit the principal sum awarded by the arbitrator on or before 21.10.2002. Such deposit (Rs. 89,78,84,930/) was allowed to be made without prejudice to the rights and contentions of HUDCO in the proceedings before the High Court. Subsequently, by order dated 21.10.2002, the said position was reiterated and it was recorded that the deposit made by HUDCO would be without prejudice to the rights and contentions of the parties in the pending proceedings. The first appeal from the order dated 20-1-2003, having been dismissed by the Single Judge of the High Court on 9-11-2004, the respondent filed a special leave petition before the Supreme Court, which was dismissed on 12-2-2008, but the rate of interest was reduced from 20% to 18%. Meanwhile HUDCO had also paid a sum of Rs.59.61 crores to the appellant on 23-3-2006. It paid a further sum of Rs.48.09 crores on 16.4.2008. With these payments,

according to HUDCO, the award was satisfied.

In the execution petition, the case of the appellant was that the sum of Rs.89,78,84,930/- deposited by HUDCO was appropriated towards the interest due under the award; whereas the stand of the respondent-HUDCO was that the said amount should be appropriated towards the principal sum payable to the appellant under the award. The Single Judge of the High Court directed the payment to the appellant as per its calculations. However, the Division Bench of the High Court held that the said amount deposited by HUDCO would be appropriated towards the principal amount due and not towards the interest; and set aside the order of the Single Judge.

In the instant appeal, the question for consideration before the Court was: whether the amount/ deposited and/or paid by the respondent to the appellant in terms of the Award of the Arbitrator, was first to be appropriated towards payment of the interest due on the principal sum or whether the same was to be appropriated against the principal sum itself.

Allowing the appeal, the Court

HELD: 1.1 Admittedly, there was no agreement between the parties as to how the amounts to be paid in terms of the Award were to be appropriated by the appellant. Accordingly, the well settled principle that in such cases it was for the creditor to appropriate such payment firstly against the interest payable, would be squarely attracted to the facts of this case. [para 26] [173-H; 174-A-B]

1.2 In the instant case, a unilateral assertion had been made by HUDCO as the debtor that the sum of Rs.89.78 crores was being tendered as payment towards the

principal amount and that there was, therefore, no other amount/ due and payable to the creditor-appellant; but the amount as deposited was accepted by the appellant without prejudice to its rights and contentions in the appeal. [para 27] [174-F-H]

1.3 The philosophy behind the principle set out in *Meka Venkatadri's* case and as reiterated in *Rai Bahadur Seth Nemichand's* case and also in *Smithaben's* case and then consistently followed by this Court, is that a debtor cannot be allowed to take advantage of his default to deny to the creditor the amount to which he would be entitled on account of such default, by way of elimination of the principal amount due itself, unless, of course, the provisions of s.59 of the Contract Act, 1872, were attracted or there was a separate agreement between the parties in that regard. That is not so in the instant case and, accordingly, the creditor cannot be denied its dues on a unilateral stipulation that the amount of Rs.89.78 crores was being deposited as against the principal sum due in terms of the Award. Since the said amount was accepted by the appellant on protest, it would be entitled to appropriate the same against the interest which was due and payable till that date on the principal amount, as has been asserted by it. [para 28] [175-A-D]

M/s I.C.D.S. Ltd. Vs. Smithaben H. Patel & Ors., **(1999) 3 SCC 80;** *Meghraj Vs. Mst. Bayabai & others,* **1970 (1) SCR 523 =AIR 1970 SC 161– relied on.**

Meka Venkatadri Appa Rao Bahadur Zamindar Garu & Ors. Vs. Raja Parthasarathy Appa Rao Bahadur Zamindar Garu, **AIR 1922 PC 233; and** *Rai Bahadur Seth Nemichand Vs. Seth Radha Kishen,* **AIR 1922 PC 26 – referred to.**

1.4 The Division Bench of the High Court erred in presuming that the said amount had been accepted by

the appellant on account of good business sense in view of the uncertainty of the final outcome of the case. The Division Bench of the High Court should have proceeded on the basis of the principles of law as laid down by this Court in *Smithaben's* case, keeping in mind the earlier decisions of the Privy Council in both *Meka Venkatadri's* case and *Rai Bahadur Seth Nemichand's* case in interfering with the judgment of the Single Judge. The Division Bench seems to have erroneously taken the presence of the counsel for the appellant, when the said undertaking of the respondent was recorded, in coming to the conclusion that since no objection had been raised with regard to the said deposit, it must be presumed that it had the consent of the appellant and, therefore, was covered by the provisions of ss. 59 and 60 of the Contract Act. [para 29] [175-E-H]

2. Regarding the question as to whether the Award of the Arbitrator tantamounts to a decree or not, the language used in s.36 of the Arbitration and Conciliation Act, 1996, makes it very clear that such an Award has to be enforced under the Code of Civil Procedure in the same manner as it were a decree of the court. The said language leaves no room for doubt as to the manner in which the Award of the Arbitrator was to be accepted. [para 30] [176-A-B]

3. The judgment and order of the Division Bench of the High Court is set aside and that of the Single Judge restored. [para 31] [176-C]

NALCO Vs. Presteel & Fabrication Pvt. Ltd., **(2004) 1 SCC 540;** *Paramjeet Singh Patheja Vs. ICDS Ltd.,* **2006 Suppl. (8) SCR 178 = (2006) 13 SCC 322;** *Morgan Securities and Credit Pvt. Ltd. Vs. Modi Rubber Ltd.,* **2006 Suppl. (10) SCR 1022 = (2006) 12 SCC 642;** *West Bengal Essential Commodities Supply Corporation Vs. Swadesh*

Agro Farming & Storage Pvt. Ltd. & Anr., **1999 Suppl. (2) SCR 399 = (1999) 8 SCC 315 – cited.**

Case Law Reference:

1970 (1) SCR 523	**relied on**	**para 8**
2004 (1) SCC 540	**cited**	**para 20**
2006 Suppl. (8) SCR 178	**cited**	**para 20**
2006 Suppl. (10) SCR 1022	**cited**	**para 20**
1999 Suppl. (2) SCR 399	**cited**	**para 20**
AIR 1922 PC 26	**relied on**	**para 20**
AIR 1922 PC 233	**relied on**	**para 26**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9763 of 2011.

From the Judgment & Order dated 20.07.2009 of the High Court of Delhi at New Delhi in EFA (OS) No. 4 of 2009.

Ashok Desai, Mukul Rohtagi, Abhimanyu Mahajan, Rahul Pratap, "Coac" for the Appellant.

Parag P. Tripathi, ASG Shadan Farasat. Sanjay Kumar, Ayush Agrawal (for Suresh A. Shroff & Co.) for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. This Appeal has been filed by Leela Hotels Ltd. against the judgment and order dated 20th July, 2009, passed by the Division Bench of the Delhi High Court in EFA(OS) No.4 of 2009, heard along with several Miscellaneous Applications setting aside the order dated 19th November, 2008, passed by the learned Single Judge, who had directed payment to the Appellant herein as per its calculations. It is the common case

of the parties that on 17th October, 1996, the Housing and Urban Development Corporation Ltd. (HUDCO) invited offers for grant of sub-lease of land measuring 11,480 sq. meters in HUDCO Place situated in Andrews Ganj, New Delhi, for construction of a Five-Star Hotel thereupon. The Appellant herein being the highest bidder, a letter of allotment of the said land was issued to it on 31st March, 1997, which was followed by a perpetual sub-lease dated 4th July, 1997. Out of the total consideration, the first instalment comprising 40% of the consideration amount was paid by the Appellant herein on 10th April, 1997. The second and third instalments, each amounting to Rs.65,38,29,000/-, were payable by 31st March, 1998, and 31st March, 1999, respectively. It was stipulated in the sub-lease that in case of default in payment of the second and third instalments, the same could be paid along with interest at the rate of 20% per annum within three months of the due date. It was further stipulated that in default of payment even in terms of the said relaxation, the allotment would automatically stand cancelled and in such event 50% of the amount paid upto that date would stand forfeited and the balance 50% would be refunded without interest. Admittedly, the second instalment was paid by the Appellant herein along with interest for the delayed payment and ground rent was also paid till 31st March, 1998. Since, however, the Appellant defaulted in payment of the third instalment, the lease agreement was cancelled and as per the terms of the agreement 50% of the total amount paid by the Appellant amounting to Rs.76,28,00,500/- was refunded by the Corporation to the Appellant, while forfeiting the balance 50%.

3. Being aggrieved by the steps taken by the Respondent Corporation, the Appellant filed a Petition before the Chief Justice of the Delhi High Court to appoint an Arbitrator in terms of the arbitration clause, which was registered as Arbitration Application No.193 of 1999. On 23rd June, 1999, an Arbitrator was appointed by the Delhi High Court before whom the Appellant herein claimed a sum of Rs.142,16,08,896/- from the Respondent Corporation along with interest at the rate of 20%

per annum along with a further sum of Rs.19,24,45,800/- comprising the ground rent paid along with interest thereon at the rate of 25% per annum along with a sum of Rs.5,98,22,058/- towards refund of property tax. A sum of Rs.5,62,27,715/- was also claimed by way of damages.

4. The learned Arbitrator allowed the claims of Leela Hotels and rejected the counter-claim made by HUDCO. In his Award, the learned Arbitrator held that Leela Hotels was entitled to recover and HUDCO was obliged to pay damages computed with regard to the amounts paid as the first and second instalments of the premium, together with interest paid with the second instalment, less the amount refunded by HUDCO to Leela Hotels under letter dated 8th July, 1999, and as further reduced by the amount of property tax paid by HUDCO on behalf of Leela Hotels to the Municipal Corporation of Delhi. It was also directed that the interest at the rate of 20% per annum would be paid by HUDCO to Leela Hotels on the amount representing property tax for the period during which the amount remained with HUDCO until payment to MCD and also on the amount refunded by HUDCO under its letter dated 8th July, 1999, for the period for which that amount remained with HUDCO until repayment to Leela Hotels. Leela Hotels was also held to be entitled to such interest on the balance of the amount from the date of the respective payments made initially by Leela Hotels to HUDCO till the date of the Award.

5. The Appellant filed its objections under Section 34 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as the "1996 Act", before the High Court. The same was dismissed by the High Court by its order dated 21st January, 2003. Before the said petition was dismissed, the Respondent herein undertook to deposit the principal sum awarded by the Arbitrator on or before 21st October, 2002. The said sum of Rs.89,78,84,930/-, was allowed to be deposited without prejudice to the rights and contentions of the Respondent herein. When the cheque for the aforesaid amount was brought

to Court on 21st October, 2002, the said Respondent got it recorded that it represented the net principal amount due and payable to the Appellant herein under the Award and that the said deposit was without liability on its part to pay future interest thereupon.

6. The first appeal from the said order dated 20th January, 2003, having been dismissed by the High Court on 9th November, 2004, the Respondent filed a Special Leave Petition before this Court, which was dismissed on 12th February, 2008. Although, the Special Leave Petition was dismissed, the rate of interest for the pre-Award period was reduced from 20% to 18% per annum. Furthermore, since this Court had directed the Appellant to pay or deposit 50% of the balance decretal amount, the Respondent paid a sum of Rs.59.61 crores to the Appellant herein on 23rd March, 2006. The Respondent paid a further sum of Rs.48.09 crores to the Appellant herein on 16th April, 2008, which, according to the Respondent, satisfied the decree. This, in fact, was the genesis of the dispute between the parties.

7. As far as the Appellant herein was concerned, in its calculation sheet the sum of Rs.89,78,84,930/- was shown to be appropriated towards the interest due under the Award. A claim was also made for interest on the interest. On the other hand, in the calculation sheet filed by the Respondent herein it was indicated that the aforesaid amount deposited should be appropriated towards the principal sum payable to the Appellant herein under the Award and had calculated simple interest at the rate awarded by the Arbitrator as modified by this Court. Consequently, as was noted by the Division Bench of the Delhi High Court, the controversy which surfaced on account of the contesting claims of the parties was whether the aforesaid amount could be adjusted, as claimed by the Appellant herein, towards the interest, or was the Appellant obliged to appropriate the said sum towards the principal sum due to it under the Award. A further question which surfaced was whether

the Appellant herein was entitled to charge interest on interest or compound interest in accordance with the method indicated in the calculation sheet filed by it.

8. In dealing with the first question as to whether the payment made by the judgment-debtor is to be appropriated first towards discharge of the principal or towards discharge of the interest, the Division Bench noted the decision of this court in *M/s I.C.D.S. Ltd. Vs. Smithaben H. Patel & Ors.* [(1999) 3 SCC 80], wherein, this Court had held that Sections 59 and 60 of the Contract Act, 1872, would only be applicable at the pre-decretal stage and not thereafter and that post-decretal payments would have to be made either in terms of the decree or in accordance with the agreement arrived at between the parties, though, on the genuine principles indicated in Sections 59 and 60 of the aforesaid Act. After referring to various other decisions of this Court and the Lahore High Court, the Division Bench of the High Court referred to the decision in *Meghraj Vs. Mst. Bayabai & others,* [AIR 1970 SC 161], wherein the law in this regard was laid down by this Court that the general rule of appropriation of payment towards a decretal amount is that such an amount is to be adjusted firstly strictly in accordance with the directions contained in the decree and in the absence of such direction, adjustments would have to be made firstly towards payment of interest and costs and, thereafter, in payment of the principal amount. It was, however, indicated that such a principle would be subject to an exception when the parties might agree to the adjustment of the payment in any manner despite the decree. It was, accordingly, held that unless the Respondent herein was able to show that the parties had either impliedly or expressly agreed to adjustment of the said sum of Rs.89,78,84,930/- towards the principal amount, the Appellant herein would be entitled to appropriate the said amount fully towards the payment of interest.

9. It may be indicated that on 11th October, 2002, the Respondent herein undertook to deposit the principal amount

awarded by the Arbitrator on or before 21st October, 2002. Such deposit was allowed to be made without prejudice to the rights and contentions of HUDCO in the proceedings before the High Court. Subsequently, by order dated 21st October, 2002, the said position was reiterated and it was recorded that the deposit made by the Respondent would be without prejudice to the rights and contentions of the parties in the pending proceedings and without any liability on the part of the Respondent to make payment of further interest on the above-mentioned amount. The Division Bench took the view that having regard to the submissions made on behalf of the Respondent herein that the said amount of Rs.89,78,84,930/- was on account of the principal sum due and payable to the Appellant herein under the Award, and since no objection had been raised by the Appellant herein to such contention, it would have to be held that the said sum had, in fact, been adjusted towards the principal sum. After observing that before withdrawing the amount, the Appellant herein had neither sought permission of the Court to appropriate the sum towards interest nor given any intimation regarding withdrawal of the said amount, the Division Bench made it clear that the said amount would be appropriated towards the principal amount due and not towards interest. The Division Bench noted that the amount being withdrawn was without prejudice to the Appellant's rights towards payment of interest. The Division Bench took the view that since the Respondent herein was keen to avoid the possibility of paying further interest on the principal sum, in the event of its objections being dismissed, it offered to deposit the principal sum payable under the Award. The Division Bench observed that it made good business sense on the part of the Appellant, at that time, to accept the aforesaid amount towards the principal sum payable to it under the Award and to utilize the said sum for its business, instead of waiting for the final outcome of the litigation between the parties. The Division Bench came to the conclusion that it was in such circumstances that the Respondent had agreed to deposit the said sum of

Rs.89,78,84,930/- specifically, towards the principal amount under the Award.

10. The Division Bench further observed that both the parties were duly represented by their respective counsel, when the Respondent herein offered and undertook to deposit the principal amount awarded by the Arbitrator and also insisted that it be recorded as part of the proceedings that the said payment was to be appropriated towards the principal amount awarded by the learned Arbitrator and was without any further liability on the part of the Respondent to make payment of further interest on the said amount. The Division Bench based its judgment, to a large extent, on the assumption that since the Appellant had remained silent to the said stipulation made on behalf of the Respondent, it would have to be presumed that the Appellant herein had consented to the said proposal.

11. On such reasoning, the Division Bench set aside the order passed by the learned Single Judge on 19th November, 2008, and after noting that a sum of Rs.50.54 crores had been deposited by the Respondent No.1 herein during the pendency of the Appeal, directed him to decide in the light of the judgment rendered by the Division Bench as to whether any further amount was payable by the Respondent No.1 herein to the Appellant in terms of the judgment. Consequential directions were also given on the outcome of such findings.

12. As mentioned hereinbefore, this Appeal is directed against the said judgment of the Division Bench dated 20th July, 2009.

13. Appearing for the Appellant, Mr. Ashok Desai, learned Senior Advocate, submitted that the crucial question to be considered and decided in this case was whether the amounts deposited or paid by HUDCO from time to time were to be appropriated first towards the interest payable on the principal amount, following the decision in *Smithaben's* case (supra), or towards the principal, having regard to the provision in the

Award relating to future interest which states that Leela Hotels is entitled to interest at the rate of 15% per annum from the date of the Award to the date of recovery. Mr. Desai submitted that the language of the Award is clear that the amount on which future interest has to be calculated includes interest awarded by the Arbitrator till the date of the Award. Mr. Desai submitted that it was not a case of compound interest, but a case of calculating simple interest on the amount as remained unpaid each year. Mr. Desai also submitted that after the Award had been passed, Leela Hotels had calculated interest on the basis of yearly rests, but subsequently gave up its claim on the basis of compound interest and limited its claim to simple interest after appropriating the amount received from HUDCO first towards interest and then towards principal, in accordance with the decision in *Smithaben's* case (supra). Mr. Desai submitted that the High Court had erred in accepting the calculation made by HUDCO which had not computed the amount awarded by the Arbitrator and had not computed future interest in terms of the Award.

14. On the second issue as to how the money paid by HUDCO is to be appropriated, Mr. Desai urged that in *Smithaben's* case (supra), it had been very clearly explained that in view of the consistent view taken first by the Privy Council and then by this Court, the general rule of appropriation of payment towards a decretal amount is that such an amount is to be adjusted firstly in accordance with the directions contained in the decree and in the absence of such directions, adjustment should firstly be made in payment of interest and costs and thereafter towards payment of the principal amount. Mr. Desai urged that the Division Bench had misapplied the ratio in *Smithaben's* case (supra) in assuming that the unilateral and voluntary deposit offered to be made by HUDCO in Court amounted to such deposit being made upon an implied acceptance that the same would be appropriated towards the principal amount. It was urged that the issue of implied agreement had never been raised or argued before the learned

Single Judge and there is no pleading in support thereof. Mr. Desai also urged that the provisions of Sections 59 and 60 of the Indian Contract Act would also have no application to the facts of this case since they only applied in regard to distinct debts and not for enforcing a decree or what is regarded as a decree by legal fiction.

15. Mr. Desai submitted that the judgments of both the learned Single Judge and the Division Bench were centered around the payment of Rs.89.78 crores and the manner in which the same was to be appropriated. It was urged that since the same was paid after the passing of the decree, Leela Hotels is entitled to appropriate the said amount first towards the interest and costs and then towards the principal. Mr. Desai urged that on account of the wrong assumptions made by the Division Bench, its judgment under appeal was liable to be set aside.

16. On the other hand, appearing for HUDCO, Mr. Parag P. Tripathi, learned Additional Solicitor General, firstly urged that the issue regarding charging of compound interest did not survive, since the parties had agreed that no compound interest was payable in terms of the Award. As to the other question as to whether the sums deposited by HUDCO were to be appropriated first against the interest and then against the principal, it was contended that the same was no longer res integra since the Award had made it clear that the first payment of Rs.76.28 crores had to be reduced from the principal amount which was due. The learned ASG submitted that it was for the first time before this Court that the Appellant has contended that the sum of Rs.76.28 crores would be appropriated first towards the interest and then towards the principal amount. The learned ASG pointed out that the refund had been made even prior to the making of a Reference to the Arbitrator or pronouncing of the Award i.e. at the pre-decretal stage and, accordingly, when the refund was made, there was no determination as to whether any payment was due from HUDCO to the Appellant.

Accordingly, the contention of Leela Hotels that the said refund of Rs.76.28 crores was to be first appropriated towards the interest does not even arise. It was also submitted that the first payment of 50% of the awarded amount amounting to Rs.76.28 crores was, therefore, treated by the Award to be payment appropriated towards the principal and since the Award had not been challenged by the Appellant herein, the objections to the Award under Section 34 of the Act filed by the Respondent also stood concluded by the decision of this Court in Civil Appeal No.1094 of 2006.

17. As regards the second amount of Rs.89.78 crores tendered by HUDCO in the Delhi High Court on 21st October, 2002, during the pendency of the proceedings under Section 34 of the Arbitration and Conciliation Act, 1996, it was submitted by the learned ASG that the same has to be appropriated towards the principal amount due from HUDCO to Leela Hotels. It was submitted that the said amount was in the nature of a pre-decretal payment and that the appropriation of the amount will have to be in the manner indicated by the Respondent to which there had been no demur.

18. It was next submitted by the learned ASG that analogy of a post-decretal payment cannot be applied to an Arbitration Award under the 1996 Act for the simple reason that the Arbitration Award under the 1996 Act does not attain the status or character of a decree within the meaning of the Code of Civil Procedure. It is to be executed “as if it were a decree”, which means that it is not a decree.

19. It was thirdly urged by the learned ASG that assuming that the Award could be treated as a decree and the second payment is a post-decretal payment, even then the said payment will have to be treated as appropriation towards the principal sum, since Leela Hotels had been duly intimated of the nature of the deposit and by way of an implied contract, Leela Hotels had appropriated the said sum towards the principal.

20. The learned ASG referred to the decision of this Court in *NALCO Vs. Presteel & Fabrication Pvt. Ltd.* [(2004) 1 SCC 540], wherein it had been held that there is no question of any decree being honoured pursuant to the passing of an Award and unlike a judgment within the meaning of the Civil Procedure Code, an Award remains unenforceable during the period available for challenging the Award, and, thereafter, till such time as the Petition under Section 34 is disposed of by the appropriate Court. Reference was also made to the decision of this Court in (1) *Paramjeet Singh Patheja Vs. ICDS Ltd.* [(2006) 13 SCC 322], wherein it was explained that the Arbitrator is not a Court and accordingly an arbitration is not an adjudication and an Award is not a decree, (2) *Morgan Securities and Credit Pvt. Ltd. Vs. Modi Rubber Ltd.* [(2006) 12 SCC 642] and (3) *West Bengal Essential Commodities Supply Corporation Vs. Swadesh Agro Farming & Storage Pvt. Ltd. & Anr.* [(1999) 8 SCC 315], where similar views have been expressed. Reference was also made to the decision of the Privy Council in the case of *Rai Bahadur Seth Nemichand Vs. Seth Radha Kishen* [AIR 1922 PC 26], wherein it was, inter alia, held that a creditor to whom principal and interest are owed is entitled to appropriate any indefinite payment which he gets from a debtor towards the payment of interest. However, a debtor might in making a payment stipulate that it was to be applied only towards the principal. If such a stipulation was made, the creditor was at liberty to refuse the payment on such terms, but then he would have to give back the money or the cheque by which the money was offered. If the amount was accepted then the creditor would be bound by the appropriation as proposed by the debtor.

21. As to the decision of this Court in *Smithaben's* case (supra), the learned ASG submitted that the payment was unilaterally made out of Court by the debtor with a covering letter, which was immediately responded to by the decree-holder who made it clear that he had appropriated the amount towards interest alone. This Court, therefore, held that the

creditor was not bound by the appropriation so made by the debtor. The learned ASG submitted that in the instant case the Respondent had tendered a sum of Rs.89.78 crores in Court as payment towards the principal amount and the same had been accepted by Leela Hotels without objection and accordingly the decision in *Smithaben's* case (supra) would have no application to the facts of this case. The learned ASG submitted that there being little or no substance in the Appeal, the same was liable to be dismissed with costs.

22. Of the two issues involved in this matter, it appears that the issue relating to charging of compound interest did not survive since the parties had agreed that no compound interest would be payable in terms of the Award. In fact, although such an assertion had been made by the learned ASG, the same was not seriously opposed by Mr. Desai who had taken the stand that this was not a case of compound interest, but a case of calculating simple interest on the amount as remained unpaid. Mr. Desai also accepted the position that after the Award had been passed by the learned Arbitrator, Leela Hotels had calculated the interest on the basis of yearly rests, but had subsequently given up its claim of compound interest and limited its claim to simple interest after appropriating the amount received from HUDCO, first towards interest and then towards the principal in accordance with the decision in *Smithaben's* case (supra).

23. Consequently, the only issue which remains for decision is whether the amounts deposited and/or paid by HUDCO to M/s Leela Hotels in terms of the Award of the learned Arbitrator, was first to be appropriated towards payment of the interest due on the principal sum or whether the same was to be appropriated against the principal sum itself.

24. From the submissions made on behalf of the respective parties, the following payments appear to have been made by HUDCO to the Appellant herein:-

(i) 12.07.1999 - Rs.76.28 crores

(ii) 21.10.2002 - Rs.89.78 crores

(iii) March 2006 - Rs.59.61 crores

(iv) May 2008 - Rs.48.09 crores and

(v) May 2009 - Rs.50.54 crores.

It has been contended by the learned ASG that the amount of Rs.89.78 crores having been paid towards the principal amount, the other payments made subsequently were towards interest and, accordingly, there was no amount due and payable to the Appellant. On the other hand, it has been claimed on behalf of the Appellant that the said sum of Rs.89.78 crores had been appropriated against the interest as per the decision in *Smithaben's* case (supra), and, accordingly, the stand taken on behalf of HUDCO was erroneous.

25. As indicated hereinbefore, the submissions made by the learned ASG on behalf of HUDCO was based on the proposition as contained in Sections 59 and 60 of the Indian Contract Act, 1872, on account of the stipulation recorded on behalf of HUDCO that the amount of Rs.89.78 crores was being tendered towards the principal sum, to which there was no objection from the Appellant and, accordingly, it must be held that that since the amount had been received without demur, such payment fell within the provisions of Section 59 of the aforesaid Act. In fact, the Division Bench of the High Court proceeded to consider such payment and acceptance to be a voluntary acceptance by the Appellant of the aforesaid amount as appropriation towards the principal as it made good business sense to accept the same and to utilise the same in spite of waiting for something indefinite in the future. Such a submission, though legal and correct, is not supported by the materials on record.

26. Admittedly, there was no agreement between the

parties as to how the amounts to be paid in terms of the Award were to be appropriated by the Appellant. Accordingly, in terms of the well settled principle that in such cases it was for the creditor to appropriate such payment firstly against the interest payable, would, in our view, be squarely attracted to the facts of this case. As was laid down by the Privy Council in *Meka Venkatadri Appa Rao Bahadur Zamindar Garu & Ors. Vs. Raja Parthasarathy Appa Rao Bahadur Zamindar Garu* [AIR 1922 PC 233], and later reiterated in *Rai Bahadur Seth Nemichand's* case (supra), when monies are received without a definite appropriation on the one side or the other, the rule which is well established in ordinary cases is that in those circumstances, the money is first applied in payment of interest and when that is satisfied, in payment of the capital. In the latter case, the said principal was restated and it was indicated that a creditor to whom principal and interest are owed is entitled to appropriate any indefinite payment which he gets from a debtor to the payment of interest. It was also indicated that a debtor might in making a payment stipulate that it was to be applied only towards the principal. If he did so, the creditor was at liberty to refuse payment on such terms, but then he would have to give back the money or the cheque by which the money is proffered and if the same is accepted, the creditor would then be bound by the appropriation as proposed by the debtor.

27. In the instant case, a unilateral assertion had been made by HUDCO as the debtor that the sum of Rs.89.78 crores was being tendered as payment towards the principal amount and that there was, therefore, no other amounts due and payable to the creditor Leela Hotels Ltd. The principle as laid down in the two aforesaid decisions, and as subsequently followed in *Smithaben's* case (supra) will not apply in the facts of the instant case, since the amount as deposited was accepted by the Appellant without prejudice to its rights and contentions in the appeal. Since the amount had been accepted on protest, the principle laid down in *Rai Bahadur Seth Nemichand's* case (supra) will have no application.

28. The philosophy behind the principle set out in *Meka Venkatadri's* case (supra) and as reiterated in *Rai Bahadur Seth Nemichand's* case (supra) and also in *Smithaben's* case (supra) and then consistently followed by this Court, is that a debtor cannot be allowed to take advantage of his default to deny to the creditor the amount to which he would be entitled on account of such default, by way of elimination of the principal amount due itself, unless, of course, the provisions of Section 59 of the Indian Contract Act, 1872, were attracted or there was a separate agreement between the parties in that regard. That is not so in the instant case and, accordingly, the creditor cannot be denied its dues on a unilateral stipulation that the amount of Rs.89.78 crores was being deposited as against the principal sum due in terms of the Award. Since the said amount was accepted by the Appellant on protest, it would be entitled to appropriate the same against the interest which was due and payable till that date on the principal amount, as has been asserted by it.

29. In our view, the Division Bench of the Delhi High Court erred in presuming that the said amount had been accepted by the Appellant on account of good business sense in view of the uncertainty of the final outcome of the case. In our view, the Division Bench of the High Court should have proceeded on the basis of the principles of law as laid down by this Court in *Smithaben's* case (supra), keeping in mind the earlier decisions of the Privy Council in both *Meka Venkatadri's* case (supra) and *Rai Bahadur Seth Nemichand's* case (supra) in interfering with the judgment of the learned Single Judge. The Division Bench seems to have erroneously taken the presence of the learned counsel for the Appellant, when the aforesaid undertaking of the Respondent was recorded, in coming to the conclusion that since no objection had been raised with regard to the said deposit, it must be presumed that it had the consent of the Appellant and hence was covered by the provisions of Sections 59 and 60 of the Indian Contract Act, 1872.

30. Regarding the question as to whether the Award of the learned Arbitrator tantamounts to a decree or not, the language used in Section 36 of the Arbitration and Conciliation Act, 1996, makes it very clear that such an Award has to be enforced under the Code of Civil Procedure in the same manner as it were a decree of the Court. The said language leaves no room for doubt as to the manner in which the Award of the learned Arbitrator was to be accepted.

31. Hence, the submissions made by the learned ASG on behalf of HUDCO cannot be accepted and are, therefore, rejected. Consequently, the Appeal succeeds and the judgment and order of the Division Bench of the High Court is set aside and that of the learned Single Judge is restored.

32. Having regard to the nature of the issues involved in this case, the parties will bear their own costs.

R.P. Appeal allowed.

GULAB DAS & ORS.

v.

STATE OF M.P.

(Criminal Appeal No. 2126 of 2011)

NOVEMBER 16, 2011

[DR. B.S. CHAUHAN AND T.S. THAKUR, JJ.]

Code of Criminal Procedure, 1973:

s.320 – Compounding of offences – Held: The offences which are not compoundable u/s.320 cannot be allowed to be compounded even if there is any settlement between the complainant on the one hand and the accused on the other – However, even when compounding is rejected, the fact of settlement between the parties can be taken into consideration while determining the question of sentence to be awarded to the accused-appellants – Compromise – Penal Code, 1860 – ss.307, 323, 325.

Sentence/Sentencing:

Reduction of sentence – Fight between two brothers and their family – Registration of cross cases against each other – Conviction and sentence – Settlement between the parties – Prayer for lenient view in regard to sentence awarded to them – Held: The parties were related to each other – Incident took place 19 years back – Appellant 2 and 3 were in twenties at that time – Appellants already served substantial part of sentence – Offence u/s.307 not compoundable – Therefore, conviction upheld, however, sentence reduced to period already undergone – Penal Code, 1860 – ss.307, 323, 325.

Dispute over the partition fence between the properties belonging to two brothers gave rise to fight. Both the parties received injuries resulting in registration

of cross cases by them. While the case registered against the appellants was for offences punishable under Sections 307, 325, 323 read with Section 34 IPC, the case registered against the opposite party was for the alleged commission of offences punishable under Sections 325, 323, 294 read with Section 34 IPC. Separate charge sheets in relation to both the cases were filed. The Sessions Judge acquitted the appellants for some of the offences while convicting them for some other with which they were charged. Appellant no.1 and 2, were resultantly sentenced to undergo imprisonment for a period of one month under Section 323 IPC. Appellant No.2 was further sentenced to undergo rigorous imprisonment for a period of three years and a fine of Rs.500/- under Section 307 IPC. In default of payment of fine, he was sentenced to undergo further imprisonment for a period of one month. Appellant No.3 was similarly sentenced to undergo three years' imprisonment and a fine of Rs.500/- under Section 307 IPC and in default of payment of fine to further undergo one month's rigorous imprisonment. The sentences were directed to run concurrently. The High Court dismissed the appeal filed against the conviction and sentence.

In the instant appeal, it was contended for the appellant that the parties have entered into an amicable settlement/compromise and therefore, this Court could allow the matter to be compounded or in the alternative take a lenient view in regard to the sentence awarded to them.

The question that fell for determination was whether the prayer for composition of the offence under Section 307 IPC could be allowed having regard to the compromise arrived at between the parties.

Partly allowing the appeal, the Court

HELD: 1. The offences which are not compoundable under Section 320 of the Cr.P.C. cannot be allowed to be compounded even if there is any settlement between the complainant on the one hand and the accused on the other. Therefore, the prayer for permission to compound the offence for which Appellant Nos. 2 and 3 were convicted is rejected. The settlement/ compromise arrived at between the parties can be taken into consideration for the purpose of determining the quantum of sentence to be awarded to the appellants. Even when the prayer for composition has been declined, the fact of settlement between the parties can be taken into consideration while dealing with the question of sentence. Apart from the fact that a settlement has taken place between the parties, there were few other circumstances that persuade to interfere on the question of sentence awarded to the appellants. The incident in question had taken place in the year 1994. The parties were related to each other. Both appellant nos. 2 and 3 were at the time of the incident in their twenties. The incident had led to registration of a cross case in which the trial court has already convicted opposite party for offences punishable under Sections 325/34 and 323 IPC and sentenced them to undergo imprisonment for a period of two years and a fine of Rs.300/- and imprisonment of six months under Section 323 IPC. The parties having settled the matter, would be approaching the High Court for an appropriate order in the appeal pending before it. More so, the appellants have already served substantial part of the sentence awarded to them. In the totality of the circumstances the settlement arrived at between the parties is a sensible step that will benefit the parties, give quietus to the controversy and rehabilitate and normalise the relationship between them. While upholding the order of conviction recorded by the Courts below, the sentence awarded to the appellants is

reduced to the sentence already undergone by them. [Paras 7-10] [183-A-H; 184-A-C]

Ram Lal and Anr. v. State of J & K **(1999) 2 SCC 213: 1999 (1) SCR230;** *Ishwar Singh v. State of Madhya Pradesh* **(2008) 15 SCC 667: 2008 (14) SCR 574 – relied on.**

Case Law Reference:

1999 (1) SCR 230	**relied on**	**Para 7**
2008 (14) SCR 574	**relied on**	**Para 7**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2126 of 2011.

From the Judgment & Order dated 18.12.2009 of the High Court of Judicature Madhya Pradesh at Jabalpur Bench in Criminal Appeal No. 1509 of 2000.

June Chaudhari, Prabhat Kumar Rai, Shakil Ahmed Syed for the Appellants.

Siddhartha Dave, Vibha Datta Makhija, Jemtiben Ao, Kunal Verma for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Leave granted.

2. This appeal calls in question the correctness of an order passed by the High Court of Madhya Pradesh at Jabalpur whereby Criminal Appeal No.1509 of 2000 filed by the appellants challenging their conviction and the sentences awarded to them by the Additional Sessions Judge, Hoshangabad, in Sessions Trial No.60/1995 has been dismissed.

3. Appellant No.1, Gulab Das and his brother, Veeraji are residents of village Sonasavri, District Hoshangabad in the

State of Madhya Pradesh. Both of them have built their respective houses that are adjacent to each other. Three days prior to the incident Gulab Das had put up a partition fence between the two properties. On 30th September, 1994 at about 7.45 a.m. while Veeraji was shifting the partition fence, alleging that it encroached on his property, an exchange of hot words started between Gulab Das and his two sons who are appellant Nos. 2 & 3 on one hand and Veeraji, his wife and sons on the other. A free fight followed in which both the parties received injuries resulting in registration of cross cases by them in Police Station Itarsi, District Hoshangabad. While the case registered against the appellants was for offences punishable under Sections 307, 325, 323 read with Section 34 IPC, that registered against the opposite party was for the alleged commission of offences punishable under Sections 325, 323, 294 read with Section 34 IPC. Separate charge sheets in relation to both the cases were filed by the police before the Jurisdictional Magistrate who committed the cases to the Court of Sessions Judge, Hoshangabad. The case against the appellants was made over to the First Additional Sessions Judge, Hoshangabad, who acquitted the appellants for some of the offences while convicting them for some others with which they were charged. The operative portion of the trial Court's order was in the following words:

> "Therefore, accused persons Rajendra @ Rajjan and Chetan is being held guilty for charges under section 307 IPC for causing deadly injuries with intention to cause death of Veeraji and accused Gopaldas is being held guilty under section 323 IPC for causing voluntary simple injuries on Veeraji and accused persons Chetan is held guilty under Section 323 IPC for causing simple injuries on Phoolabai. Accused Chandrashekhar is being acquitted from charges under sections 307, 307/34, 325/34, 323/34, 323/34 IPC. Accused Gulabdas is being acquitted from charges under sections 307, 307/34, 325/34, 323/34, 323/34 IPC and accused Chetan is acquitted from charges

> under sections 307/34, 325/34, 323/34 IPC."

4. Appellant No.1 Gulab Das, and Appellant No.2, Chetan were resultantly sentenced to undergo imprisonment for a period of one month under Section 323 IPC. Appellant No.2 Chetan was further sentenced to undergo rigorous imprisonment for a period of three years and a fine of Rs.500/- under Section 307 IPC. In default of payment of fine, he was sentenced to undergo further imprisonment for a period of one month. Appellant No.3 was similarly sentenced to undergo three years' imprisonment and a fine of Rs.500/- under Section 307 IPC and in default of payment of fine to further undergo one month's rigorous imprisonment. The sentences were directed to run concurrently.

5. Aggrieved by their conviction and sentence the appellants appealed to the High Court of Madhya Pradesh at Jabalpur which failed and has been dismissed by the order impugned in this appeal. The appellants have in the present appeal by special leave assailed the said order of dismissal.

6. Ms. June Chaudhari, learned senior counsel for the appellants argued that during the pendency of the case in this Court the parties have entered into an amicable settlement/compromise and filed Criminal Misc. Petition No.20418 of 2011 for permission to compound the offences of which the appellants stand convicted. She drew our attention to the compromise deed filed along with the application and argued that since the parties had buried the hatchet by amicably settling their disputes, this Court could allow the matter to be compounded or in the alternative take a lenient view in regard to the sentence awarded to them. It was further submitted that so far as Appellant No.1 is concerned he has already served the sentence awarded to him under Section 323 IPC.

7. In the light of the submissions made at the bar the only question that falls for determination is whether the prayer for composition of the offence under Section 307 IPC could be

allowed having regard to the compromise arrived at between the parties. Our answer is in the negative. This Court has in a long line of decisions ruled that offences which are not compoundable under Section 320 of the Cr.P.C. cannot be allowed to be compounded even if there is any settlement between the complainant on the one hand and the accused on the other. Reference in this regard may be made to the decisions of this Court in *Ram Lal and Anr. v. State of J & K* (1999) 2 SCC 213, and *Ishwar Singh v. State of Madhya Pradesh* (2008) 15 SCC 667. We have, therefore, no hesitation in rejecting the prayer for permission to compound the offence for which Appellant Nos. 2 and 3 stand convicted.

8. Having said that we are of the view that the settlement/ compromise arrived at between the parties can be taken into consideration for the purpose of determining the quantum of sentence to be awarded to the appellants. That is precisely the approach which this Court has adopted in the cases referred to above. Even when the prayer for composition has been declined this Court has in the two cases mentioned above taken the fact of settlement between the parties into consideration while dealing with the question of sentence. Apart from the fact that a settlement has taken place between the parties, there are few other circumstances that persuade us to interfere on the question of sentence awarded to the appellants. The incident in question had taken place in the year 1994. The parties are related to each other. Both Appellant nos. 2 and 3 were at the time of the incident in their twenties. It is also noteworthy that the incident had led to registration of a cross case against the complainant party in which the trial Court has already convicted Veeraji and others for offences punishable under Sections 325/34 and 323 IPC and sentenced them to undergo imprisonment for a period of two years and a fine of Rs.300/- and imprisonment of six months under Section 323 IPC. We are told that the parties having settled the matter, will approach the High Court for an appropriate order in the appeal

pending before it. More so, the appellants have already served substantial part of the sentence awarded to them.

9. In the totality of the circumstances we are of the view that the settlement arrived at between the parties is a sensible step that will benefit the parties, give quietus to the controversy and rehabilitate and normalise the relationship between them.

10. In the result, while upholding the order of conviction recorded by the Courts below, we reduce the sentence awarded to the appellants to the sentence already undergone by them. The appeal is to that extent allowed and the impugned orders modified. The appellants shall be set free forthwith if not otherwise required in any other case.

D.G. Appeal partly allowed.

UMMU SABEENA

v.

STATE OF KERALA & ORS.

(Criminal Appeal No. 2136 of 2011)

NOVEMBER 17, 2011

[ASOK KUMAR GANGULY AND JAGDISH SINGH KHEHAR, JJ.]

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA) – s.3 – Order of detention under – Representation made by detenus – Central Government took two months to dispose of the detention representation – Held: Orders of detention quashed on the ground of delay on the part of the Central Government in disposing of the representation of the detenus – Expression 'as soon as may be' in sub-clause (5) of Article 22 of the Constitution sufficiently makes clear the concern of the framers of the Constitution that the representation should be very expeditiously considered and disposed of with a sense of urgency and without any avoidable delay – Constitution of India, 1950 – Article 22(5).

Constitution of India, 1950 – Article 226 – Writs – Writ of Habeas Corpus –Technical objection of respondents on question of prayer in the Habeas Corpus Petition filed by the appellants-detenus – Held: In dealing with writs of Habeas Corpus, such technical objections cannot be entertained – The writ of Habeas Corpus is the oldest writ evolved by the Common Law of England to protect the individual liberty against its invasion in the hands of the Executive or may be also at the instance of private persons – This principle of Habeas Corpus has been incorporated in the Indian Constitutional law – The writ of Habeas Corpus is a writ of the highest Constitutional importance being a remedy available to the lowliest citizen against the most powerful authority – In

the instant case, if the technical objection made by the respondent in this proceeding is upheld and the matter is sent back to the High Court for re-agitation of this question, the same would deprive the detenus of their precious liberty, which has been invaded in view of the manner in which their representations were unduly kept pending – Such technical objection accordingly over-ruled.

An order of detention under Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA) was served on the appellants-detenus on 10th March, 2011 who filed writ petitions before the High Court for issuance of writs of Habeas Corpus.

Representations made by the detenus on the 30th March, 2011 were rejected by the State Government on 8th April, 2011 and thereafter forwarded to the Central Government. The Central Government took time till 6th June, 2011 to reject the same. This delay on the part of the Central Government in the rejection of the detention representation was questioned and the detention of the appellants was assailed on the ground that the representations filed on their behalf were not disposed of in accordance with the mandate of Article 22(5) of the Constitution.

The question which arose for consideration in the present appeal was whether the manner of consideration and rejection of detention representation by the Central Government was in accord with the principles laid down by this Court on this aspect in several earlier cases.

Allowing the appeals, the Court

HELD: 1.1. In the Constitution Bench decision of this Court in the case of *Abdulla Kunhi, the Court, after noting the Constitutional provisions under sub-clauses**

(4) and (5) of Article 22 of the Constitution, held that neither under the Constitution nor under the relevant statutory provision, any time limit has been fixed for consideration of representation made by a detenu. The time limit, according to the Constitution Bench, has been deliberately kept elastic. But the Constitution Bench laid emphasis on the expression 'as soon as may be' in sub-clause (5) of Article 22 and held that the said expression sufficiently makes clear the concern of the framers of the Constitution that the representation should be very expeditiously considered and disposed of with a sense of urgency and without any avoidable delay. Considering the aforesaid provision, the Constitution Bench held that "there should not be any supine indifference, slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal". The same principles were re-iterated in two subsequent judgments of this Court in the case of *Rajammal* and in the case of *Kundanbhai Dulabhai Shaikh*. Going by the aforesaid precedents, it must be held that the procedural safeguards given for protection of personal liberty must be strictly followed. The history of personal liberty, as is well known, is a history of insistence on procedural safeguards. [Paras 9, 10, 12, 13 & 14] [191-H; 192-A-H; 193-A-E]

1.2. Following the said principle, it is clear that delay in these cases is for a much longer period and there is hardly any explanation. This Court, therefore, has no hesitation in quashing the orders of detention on the ground of delay on the part of the Central Government in disposing of the representation of the detenus. [Para 15] [193-F]

K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of

India & Ors., State of Karnataka & Ors. **(1991) 1 SCC 476: 1991 (1) SCR 102 – followed.**

Rajammal v. State of T.N. & Anr. **(1999) 1 SCC 417: 1998 (3) Suppl. SCR 551;** *Kundanbhai Dulabhai Shaikh v. Distt. Magistrate, Ahmedabad & Ors.* **(1996) 3 SCC 194: 1996 (2) SCR 479 – relied on.**

2.1. Insofar as the plea of the respondents on the question of prayer in the Habeas Corpus Petition filed by the appellants-detenus is concerned, i.e. that the Habeas Corpus petition was not to quash the detention on the ground of delay and it could not have been so prayed for as the writ petition was filed prior to the rejection of the representation by the detenus, this Court is constrained to observe that in dealing with writs of Habeas Corpus, such technical objections cannot be entertained. [Paras 17, 18] [194-A-C]

2.2. The writ of Habeas Corpus is the oldest writ evolved by the Common Law of England to protect the individual liberty against its invasion in the hands of the Executive or may be also at the instance of private persons. This principle of Habeas Corpus has been incorporated in our Constitutional law and in a democratic republic like India where Judges function under a written Constitution and which has a chapter on Fundamental Rights, to protect individual liberty, the Judges owe a duty to safeguard the liberty not only of the citizens but also of all persons within the territory of India. The most effective way of doing the same is by way of exercise of power by the Court by issuing a writ of Habeas Corpus. This facet of the writ of Habeas Corpus makes it a writ of the highest Constitutional importance being a remedy available to the lowliest citizen against the most powerful authority. [Paras 20, 21 and 22] [194-G-H; 195-A-C]

2.3. If the technical objection made by the respondent in this proceeding is upheld and the matter is sent back to the High Court for re-agitation of this question, the same would deprive the detenus of their precious liberty, which has been invaded in view of the manner in which their representations were unduly kept pending. This Court, therefore, overrules the aforesaid technical objection. The detenus are directed to be set at liberty forthwith unless they are required to be detained in connection with any other case. [Paras 23, 24] [195-D-F]

Law of Habeas Corpus by James A. Scott and Charles C. Roe of the Chicago Bar **[T.H. Flood & Company, Publishers, Chicago, Illinois, 1923];** *Halsbury, Laws of England, Fourth Edition, Volume 11, para 1454* **and *The*** *Common Law in India-1960 by M.C. Setalvad, page 38***– referred to.**

Case Law Reference:

1991 (1) SCR 102	**followed**	**Para 9**
1998 (3) Suppl. SCR 551	**relied on**	**Para 12**
1996 (2) SCR 479	**relied on**	**Para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2136 of 2011.

From the Judgment & Order dated 30.09.2011 of the High Court of Kerala at Ernakulam in WP No. 194 of 2011.

WITH

Crl. A. Nos. 2137, 2138 & 2139 of 2011.

V. Shekhar, K.K. Mani, Abhishek Krishna, B. Sunita Rao, Vishal Saxena, B. Krishna Prasad, M.T. George for the appearing parties.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. All these four appeals have been filed impugning an order dated 30th September, 2011 of the High Court of Kerala whereby the writ petitions filed for issuance of writs of Habeas Corpus, assailing the orders of detention dated 26th February, 2011 passed under the provisions of Conservation of Foreign Exchange and prevention of Smuggling Activities Act, 1974 (hereinafter referred to as 'the COFEPOSA') were rejected by the High Court.

3. It is not in dispute that the facts in all the cases are the same. Common ground is that an order of detention under Section 3 of the COFEPOSA was served on all the detenus on 10th March, 2011 on whose behalf petitions were filed before the High Court and therefore, their detention under the COFEPOSA commenced on and from 10th March, 2011. In these proceedings, we are not going into the merits of the grounds or the recitals thereof.

4. Before us, the detention of the appellants has been assailed on the question that the representations filed on behalf of the detenus were not disposed of in accordance with the mandate of Article 22(5) of the Constitution.

5. The admitted facts are that representations were made by the detenus on the 30th March, 2011 and the same were rejected by the State Government on 8th April, 2011. But the Central Government took time till 6th June, 2011 to reject the same. This delay on the part of the Central Government in the rejection of the detention representation has been sought to be explained on the basis of an affidavit filed on behalf of the Central Government.

6. Our attention has been drawn to the said affidavit which has been filed by one A.K. Sharma, Under Secretary to the Government of India in the Ministry of Finance, Department of Revenue, Central Economic Intelligence Bureau, COFEPOSA Section, New Delhi. The purported explanation has been given

in para 3 of the said affidavit. A perusal of para 3 of the affidavit reveals that the representation dated 30th March, 2011 was forwarded by the State Government of Kerala to the Central Government by their letter dated 16th April, 2011 and the same was received in the COFEPOSA Unit of the Ministry of Finance, Department of Revenue, New Delhi on 21st April, 2011. It has been observed that 22nd April, 2011 to 24th April, 2011 were holidays. Thereafter parawise comments on the representation were called for from the Additional Director General, Directorate of Revenue Intelligence and the detaining authority i.e. Government of Kerala on 25th April, 2011. The comments were received on 10th May, 2011. The comments of the detaining authority were received on 18th May, 2011. Then the COFEPOSA Section submitted the file along with all the relevant files and documents to the Deputy Secretary, COFEPOSA on 18th May, 2011 for examination. After detailed examination of the issues raised in the representations and comments of the Sponsoring Authority and the detaining authority, the Deputy Secretary submitted the file with comprehensive note to the Joint Secretary, COFEPOSA on 3rd June, 2011. 4th and 5th June, 2011 were Saturday and Sunday and ultimately, the said representations were considered and rejected by the Central Government on 6th June, 2011 as being devoid of merit.

7. Now the question is whether the aforesaid manner of consideration and rejection of representation by the Central Government is in accord with the principles laid down by this Court on this aspect in several cases?

8. It is clear in this case that the Central Government took about more than two months i.e. whole of April and May and ultimately rejected the representations only on 6th June, 2011 whereas representations were made on 30th March, 2011.

9. Reference in this connection may be made to the Constitution Bench decision of this Court in the case of *K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of India &*

Ors., State of Karnataka & Ors. (1991) 1 SCC 476**.** The unanimous Constitution Bench, speaking through Justice K. Jagannatha Shetty, after noting the Constitutional provisions under sub-clauses (4) and (5) of Article 22, was pleased to hold that neither under the Constitution nor under the relevant statutory provision, any time limit has been fixed for consideration of representation made by a detenu. The time limit, according to the Constitution Bench, has been deliberately kept elastic. But the Constitution Bench laid emphasis on the expression 'as soon as may be' in sub-clause (5) of Article 22 and held that the said expression sufficiently makes clear the concern of the framers of the Constitution that the representation should be very expeditiously considered and disposed of with a sense of urgency and without any avoidable delay.

10. Considering the aforesaid provision, the Constitution Bench held that "there should not be any supine indifference, slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal".

11. In support of the said conclusion, the learned Judges of the Constitution Bench relied on various other judgments mentioned in Para 12 at page 484 of the report.

12. In a subsequent judgment in the case of *Rajammal Vs. State of T.N. & Anr.* (1999) 1 SCC 417, a three Judge Bench of this Court, relying on the ratio of the Constitution Bench decision in *Abdulla Kunhi*, reiterated the same principles. From Para 9 at page 421 of the report, it would appear that in the case of *Rajammal*, the concerned Minister, while on tour, received the file after 9.2.1998 and then passed the order on 14.2.1998. No explanation was offered for this delay of about five days. This Court held that such delay has vitiated further detention of the detenu [*see para 11 at page 422*].

13. In another subsequent judgment of this Court in the case of *Kundanbhai Dulabhai Shaikh Vs. Distt. Magistrate, Ahmedabad & Ors.,* (1996) 3 SCC 194, this Court while reiterating the aforesaid principles, found that representation was received by the Central Government on 21st September, 1995 and then comments were called for from the State Government and the same were received by the Central Government on 18th October, 1995 and the representation was rejected on 19th October, 1995. This Court held in para 22 of the judgment at page 204 that the internal movement of the file thus took four days and this Court found that this inaction in taking up the representation for six days is unexplained and the mere ground was that there were forty or fifty representations pending for disposal is not a valid justification. This Court found that such delay voids the continued detention of the detenus and the detention order was quashed.

14. Going by the aforesaid precedents, as we must, we hold that the procedural safeguards given for protection of personal liberty must be strictly followed. The history of personal liberty, as is well known, is a history of insistence on procedural safeguards.

15. Following the said principle, we find that delay in these cases is for a much longer period and there is hardly any explanation. We, therefore, have no hesitation in quashing the orders of detention on the ground of delay on the part of the Central Government in disposing of the representation of the detenus.

16. Learned counsel for the respondents has however urged that he is not disputing the principles laid down by this Court in the aforesaid judgments but he submitted that in the instant case, the Habeas Corpus petition filed before the High Court was not to quash the detention on the ground of delay and inasmuch as it could not have been so prayed for as the writ petition was filed prior to the rejection of the representation by the detenus.

17. Learned counsel for the Union of India further argued that the question of delay has not been urged before the High Court.

18. Taking up the second objection first, we find that the question of delay was urged before the High Court as it appears from Pages 6 and 7 of the impugned judgment. But, insofar as the question of technical plea which has been raised by the learned counsel on the question of prayer in the Habeas Corpus petition is concerned, we are constrained to observe that in dealing with writs of Habeas Corpus, such technical objections cannot be entertained by this Court.

19. Reference in this connection may be made to the Law of Habeas Corpus by James A. Scott and Charles C. Roe of the Chicago Bar [T.H. Flood & Company, Publishers, Chicago, Illinois, 1923] where the learned authors have dealt with this aspect in a manner which we should reproduce as we are of the view that the same is the correct position in law:

> "A writ of habeas corpus is a writ of right of very ancient origin, and the preservation of its benefit is a matter of the highest importance to the people, and the regulations provided for its employment against an alleged unlawful restraint are not to be construed or applied with overtechnical nicety, and when ambiguous or doubtful should be interpreted liberally to promote the effectiveness of the proceeding. [Ware v. Sanders, 146 Iowa, 233, 124 N.W. 958]".

20. In this connection, if we may say so, the writ of Habeas Corpus is the oldest writ evolved by the Common Law of England to protect the individual liberty against its invasion in the hands of the Executive or may be also at the instance of private persons. This principle of Habeas Corpus has been incorporated in our Constitutional law and we are of the opinion that in a democratic republic like India where Judges function under a written Constitution and which has a chapter on

Fundamental Rights, to protect individual liberty, the Judges owe a duty to safeguard the liberty not only of the citizens but also of all persons within the territory of India. The most effective way of doing the same is by way of exercise of power by the Court by issuing a writ of Habeas Corpus.

21. This facet of the writ of Habeas Corpus makes it a writ of the highest Constitutional importance being a remedy available to the lowliest citizen against the most powerful authority [*see* Halsbury, Laws of England, Fourth Edition, Volume 11, para 1454].

22. That is why it has been said that the writ of Habeas Corpus is the key that unlocks the door to freedom [*see* The Common Law in India-1960 by M.C. Setalvad, page 38].

23. Following the aforesaid time-honoured principles, we make it very clear that if we uphold such technical objection in this proceeding and send the matter back to the High Court for reagitation of this question, the same would deprive the detenus of their precious liberty, which we find, has been invaded in view of the manner in which their representations were unduly kept pending. We, therefore, overrule the aforesaid technical objection and allow these appeals.

24. We direct that the detenus should be set at liberty forthwith unless they are required to be detained in connection with any other case.

25. The appeals are accordingly allowed.

B.B.B. Appeals allowed

UNION OF INDIA & ANR.
v.
PRADIP KUMAR KEDIA ETC.
(Civil Appeal Nod. 6567-6569 of 2010)

NOVEMBER 17, 2011

[P. SATHASIVAM AND A.K. PATNAIK, JJ.]

INCOME-TAX APPELLATE TRIBUNAL (RECRUITMENT AND CONDITIONS OF SERVICE) RULES, 1963:

r. 4 – Appointment of Members of Income-Tax Appellate Tribunal –Appointments of 16 candidates placed in the main select list approved by Appointments Committee – It further giving direction that appointment of the Members in future would be taken up only after the recruitment rules of Income Tax Appellate Tribunal were amended – Candidates placed in the wait list claiming appointment – Held: Until the Appointments Committee approved the list of wait-listed candidates, such candidates are not persons selected for appointment – The Appointments Committee in its meetings held on 26.04.2006 and 31.08.2007 had taken a view that any further appointment after the 16 selected candidates can be made after the amendment of the Rules – The Central Government is both the rule making authority as well as the appointing authority of any Member of the Income Tax Appellate Tribunal under the Income Tax Act, 1961 – Therefore, if the Central Government has taken a decision through the Appointments Committee of the Union Cabinet to undertake appointments in future after amendment of the Rules, it cannot be held that the reason given by the Central Government in not making any further appointments because of the proposed amendments to the Rules was not a justifiable or proper reason.

Pursuant to the advertisement dated 22.01.2005 for the posts of Judicial Member and Accountant Member of the Income Tax Appellate Tribunal, the Selection Board in its recommendations placed 18 candidates in the main select list. Since 2 candidates selected for the post of Accountant Member were not cleared by the Vigilance Department, the list of 16 remaining candidates was, on 26.04.2006, placed before the Appointments Committee of the Union Cabinet, which approved the appointment of all the 16 candidates, but directed the Law Ministry to amend the Recruitment Rules so as to provide for appointment of the members of the Income Tax Appellate Tribunal for a period of two years. In 2007, a writ petition was filed before the Madras High Court for a *mandamus* to give effect to the selection list with regard to the posts of Judicial and Accountant Members in the Income Tax Appellate Tribunal pursuant to the advertisement dated 22.01.2005. The High Court, by order dated 24.04.2007, directed the appellants to place the matter before the Appointments Committee and to give effect to the Selection List as approved by the Selection Board, in the light of the decisions in *R.S. Mittal's* ***case*[1] and *A.P. Aggarwal's* ***case***[2]. The special leave petition was dismissed by the Supreme Court with a direction to the Union of India to complete the formalities and to give effect to the Selection List. The Appointments Committee, in its decision taken on 31.08.2007, approved the names of all the 16 selected candidates and appointed them till the date of retirement on attaining the age of 62 years. The Appointments Committee also decided that the appointment of Members of the Income Tax Appellate Tribunal in future would be taken up only after the Recruitment Rules were amended. Consequently, orders**

1. *R.S. Mittal v. Union of India* 1995 (2) SCR 1127.
2. *A.P. Aggarwal v. Govt. of NCT of Delhi and Another,* 1999 (4) Suppl. SCR 443.

for appointment to all the 16 candidates were issued. Three candidates placed in the wait list filed Original Applications which came to be decided by the Principal Bench of the Central Administrative Tribunal. It directed the Union of India to consider the three wait-listed candidates for filling up the advertised vacancies existing in the posts of Judicial Member and Accountant Member in the unreserved category. The Union of India challenged the said order before the Delhi High Court contending that the vacancies in the post of Judicial Member and Accountant Member could be filled up only after the Recruitment Rules were amended as decided by the Appointments Committee. The High Court dismissed the writ petition and directed the Union of India to process the case for the appointment of the 3 wait-listed candidates against the respective vacancies and thereafter place the matter before the Appointments Committee of the Cabinet for further directions. Aggrieved, the Union of India filed the appeals.

Allowing the appeals, the Court

HELD: 1.1 Rule 4 of the Income Tax Appellate Tribunal (Recruitment and Conditions of Service) Rules, 1963 was considered by this Court in *R.S. Mittal's case* wherein it was held that a person on the select panel has no vested right to be appointed to the post for which he has been selected, but he has a right to be considered for appointment. It was also held that the appointing authority cannot ignore the select-panel or decline to make the appointment on its whims and when there is a vacancy which can be offered to him, keeping in view his merit position, then, ordinarily, there is no justification to ignore him for appointment; and there has to be a justifiable reason to decline to appoint a person who is on the select-panel. In *A.P. Aggarwal's case* this Court observed that it was not open to the Government to

ignore the panel which has already been approved and accepted by it and resort to a fresh selection process without giving any proper reason for resorting to the same. [para 14] [210-A-D]

R.S. Mittal v. Union of India **1995 (2) SCR 1127 = 1995 Supp. (2) SCC 230;** *A.P. Aggarwal v. Govt. of NCT of Delhi and Another,* **1999 (4) Suppl. SCR 443 = (2000) 1 SCC 600 – referred to.**

1.2 So far as the candidates placed in the main select list are concerned, there is no dispute that out of the 18 candidates placed in the main select list, 2 were found unsuitable, and all the 16 candidates found suitable were approved for appointment by the Appointments Committee of the Union Cabinet in its decisions dated 26.04.2006 and 31.08.2007. The difference between the decisions of the Appointments Committee of the Union Cabinet taken on 26.04.2006 and 31.08.2007 was that on 26.04.2006 the Appointments Committee approved the appointment of 16 candidates found suitable for a period of 2 years and further decided that the rules be amended for making such appointment for a period of 2 years; whereas on 31.08.2007 after the Supreme Court dismissed the special leave petition against the order of the Madras High Court, the Appointments Committee approved the appointment of the 16 candidates for a full tenure up to 62 years as provided under Rule 11 of the Rules. Thus, the main list of the selected candidates recommended by the Selection Board has been given effect to in accordance with the directions of the Madras High Court as upheld by this Court. [para 16] [211-A-D]

1.3 The wait list of candidates recommended by the Selection Board, however, has not been given effect to. Under sub-rule (3) of Rule 4 of the Rules, the Central Government shall, after taking into consideration the recommendations of the Selection Board, make a list of

persons selected for appointment as members. Thus, until the Appointments Committee approved the list of wait-listed candidates, such wait-listed candidates are not persons selected for appointment. The Appointments Committee in its meetings held on 26.04.2006 and 31.08.2007 had taken a view that any further appointment after the 16 selected candidates can be made after the amendment of the Rules. The Central Government is both the rule making authority as well as the appointing authority of any Member of the Income Tax Appellate Tribunal under the Income Tax Act, 1961. Therefore, if the Central Government has taken a decision through the Appointments Committee of the Union Cabinet to undertake appointments in future after amendment of the Rules, it cannot be held that the reason given by the Central Government in not making any further appointments because of the proposed amendments to the Rules was not a justifiable or proper reason and that the decision of the Central Government in not approving the wait list of candidates recommended by the Selection Board is not in accordance with this Court's decisions in *R.S. Mittal's case* and *A.P. Aggarwal's case.* [para 17] [211-E-H; 212-A-C]

1.4 In the considered opinion of this Court, the circumstances in which this Court dismissed the special leave petition against the order of the Madras High Court no longer subsisted after the Appointments Committee approved the appointment of the 16 selected candidates, so as to warrant a direction by the Delhi High Court to the Central Government to appoint the 3 wait-listed candidates as Members of the Income Tax Appellate Tribunal. [Para 19] [213-D-F]

Director, SCTI for Medical Science & Technology and Another v. M. Pushkaran **2007 (12) SCR 465 = (2008) 1 SCC 448 – referred to.**

1.5 The impugned judgment of the Delhi High Court and the common judgment of the Central Administrative Tribunal, Principal Bench, are set aside and the Original Applications filed by the candidates are dismissed. [para 20] [213-G]

Shankarsan Dash v. Union of India **1991 (2) SCR 567 =(1991) 3 SCC 47;** *Asha Kaul (Mrs.) and Another v. State of Jammu and Kashmir and Others* **1993 (3) SCR 94 = (1993) 2 SCC 573; and** *Sanjoy Bhattacharjee v. Union of India and Others* **1997 (2) SCR 915 = (1997) 4 SCC 283 – cited.**

Case Law Reference:

1995 (2) SCR 1127	**referred to**	**para 3**
1999 (4) Suppl. SCR 443	**referred to**	**para 3**
1991 (2) SCR 567	**cited**	**para 6**
1993 (3) SCR 94	**cited**	**para 6**
1997 (2) SCR 915	**cited**	**para 6**
2007 (12) SCR 465	**referred to**	**para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6567-6569 of 2010.

From the Judgment & Order dated 20.03.2009 of the High Court of Delhi at New Delhi in Writ Petition (C) Nos. 7526, 7521 & 7523 of 2008.

A.S. Chandhiok, ASG, Vijay Hansaria, V. Kanakraj, W.A. Quadri, Sadhna Sandhu, Bhagat Singh, Yash Wardhan Tiwari, Saima Bakshi, Anil Katiyar, B. Krishna Prasad, B. Sunita Rao, Anindita Popli, A.K. Behera, Vivek Gupta, Vanita Giri, Anjani Aiyagari for the appearing parties.

The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. These are the appeals against the common judgment dated 20.03.2009 of the Delhi High Court in Writ Petition (Civil) Nos. 7526 of 2008, 7521 of 2008 and 7523 of 2008 (for short 'the impugned judgment').

2. The facts very briefly are that the Government of India, Ministry of Law and Justice, Department of Legal Affairs, by advertisement dated 22.01.2005 invited applications for 9 vacancies in the post of Judicial Member and 13 vacancies in the post of Accountant Member in the Income Tax Appellate Tribunal. The advertisement, however, stated that the number of vacancies indicated in the advertisement was only approximate and was liable to increase or decrease due to unexpected circumstances that may occur upto 31.12.2005. On 07.09.2005, one more vacancy arose in the post of Accountant Member of the Income Tax Appellate Tribunal and this took the total number of vacancies in the post of Accountant Member to 14. Against the 9 vacancies in the post of Judicial Member and 14 vacancies in the post of Accountant Member, the Selection Board in its recommendations placed 18 candidates in the main select list, 7 candidates for the post of Judicial Member and 11 candidates for the post of Accountant Member. The Selection Board in its recommendations also placed 2 candidates, namely, Nandan Kumar Jha and B. Krishna Mohan in the wait list for the post of Judicial Member and 2 candidates, namely, P.K. Kedia and Inturi Rama Rao in the wait list for the post of Accountant Member. Out of the 18 selected candidates, 2 candidates selected for the post of Accountant Member were not cleared by the Vigilance Department and the list of 16 remaining candidates was placed before the Appointments Committee of the Union Cabinet on 26.04.2006. The Appointments Committee approved the appointment of all the 16 candidates but directed the Law Ministry to amend the recruitment rules so as to provide for appointment of the members of the Income Tax Appellate Tribunal for a period of two years.

3. In 2007, the Revenue Bar Association filed Writ Petition No. 8288 of 2007 in the Madras High Court for a *mandamus* to give effect to the selection list with regard to the posts of Judicial and Accountant Members in the Income Tax Appellate Tribunal pursuant to the advertisement dated 22.01.2005 and by order dated 24.04.2007 the Madras High Court disposed of the Writ Petition with a direction to the appellants to place the matter before the Appointments Committee and with a further direction to give effect to the Selection List as approved by the Selection Board in the light of the decisions in *R.S. Mittal v. Union of India* [1995 Supp. (2) SCC 230] and *A.P. Aggarwal v. Govt. of NCT of Delhi and Another,* [(2000) 1 SCC 600]. The order of the Madras High Court was challenged by the Union of India before this Court in a Special Leave Petition, but on 17.08.2007 this Court dismissed the Special Leave Petition and directed the Union of India to complete the formalities and to give effect to the Selection List. The Appointments Committee thereafter approved the names of all the 16 selected candidates and appointed them till the date of retirement on attaining the age of 62 years or until further orders in its decision taken on 31.08.2007. In the decision taken on 31.08.2007, the Appointments Committee also decided that the appointment of members of the Income Tax Appellate Tribunal in future will be taken up only after the recruitment rules of Income Tax Appellate Tribunal are amended. In accordance with the decision of the Appointments Committee, the Law Ministry of the Union of India, issued orders for appointment to all the 16 candidates approved by the Appointments Committee.

4. In 2008, B. Krishna Mohan, who was placed in the wait list of candidates for the post of Judicial Member and Inturi Rama Rao, who was placed in the wait list of candidates for the post of Accountant Member, filed two separate Original Applications in the Hyderabad Bench of the Central Administrative Tribunal and P.K. Kedia, who was placed in the wait list of candidates for the post of Accountant Member, filed Original Application in the Mumbai Bench of the Central

Administrative Tribunal and in all the three Original Applications, the applicants prayed for directions for their appointment. The Union of India filed its reply affidavit before the Central Administrative Tribunal saying that the Appointments Committee has decided that no further appointment of members in the Income Tax Appellate Tribunal will be made until the Income-tax Appellate Tribunal (Recruitment and Conditions of Service) Rules 1963 (for short 'the Rules') are amended. The three Original Applications were transferred to the Principal Bench of the Central Administrative Tribunal and on 31.07.2008, the Principal Bench passed a common order allowing the three Original Applications and directing the Union of India to consider the three wait-listed candidates for filling up the advertised vacancies existing in the posts of Judicial Member and Accountant Member in the unreserved category within eight weeks.

5. The Union of India challenged the common order of the Principal Bench of the Central Administrative Tribunal before the Delhi High Court contending that the vacancies in the post of Judicial Member and Accountant Member can be filled up only after the recruitment rules of the Income Tax Appellate Tribunal are amended as decided by the Appointments Committee. In the impugned judgment, the High Court held that the recruitment rules of the Income Tax Appellate Tribunal had already been amended and an amendment had been inserted in Rule 4(a) of the recruitment rules, but there was nothing in the amendment which disqualifies any of the three wait-listed candidates from being appointed as members of the Income Tax Appellate Tribunal. In the impugned judgment, the Delhi High Court further held that the selection had been conducted by a high-power Selection Board presided over by a sitting Judge of the Supreme Court and no one can doubt the recommendation of the Selection Board which deserved to be given due weightage and consideration. In the impugned judgment, the High Court further held that the only way of reducing the backlog is to fill up the vacancies at the earliest

and by not doing so, the Union of India was merely prolonging the agony of a large number of assesses apart from depriving itself of its legitimate dues which depends upon the verdict of the Income Tax Appellate Tribunal in appeals pending before it. The High Court, therefore, did not accept the explanation given by the Union of India in not making appointments and dismissed the writ petition and further directed the Union of India to process the case for the appointment of the 3 wait-listed candidates against the respective vacancies and thereafter place the matter before the Appointments Committee of the Cabinet for further directions within the period of eight weeks.

6. Mr. A.S. Chandhiok, learned counsel for the appellants submitted that it is settled law that the person whose name appears in the select list much less a person who is placed in the wait list, does not acquire any indefeasible right of appointment. In support of this submission, he relied on the decisions of this Court in *Shankarsan Dash v. Union of India* [(1991) 3 SCC 47], *Asha Kaul (Mrs.) and Another v. State of Jammu and Kashmir and Others* [(1993) 2 SCC 573] and *Sanjoy Bhattacharjee v. Union of India and Others* [(1997) 4 SCC 283]. He submitted that in the present case, the Selection Board selected 18 candidates out of whom 2 did not get the vigilance clearance and all the remaining 16 selected candidates were approved for appointment by the Appointments Committee of the Union Cabinet but the Appointments Committee decided not to make any further appointment till the amendment of the Rules. He submitted that out of these 16 selected candidates, one candidate selected for the post of Judicial Member declined to accept the offer of appointment and another candidate though appointed as Judicial Member resigned and as a result there were some unexpected vacancies and in these unexpected vacancies B. Krishna Mohan who was placed in the wait list of the candidates recommended for appointment as Judicial Member could not be appointed because of the decision of the Appointments Committee not to make any further appointment until the

amendment of the Rules. He submitted that similarly there were 5 vacancies of Accountant Members in the general quota and 5 candidates were selected but one selected candidate declined and another selected candidate did not get vigilance clearance and Inturi Rama Rao and P.K. Kedia, who were placed in the wait list could not be appointed as the Appointments Committee had taken a view that there will be no further appointments till the rules are amended.

7. Mr. Chandhiok submitted that the High Court has held that there was nothing in the amendment inserting Rule 4(a) in the Rules which disqualifies any of the aforesaid 3 wait-listed candidates, namely, B. Krishna Mohan, Inturi Rama Rao and P.K. Kedia from being appointed as the members of the Income Tax Appellate Tribunal and hence the amendment of the Rules was not relevant for denying appointment to the 3 wait-listed candidates as members of the Income Tax Appellate Tribunal. He submitted that Rule 4(a) was already in existence when the Selection Board made its recommendations in 2005 and the Appointments Committee in its decisions was therefore did not have in mind Rule 4(a) of the Rules when it decided on 31.08.2007 that all further appointments will be made only after amendment of the rules. In this context, he referred to Para 6 of the reply filed by the Union of India before the Central Administrative Tribunal, Principal Bench, New Delhi in O.A. No. 1024 of 2008 filed by P.K. Kedia. He submitted that the High Court, therefore, wrongly considered the amendment inserting Rule 4(a) of the Rules and rejected the explanation given by the Appointments Committee in not making appointment.

8. Mr. Vijay Hansaria, appearing for B. Krishna Mohan, submitted that the recommendations of the Selection Board would show that the wait-listed candidates who were to be considered for appointment in case any of the candidates included in the main list of selected candidates were not available or found unsuitable for appointment after antecedents verification and therefore if some of the candidates placed in

the main list of selected candidates were either not available or not found suitable for appointment after antecedents verification, the wait-listed candidates have the right to be considered for appointment. He submitted that the advertisement was for filling up not only existing vacancies but also vacancies that may occur upto 31.12.2005 as has been stated in Para 2 of the advertisement. He submitted that well before 31.12.2005, 2 vacancies in the post of Judicial Members occurred and B. Krishna Mohan was entitled to be considered for appointment to the post of Judicial Member of the Income Tax Appellate Tribunal. He submitted that the Madras High Court issued *mandamus* in Writ Petition No. 8288 of 2007 to the appellants to place the matter before the Appointments Committee of the Union Cabinet and also directed to give effect to the selection list as approved by the selection board. He submitted that the selection list approved by the selection board would include not only the candidates placed in the main selection list, but also the candidates in the wait list.

9. Mr. Hansaria submitted that in *R.S. Mittal v. Union of India* (supra) this Court while interpreting Rule 4 of the Rules has held that when a person has been selected by the Selection Board and there is a vacancy which could be offered to him, keeping in view his merit position, then, ordinarily there is no justification to ignore him for appointment. He also relied on the decision in *A.P. Aggarwal v. Govt. of NCT of Delhi and Another* (supra) in which this Court has reiterated that it is not open to the Government to ignore the panel which has already been approved and accepted by it and resort to a fresh selection process without giving any proper reason for resorting to the same. He cited *Director, SCTI for Medical Science & Technology and Another v. M. Pushkaran* [(2008) 1 SCC 448] in which this Court has held that the selectee has no such legal right and the superior court in exercise of its power of judicial review would not ordinarily direct issuance of any writ, but each case must be considered on its own merits and where the Court

does not find any reason for the authorities not to offer any appointment to candidate placed in the selection panel, the Court can direct appointment. He submitted that in the present case, since no good reason had been shown by the appellants for not making appointment to the vacancies for the post of Judicial Members in the Income Tax Appellant Tribunal, the High Court rightly directed the appellants to make the appointment of B. Krishna Mohan as a Judicial Member.

10. Mr. A.K. Behera, appearing for P.K. Kedia submitted that as two of the selected candidates recommended for Accountant Member by the selection board were not appointed to the vacancies in the unreserved quota already advertised, P.K. Kedia, who was placed in the wait list of candidates selected for appointment to the post of Accountant Member has a vested right to be considered for appointment as has been held by this Court in *R.S. Mittal v. Union of India* (supra). He also relied on *A.P. Aggarwal v. Govt. of NCT of Delhi and Another* and *Director, SCTI for Medical Science & Technology and Another v. M. Pushkaran* (supra).

11. Mr. Behera next submitted that the Madras High Court in its order dated 24.04.2007 directed the appellants to give effect to the selection list as approved by the Selection Board and against this order of the Madras High Court the appellants filed Special Leave Petition (Civil) No. 13681 of 2007, but on 17.08.2007 this Court dismissed the Special Leave Petition and directed the appellants to give effect to the selection list as approved by the Selection Board within eight weeks. He submitted that the grounds which were urged in Special Leave Petition No. 13681 of 2007 have been reiterated in the present Special Leave Petition and this was not permissible in law. He argued that this is therefore a fit case in which this Court should dismiss the Civil Appeal.

12. Mr. V. Kanakraj, learned counsel appearing for Inturi Rama Rao, submitted that the rules do not prohibit preparation of a wait list. He submitted that the recommendation of the

Selection Board would show that some of the candidates were placed in the wait list because the Selection Board did not want to recommend candidates in the main select list in excess of the notified vacancies. He submitted that the candidates placed in the wait list therefore also had merit and deserve to be appointed. He finally submitted that the candidates placed in the wait list had a legitimate expectation of being considered for appointment to the vacancies as and when they arose.

13. Selection and recruitment of members of the Income Tax Appellate Tribunal, both Judicial and Accountant, is made under Rule 4 of the Rules which is quoted hereinbelow:

"4. Method of Recruitment:-

(1) There shall be a Selection Board consisting of -

(i) a nominee of the Minister of Law;

(ii) The Secretary to the Government of India Ministry of Law (Department of Legal Affairs);

(iii) The President of the Tribunal; and

(iv) Such other persons, if any, not exceeding two, as the Minister of Law may appoint.

(2) The nominee of the Minister of Law shall be the Chairman of the Selection Board.

(3) The Selection Board shall recommend persons for appointment as members from amongst the persons on the list of candidates prepared by the Ministry of Law after inviting applications therefore by advertisement or on the recommendations of the appropriate authorities.

(4) The Central Government shall after taking into consideration the recommendations of the Selection Board make a list of persons selected for appointment as members."

14. Rule 4 of the Rules quoted above was considered by this Court in *R.S. Mittal v. Union of India* (supra) and this Court held that a person on the select panel has no vested right to be appointed to the post for which he has been selected, but he has a right to be considered for appointment. This Court also held in the aforesaid decision that the appointing authority cannot ignore the select-panel or decline to make the appointment on its whims and when there is a vacancy which can be offered to him, keeping in view his merit position, then, ordinarily, there is no justification to ignore him for appointment. In the aforesaid decision, this Court has held that there has to be a justifiable reason to decline to appoint a person who is on the select-panel. The question of filling up the post of Member in Sales Tax Appellate Tribunal constituted under the Delhi Sales Tax Act, 1975 arose for consideration in *A.P. Aggarwal v. Govt. of NCT of Delhi and Another* (supra) and this Court observed that it was not open to the Government to ignore the panel which has already been approved and accepted by it and resort to a fresh election process without giving any proper reason for resorting to the same.

15. The Madras High Court has disposed of writ petition No. 8288 of 2007 on 24.04.2007 with a direction to the appellants to place the matter before the Appointments Committee and further directed to give effect to the selection list as approved by the Selection Board in the light of the decision in *R.S. Mittal v. Union of India* (supra) and *A.P. Aggarwal v. Govt. of NCT of Delhi and Another* (supra). Against these directions of the Madras High Court, though the appellants carried a special leave petition, this Court dismissed the special leave petition on 17.08.2007 and directed the Union of India to complete the formalities and give effect to the selection list. Hence, we are required to consider whether the selection list has been given effect to by the appellants in the light of the decisions of this Court in *R.S. Mittal v. Union of India* (supra) and *A.P. Aggarwal v. Govt. of NCT of Delhi and Another* (supra).

16. So far as the candidates placed in the main select list, there is no dispute that out of the 18 candidates placed in the main select list, 2 were found unsuitable and the remaining 16 were found suitable and all the 16 candidates found suitable were approved for appointment by the Appointments Committee of the Union Cabinet in its decisions dated 26.04.2006 and 31.08.2007. The difference between the decisions of the Appointments Committee of the Union Cabinet taken on 26.04.2006 and 31.08.2007 was that on 26.04.2006 the Appointments Committee approved the appointment of 16 candidates found suitable for a period of 2 years and further decided that the rules be amended for making such appointment for a period of 2 years, whereas on 31.08.2007 after the Supreme Court dismissed the Special Leave Petition against the order of the Madras High Court, the Appointments Committee approved the appointment of the 16 candidates for a full tenure upto 62 years as provided under Rule 11 of the Rules. Hence, the main list of the selected candidates recommended by the Selection Board has been given effect to in accordance with the directions of the Madras High Court as upheld by this Court.

17. The wait list of candidates recommended by the Selection Board, however, has not been given effect to. Under sub-rule (3) of Rule 4 of the Rules quoted above, the Central Government after taking into consideration the recommendations of the Selection Board make a list of persons selected for appointment as members. Thus, until the Appointments Committee approved the list of wait-listed candidates, such wait-listed candidates are not persons selected for appointment. Appointments Committee in its meetings held on 26.04.2006 and 31.08.2007 had taken a view that any further appointment after the 16 selected candidates can be made after the amendment of the Rules. The Central Government is both the rule making authority as well as the appointing authority of any member of the Income Tax Appellate Tribunal under the Income Tax Act, 1961. Hence, if the Central

Government has taken a decision through the Appointments Committee of the Union Cabinet to undertake appointments in future after amendment of the rules, it is difficult for the Court to hold that the reason given by the Central Government in not making any further appointments because of the proposed amendments to the rules was not a justifiable or proper reason and that the decision of the Central Government in not approving the wait list of candidates recommended by the Selection Board is not in accordance of this Court's decisions in *R.S. Mittal v. Union of India* (supra) and *A.P. Aggarwal v. Govt. of NCT of Delhi and Another* (supra).

18. The High Court, however, has held that the amendment inserting Rule 4(a) of the Rules did not in any way disqualify the three candidates placed in the wait list to be appointed as Members of the Income Tax Appellate Tribunal. The High Court lost sight of the fact that Rule 4(a) had already been inserted in the Rules by notification dated 26.04.2004 and therefore this could not be the amendment which was in the mind of the Appointments Committee when it took the decisions on 26.04.2006 and 31.08.2007 to make further appointments only after the Rules were amended. Para 6 of the short reply on behalf of the Union of India filed before the Central Administrative Tribunal, Principal Bench, New Delhi in O.A. No. 1024 of 2008 has made a reference to the proposed amendment discussed in the meeting of the Appointments Committee and is quoted hereinbelow:

> "Para 6 – The ACC approved appointment of 16 candidates for a period of not exceeding 02 years from the date of assumption of charge of the post or until further orders and also it directed the respondent No.1 for amendment of the Recruitment rules. Since the existing recruitment rules do not have provision of appointment of members for a period of two years except in the case of appointment to the temporary benches, the matter was under correspondence between the respondent and the ACC."

19. As has been held by this Court in *Director, SCTI for Medical Science & Technology and Another v. M. Pushkaran* (supra) each case must be considered on its own merits and where the Court does not find any reason for the authorities not to offer any appointment to the candidate placed in the selection panel the Court can direct appointment. In the facts of the present case, the Madras High Court did not see any justification on the part of the Central Government in not giving effect to the select panel when there was a very large pendency of cases in the Income Tax Appellate Tribunal resulting in hardship to the litigant public as well as loss to the exchequer, but after the Appointments Committee approved appointments of 16 selected candidates found suitable for appointment as members of the Income Tax Appellate Tribunal, the immediate need for filling up the vacancies was met and if the Appointments Committee has taken a view that any further appointments will be considered only after the rules are amended, the Court should not compel the Central Government to make the appointments from the wait-listed candidates recommended by the Selection Board by a writ of mandamus. In our considered opinion, the circumstances in which this Court dismissed the Special Leave Petition against the order of the Madras High Court no longer subsisted after the Appointments Committee approved the appointment of the 16 selected candidates so as to warrant a direction by the Delhi High Court to the Central Government to appoint the 3 wait-listed candidates as members of the Income Tax Appellate Tribunal.

20. We accordingly set aside the impugned judgment of the Delhi High Court and the common judgment of the Central Administrative Tribunal, Principal Bench, in O.A. Nos. 1024 of 2008, 1036 of 2008 and 1037 of 2008 and dismiss the Original Applications. The appeals are allowed, but there shall be no order as to costs.

R.P. Appeals allowed.

M/S. DEWAN CHAND BUILDERS & CONTRACTORS.
v.
UNION OF INDIA & ORS.
(Civil Appeal No. 1830 of 2008)

NOVEMBER 18, 2011

[D.K. JAIN AND ASOK KUMAR GANGULY, JJ.]

The Building and other Construction Workers Welfare Cess Act, 1996 – The Building and other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 – Constitutional validity of – Cess levied under the Scheme of the Cess Act – 'Fee' or 'Tax' – Held: Is a fee and not a tax – Cess on the cost of construction incurred by the employers on the building and other construction works is for ensuring sufficient funds for the Welfare Boards to undertake social security schemes and welfare measures – Funds, so collected is set apart for the benefit of the building and construction workers; appropriated specifically for performance of specified purpose and is not merged in the public revenue for the benefit of the general public – Nexus between the cess and the purpose for which it is levied is established, satisfying the element of quid pro quo in the scheme – Thus, the said Acts are constitutionally valid and within the competence of Parliament as levy under the impugned enactments is a fee referable to Entry 97 of List-I, Seventh Schedule of the Constitution – Quid pro quo – Maxims.

The Building and other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 – The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Central Rules, 1998 – The Building and Other Construction Workers Welfare Cess Act, 1996 – The Building and Other Construction Workers Welfare Cess Rules, 1998 – Object of

the enactments – Held: Is to regulate the employment and conditions of service of building and other construction workers, traditionally exploited sections of the society and to provide for their safety, health and other welfare measures.

Tax or Fee – Determination of the character of a levy - True test – Held: Is the primary object of the levy and the essential purpose intended to be achieved.

Writ petitions were filed challenging the constitutional validity of the Building and other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996; the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Central Rules, 1998; the Building and Other Construction Workers Welfare Cess Act, 1996; and the Building and Other Construction Workers Welfare Cess Rules, 1998. The High Court held that the said Acts and the Rules are constitutionally valid and within the competence of the Parliament as the levy under the impugned enactments is a "fee", referable to Entry 97 of List-I of the Seventh Schedule of the Constitution. Aggrieved, appellant-contractor engaged in building and other construction works, filed the instant appeals.

The question which arose for consideration in the instant appeals was whether the cess levied under the scheme of the Building and Other Construction Workers Welfare Cess Act, 1996, was a 'fee' or a 'tax'.

Dismissing the appeal, the Court

HELD: 1.1 It is clear from the scheme of the Building and other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 for short the 'BOCW' Act that its sole aim is the welfare of building and construction workers, directly relatable to

their constitutionally recognised right to live with basic human dignity, enshrined in Article 21 of the Constitution of India. It envisages a network of authorities at the Central and State levels to ensure that the benefit of the legislation is made available to every building and construction worker, by constituting Welfare Boards and clothing them with sufficient powers to ensure enforcement of the primary purpose of the BOCW Act. The means of generating revenues for making effective the welfare provisions of the BOCW Act is through the Building and Other Construction Workers Welfare Cess Act, 1996 (for short the CESS Act) [Paras 5 and 6] [223-H; 224-A-C]

1.2 The Statement of Objects and Reasons to the BOCW Act explained that it had been considered "necessary to levy a Cess on the cost of construction incurred by the employers on the building and other construction works for ensuring sufficient funds for the Welfare Boards to undertake the social security Schemes and welfare measures." Simultaneously with the enactment of the BOCW Act, the Parliament enacted the Cess Act. The Statement of Objects and Reasons to the Cess Act noted that the intention was to "provide for the levy and collection of a Cess on the cost of construction incurred by the employers for augmenting the resources of the Building and Other Construction Workers' Welfare Boards constituted by the State Governments under the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Ordinance, 1995." [Para 7] [174-D-F]

1.3 It is manifest from the overarching schemes of the BOCW Act, the Cess Act and the Rules made thereunder that their sole object is to regulate the employment and conditions of service of building and other construction workers, traditionally exploited sections in the society and to provide for their safety, health and other welfare

measures. The BOCW Act and the Cess Act break new ground in that, the liability to pay Cess falls not only on the owner of a building or establishment, but under Section 2(i)(iii) of the BOCW Act "in relation to a building or other construction work carried on by or through a contractor, or by the employment of building workers supplied by a contractor, the contractor." The extension of the liability on to the contractor is with a view to ensure that, if for any reason it is not possible to collect Cess from the owner of the building at a stage subsequent to the completion of the construction, it can be recovered from the contractor. The Cess Act and the Cess Rules ensure that the Cess is collected at source from the bills of the contractors to whom payments are made by the owner. In short, the burden of Cess is passed on from the owner to the contractor. [Para 8] [226-H; 227-A-D]

2.1 The true test to determine the character of a levy, delineating 'tax' from 'fee' is the primary object of the levy and the essential purpose intended to be achieved. There is no doubt that the Statement of Objects and Reasons of the Cess Act, clearly spells out the essential purpose, the enactment seeks to achieve i.e. to augment the Welfare Fund under the BOCW Act. The levy of Cess on the cost of construction incurred by the employers on the building and other construction works is for ensuring sufficient funds for the Welfare Boards to undertake social security schemes and welfare measures for building and other construction workers. The fund, so collected, is directed to specific ends spelt out in the BOCW Act. Therefore, applying the aforesaid principle, it is clear that the said levy is a 'fee' and not 'tax'. The said fund is set apart and appropriated specifically for the performance of specified purpose; it is not merged in the public revenues for the benefit of the general public and as such the nexus between the Cess and the purpose for

which it is levied gets established, satisfying the element of quid pro quo in the scheme. With these features of the Cess Act in view, the subject levy has to be construed as 'fee' and not 'tax'. [Paras 18 and 19] [232-D-H; 233-A]

2.2 In the instant case, there does exist a reasonable nexus between the payer of the Cess and the services rendered for that industry and therefore, the said levy cannot be assailed on the ground that being in the nature of a 'tax', it was beyond the legislative competence of Parliament. There is no infirmity in the conclusions arrived at by the High Court while upholding the validity of the impugned Acts. The appeals are dismissed with costs, quantified at Rs. 25,000/- in each set of appeals. [Paras 23 and 25] [235-B-D-E]

Hingir Rampur Coal Co. Ltd. Vs. State of Orissa **1961 (2) SCR 537;** *State of W.B. Vs. Kesoram Industries Ltd. & Ors.* **(2004) 10 SCC 201 – relied on.**

The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt **AIR 1954 SC 282;** *Kewal Krishan Puri and Anr. Vs. State of Punjab and Anr.***(1980) 1 SCC 416;** *Sreenivasa General Traders and Ors. Vs. State of Andhra Pradesh and Ors.* **(1983) 4 SC 353 – referred to**

Case Law Reference:

AIR 1954 SC 282	**Referred to**	**Para 15**
1961 (2) SCR 537	**Referred to**	**Para 15**
(2004)10 SCC 201	**Referred to**	**Para 17**
(1980) 1 SCC 416	**Referred to**	**Para 21**
(1983) 4 SC 353	**Referred to**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1830 of 2008.

From the Judgment & Order dated 28.02.2007 of the High Court of Delhi at New Delhi in Civil Writ Petition No. 3620 of 2003.

WITH

C.A. Nos. 1831 & 1832 of 2008.

S. Ganesh, R.P. Bhatt, Uday Joshi, Nar Hari Singh, Vikas Mehta, R.C. Kaushik, Anupam Varma, Pukhrambam Ramesh Kumar, Vishal Anand, Vishnu Sudarshan, S. Wasim A. Qadri, Sadhna Sandhu, C.K. Sharma, Anil Katiyar, Aditya Sharma, A.N. Terdal, D.S. Mahra for the appearing parties.

The Judgment of the Court was delivered by

D.K. JAIN, J.: 1. These appeals, by special leave, arise out of judgment and final order dated 28th February, 2007 in W.P.(C) No.3620/2003 [connected with W.P.(C) Nos.216-17 of 2006]; W.P.(C) Nos.7480-81/2006 & CM No. 5879/2006, and W.P.(C) Nos.7485-87/2006 & CM No.5886/2006] rendered by the High Court of Delhi, whereby, the said petitions were dismissed with costs of '25000/-. The High Court has held that The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (for short "the BOCW Act"); The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Central Rules, 1998, (for short the "1998 Central Rules"); The Building and Other Construction Workers Welfare Cess Act, 1996 (for short "the Cess Act") and The Building and Other Construction Workers Welfare Cess Rules, 1998 (for short "the Cess Rules") are constitutionally valid and within the competence of the Parliament as the levy under the impugned enactments is a "fee", referable to Entry 97 of List-I of the Seventh Schedule of the Constitution of India.

2. Since all the appeals involve a common pure question of law, these are being disposed of by this common judgment. For deciding the subject issue before us *viz.* constitutional validity of the Cess Act, even a reference to the factual aspects

is unnecessary, except to note that the appellant in these appeals is a contractor, engaged in building and other construction works in the National Capital Territory of Delhi.

3. However, before addressing the contentions advanced on behalf of the parties, it will be useful to survey the relevant provisions of both the Acts and the Rules.

4. The background in which the BOCW Act was enacted, is set out in the Statement of Objects and Reasons, appended to the Bill preceding its enactment. To better appreciate the legislative intent, it would be instructive to refer to the following extract from the Statement of Objects and Reasons :

> "It is estimated that about 8.5. Million workers in the country are engaged in building and other construction works. Building and other construction workers are one of the most numerous and vulnerable segments of the unorganized labour in India. The building and other construction works are characterized by their inherent risk to the life and limb of the workers. The work is also characterized by its casual nature, temporary relationship between employer and employee, uncertain working hours, lack of basic amenities and inadequacy of welfare facilities. In the absence of adequate statutory provisions, the requisite information regarding the number and nature of accidents is also not forthcoming. In the absence of such information, it is difficult to fix responsibility or to take any corrective action.
>
> Although the provisions of certain Central Acts are applicable to the building and other construction workers yet a need has been felt for a comprehensive Central Legislation for regulating their safety, health, welfare and other conditions of service."

5. A fairly long preamble to the BOCW Act is again indicative of its purpose. It reads thus:

"An Act to regulate the employment and conditions of service of building and other construction workers and to provide for their safety, health and welfare measures and for other matters connected therewith or incidental thereto."

Further, Section 1(4) of the BOCW Act makes it clear that it:

"……applies to every establishment which employs, or had employed on any day of the preceding twelve months, ten or more building workers in any building or other construction work."

Some of the definitions under Section 2 of the BOCW Act, relevant for these appeals are:

(b) "beneficiary" means a building worker registered under Section 12;

(c) "Board" means a Building and Other Construction Workers' Welfare Board constituted under sub-section (1) of Section 18;

(d) … … …

(e) "building worker" means a person who is employed to do any skilled, semi-skilled or unskilled, manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be expressed or implied, in connection with any building or other construction work but does not include any such person-

(i) who is employed mainly in a managerial or administrative capacity; or

(ii) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or

exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature;

(f) … … …

(g) "contractor" means a person who undertakes to produce a given result for any establishment, other than a mere supply of goods or articles of manufacture, by the employment of building workers or who supplies building workers for any work of the establishment; and includes a sub-contractor;

(h) … … …

(i) "employer", in relation to an establishment, means the owner thereof, and includes,-

(i) in relation to a building or other construction work carried on by or under the authority of any department of the Government, directly without any contractor, the authority specified in this behalf, or where no authority is specified, the head of the department;

(ii) in relation to a building or other construction work carried on by or on behalf of a local authority or other establishment, directly without any contractor, the chief executive officer of that authority or establishment;

(iii) in relation to a building or other construction work carried on by or through a contractor, or by the employment of building workers supplied by a contractor, the contractor;

(j) … … …

(k) "Fund" means the Building and Other Construction Workers' Welfare fund of a Board constituted under sub-section (1) of Section 24."

The scheme of the BOCW Act is that it empowers the Central Government and the State Governments to constitute Welfare Boards to provide and monitor social security schemes and welfare measures for the benefit of the building and other construction workers. Section 7 requires every employer in relation to an establishment to which the BOCW Act applies to get such establishment registered. Section 10 makes this requirement mandatory and therefore, without such registration, the employer of an establishment, to which the BOCW Act applies, cannot employ building workers.

Chapter IV of the BOCW Act contains provisions stipulating the registration of building workers as beneficiaries and requires certain contributions to be made by such beneficiary at such rate per month as may be specified by the State Government. Where the worker is unable to pay his contribution due to any financial hardship, the Board can waive the payment of such contribution for a period not exceeding three months at a time.

Chapter V of the BOCW Act sets out the constitution and functions of the Building and Other Construction Workers' Welfare Boards. Section 24 sets out the provision for the constitution of the Welfare Fund and its application.

Part III of Chapter VI of the BOCW Act contains provisions concerning the safety, health and welfare of the construction workers generally and with reference to specific kinds of activities.

It is thus, clear from the scheme of the BOCW Act that its sole aim is the welfare of building and construction workers,

directly relatable to their constitutionally recognised right to live with basic human dignity, enshrined in Article 21 of the Constitution of India. It envisages a network of authorities at the Central and State levels to ensure that the benefit of the legislation is made available to every building and construction worker, by constituting Welfare Boards and clothing them with sufficient powers to ensure enforcement of the primary purpose of the BOCW Act.

6. The means of generating revenues for making effective the welfare provisions of the BOCW Act is through the Cess Act, which is questioned in these appeals as unconstitutional.

7. The Statement of Objects and Reasons to the BOCW Act explained that it had been considered "necessary to levy a Cess on the cost of construction incurred by the employers on the building and other construction works for ensuring sufficient funds for the Welfare Boards to undertake the social security Schemes and welfare measures." Simultaneously with the enactment of the BOCW Act, the Parliament enacted the Cess Act. The Statement of Objects and Reasons to the Cess Act noted that the intention was to "provide for the levy and collection of a Cess on the cost of construction incurred by the employers for augmenting the resources of the Building and Other Construction Workers' Welfare Boards constituted by the State Governments under the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Ordinance, 1995."

Section 2(a) of the Cess Act defines the term "Board" to mean the Board constituted by the State Government under sub-section (1) of Section 18 of the BOCW Act. Section 2(d) of the Cess Act adopts all of the definitions contained in the BOCW Act and reads as under:

"2(d) words and expressions used herein but not defined and defined in the Building and Other Construction Workers (Regulation of Employment and Conditions of

Service) Act, 1996 shall have the meanings respectively assigned to them in that Act."

Section 3 of the Cess Act, the charging Section, reads as under:

"3. Levy and collection of Cess: (1) There shall be levied and collected a Cess for the purpose of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, at such rate not exceeding two per cent, but not less than one per cent of the cost of construction incurred by an employer, as the Central Government may, by notification in the Official Gazette, from time to time specify.

(2) The Cess levied under Sub-section (1) shall be collected from every employer in such manner and at such time, including deduction at source in relation to a building or other construction work of a Government or of a public sector undertaking or advance collection through a local authority where an approval of such building or other construction work by such local authority is required, as may be prescribed.

(3) The proceeds of the Cess collected under Sub-section (2) shall be paid by the local authority or the State Government collecting the Cess to the Board after deducting the cost of collection of such Cess not exceeding one per cent of the amount collected.

(4) Notwithstanding anything contained in Sub-section (1) or Sub-section (2), the Cess leviable under this Act including payment of such Cess in advance may, subject to final assessment to be made, be collected at a uniform rate or rates as may be prescribed on the basis of the quantum of the building or other construction work involved."

Section 4 of the Cess Act requires "every employer" to file a return in the manner prescribed. Section 5 spells out the process for the assessment of the Cess payable, while, Section 8 provides for interest payable in the event of a delayed payment of Cess. Section 9 stipulates penalty for non-payment of the Cess within the specified time. There is an internal mechanism of appeal under Section 11 for an employer who is aggrieved by the assessment order made under Section 5.

In exercise of the power conferred under Section 14 of the Cess Act, the Central Government framed the Cess Rules. Rule 3 thereof defines the cost of construction for the purpose of levy of Cess as under:

"3. Levy of Cess- For the purpose of levy of Cess under Sub-section (1) of Section 3 of the Act, cost of construction shall include all expenditure incurred by an employer in connection with the building or other construction work but shall not include-

-cost of land;

-any compensation paid or payable to a worker or his kin under the Workmen's Compensation Act, 1923."

Rule 4 of the Cess Rules makes it mandatory for deduction of Cess payable at the notified rates from the bills paid for the building and other construction work of a Government or a Public Sector Undertaking. Rule 5 prescribes the manner in which the proceeds of Cess collected under Rule 4 shall be transferred by such Government office, Public Sector Undertakings, local authority, or Cess collector, to the Board. The powers of the Assessing Officer and the Board of Assessment are enumerated in Rules 7 to 14 of the Cess Rules.

8. It is manifest from the overarching schemes of the BOCW Act, the Cess Act and the Rules made thereunder that their sole object is to regulate the employment and conditions

of service of building and other construction workers, traditionally exploited sections in the society and to provide for their safety, health and other welfare measures. The BOCW Act and the Cess Act break new ground in that, the liability to pay Cess falls not only on the owner of a building or establishment, but under Section 2(i)(iii) of the BOCW Act "in relation to a building or other construction work carried on by or through a contractor, or by the employment of building workers supplied by a contractor, the contractor." The extension of the liability on to the contractor is with a view to ensure that, if for any reason it is not possible to collect Cess from the owner of the building at a stage subsequent to the completion of the construction, it can be recovered from the contractor. The Cess Act and the Cess Rules ensure that the Cess is collected at source from the bills of the contractors to whom payments are made by the owner. In short, the burden of Cess is passed on from the owner to the contractor.

9. Although both the statutes were enacted in 1996, the Central Government in exercise of its powers under Section 62 of the BOCW Act notified the Delhi Building and Other Construction Workers (RE&CS), Rules, 2002 (for short "the Delhi Rules") vide Notification No. DLC/CLA/BCW/01/19 dated 10th January, 2002. Accordingly, Government of NCT of Delhi constituted the Delhi Building and Other Construction Workers Welfare Board vide Notification No. DLC/CLA/BCW/02/596 dated 2nd September, 2002. Thus, the Cess Act and the Cess Rules are operative in the whole of NCT of Delhi w.e.f. January, 2002.

10. As noted above, the principal ground for challenge to the validity of the Cess Act is the lack of legislative competence of the Parliament. Mr. Uday Joshi, learned counsel appearing on behalf of the appellant, strenuously urged that the impost levied by the Cess Act is a compulsory and involuntary exaction, made for a public purpose without reference to any special benefit for the payer of the Cess. It was argued that there exists

no co-relationship between the payee of the Cess and the services rendered and therefore, the levy is in effect a tax. It was submitted that the maintenance of a separate corpus, i.e., Building and Other Construction Workers Welfare Fund, which also vests in the State, is a cloak to cover the true character of the levy, which is to be utilized for the benefit of the building worker, is in fact a 'tax.'

11. Asserting that the Cess Act in fact provides for the levy of tax although it is termed as Cess, it was contended that no tax can be levied or collected in terms of Article 265 of the Constitution of India, except by authority of law. In other words, the power to make a legislation imposing a tax has to be traced with reference to a specific Entry in the Lists in the Seventh Schedule to the Constitution. According to the learned counsel, the subject matter of the present statute i.e. the Cess Act being fully covered by Entry 49 in List II (State List) pertaining to taxes on "lands and buildings", the power to levy Cess would not be available to the Parliament, based on the assumption of residuary power.

12. *Per contra,* Mr. R.P. Bhatt, learned senior counsel appearing on behalf of the respondents, defending the constitutional validity of the subject legislation, stressed that the Cess Act is within the legislative competence of Parliament with reference to Entry 97 of List I in the Seventh Schedule. In the written submissions filed on behalf of the respondents, it is pleaded that the charging Section in the Cess Act makes it clear that the levy is attracted when there is an activity of building and construction. The collection of cess on the cost of construction is for enhancing the resources of the Building & other Construction Workers' Welfare Boards constituted under the BOCW Act. The Cess so collected is directed to a specific end spelt out in the BOCW Act itself; it is set apart for the benefit of the building and construction workers; appropriated specifically for the performance of such welfare work and is not merged in the public revenues for the benefit of the general public.

13. It is evident from the contentions raised on behalf of the appellant that there is a two pronged attack on the legislative competence of the Parliament to enact the Cess Act: (i) it is a 'tax' and not a 'cess' because no element of quid pro quo exists between the payer of the cess and the beneficiary and (ii) if it is a 'tax' then it is a tax on "lands and buildings" falling within the ambit of Entry 49 List II (the State List) of the Seventh Schedule, ousting the legislative competence of the Parliament.

14. Thus, the core issue arising for consideration is whether the cess levied under the scheme of the impugned Cess Act is a 'fee' or a 'tax'. Before embarking on an evaluation based on the said submissions, it would be apposite to briefly examine the concept of 'tax' and 'fee'.

15. The question whether a particular statutory impost is a 'tax' or 'fee' has arisen as a challenge in several cases before this Court, which in turn necessitated the demarcation between the concepts of 'Cess', 'tax' and 'fee'. The characteristics of a fee, as distinct from tax, were explained as early as in *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (generally referred to as the 'Shirur Mutt's[1] Case'). The ratio of this decision has been consistently followed as a locus classicus in subsequent decisions dealing with the concept of 'fee' and 'tax'. The Constitution Bench of this Court in *Hingir Rampur Coal Co. Ltd. Vs. State of Orissa*[2] was faced with the challenge to the constitutional validity of the Orissa Mining Areas Development Fund Act, 1952, levying Cess on the petitioner's colliery. The Bench explained different features of a 'tax', a 'fee' and 'cess' in the following passage:

> "The neat and terse definition of Tax which has been given by Latham, C.J., in *Matthews v. Chicory Marketing Board* (1938) 60 C.L.R. 263 is often cited as a classic on this subject. "A Tax", said Latham, C.J., "is a compulsory exaction of money by public authority for public purposes enforceable by law, and is not payment for services rendered". In bringing out the essential features of a tax this definition also assists in distinguishing a tax from a Fee. It is true that between a tax and a fee there is no generic difference. Both are compulsory exactions of money by public authorities; but whereas a tax is imposed for public purposes and is not, and need not, be supported by any consideration of service rendered in return, a fee is levied essentially for services rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authority which imposes it. *If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the cess is distinguishable from a tax and is described as a fee.* Tax recovered by public authority invariably goes into the consolidated fund which ultimately is utilised for all public purposes, whereas a cess levied by way of Fee is not intended to be, and does not become, a part of the consolidated fund. It is earmarked and set apart for the purpose of services for which it is levied."
>
> (Emphasis supplied by us)

1. AIR 1954 SC 282.
2. 1961 (2) SCR 537.

It was further held that,

> "It is true that when the Legislature levies a fee for rendering specific services to a specified area or to a specified class of persons or trade or business, in the last analysis such services may indirectly form part of services to the public in general. If the special service rendered is distinctly and primarily meant for the benefit of a specified class or area the fact that in benefiting the specified class or area the State as a whole may ultimately and indirectly

be benefited would not detract from the character of the levy as a fee. Where, however, the specific service is indistinguishable from public service, and in essence is directly a part of it, different considerations may arise. In such a case it is necessary to enquire, what, is the primary object of the levy and the essential purpose which it is intended to achieve. *Its primary object and the essential purpose must be distinguished from its ultimate or incidental results or consequences. That is the true test in determining the character of the levy."*

(Emphasis supplied by us)

16. On the basis of the above considerations, this Court in the aforementioned case, examined the scheme of the Act impugned in that case in depth and opined that the primary and the principal object of the Act was to develop the mineral areas in the State and to assist in providing more efficient and extended exploitation of its mineral wealth. The Cess levied did not become a part of the consolidated fund and was not subject to an appropriation in that behalf. It went into a special fund earmarked for carrying out the purpose of the Act and thus, its existence established a correlation between the Cess and the purpose for which it was levied, satisfying the element of quid pro quo in the scheme. These features of the Act impressed upon the levy the character of a 'fee' as distinct from a 'tax'.

17. Recently in *State of W.B. Vs. Kesoram Industries Ltd. & Ors.*[3], the Constitution Bench of this Court, was faced with a challenge to the Constitutional validity of the levy of Cesses on coal-bearing lands; tea plantation lands and on removal of bricks earth. Relying on the decision in *Hingir Rampur Coal Co. Ltd* (supra), speaking for the majority, R.C. Lahoti, J. (as His Lordship then was), explained the distinction between the terms 'tax' and 'fee' in the following words: (SCC HN)

"The term cess is commonly employed to connote a Tax

3. (2004) 10 SCC 201.

with a purpose or a tax allocated to a particular thing. However, it also means an assessment or levy. Depending on the context and purpose of levy, cess may not be a tax; it may be a fee or fee as well. It is not necessary that the services rendered from out of the Fee collected should be directly in proportion with the amount of Fee collected. It is equally not necessary that the services rendered by the Fee collected should remain confined to the person from whom the fee has been collected. Availability of indirect benefit and a general nexus between the persons bearing the burden of levy of fee and the services rendered out of the fee collected is enough to uphold the validity of the fee charged."

18. In the light of the tests laid down in *Hingir Rampur* (supra) and followed in *Kesoram Industries* (supra), it is manifest that the true test to determine the character of a levy, delineating 'tax' from 'fee' is the primary object of the levy and the essential purpose intended to be achieved.

19. There is no doubt in our mind that the Statement of Objects and Reasons of the Cess Act, clearly spells out the essential purpose, the enactment seeks to achieve i.e. to augment the Welfare Fund under the BOCW Act. The levy of Cess on the cost of construction incurred by the employers on the building and other construction works is for ensuring sufficient funds for the Welfare Boards to undertake social security schemes and welfare measures for building and other construction workers. The fund, so collected, is directed to specific ends spelt out in the BOCW Act. Therefore, applying the principle laid down in the aforesaid decisions of this Court, it is clear that the said levy is a 'fee' and not 'tax'. The said fund is set apart and appropriated specifically for the performance of specified purpose; it is not merged in the public revenues for the benefit of the general public and as such the nexus between the Cess and the purpose for which it is levied gets established, satisfying the element of quid pro quo in the

scheme. With these features of the Cess Act in view, the subject levy has to be construed as 'fee' and not a 'tax'. Thus, we uphold and affirm the finding of the High Court on the issue.

20. At this juncture, we may also deal with the argument of learned counsel appearing for the appellant that, since there exists no 'quid pro quo' between the payer (contractors) of the fee and the ultimate beneficiary (workers) of the services rendered, the said levy is in fact a tax. While it is true that 'quid pro quo' is one of the determining factors that sets apart a 'tax' from a 'fee' but the concept of quid pro quo requires to be understood in its proper perspective.

21. A Constitution bench of this Court in *Kewal Krishan Puri and Anr. Vs. State of Punjab and Anr.*[4], while dealing with provisions of the Punjab Agricultural Produce Markets Act, 1961, held that the element of quid pro quo must exist between the payer of the Fee and the special services rendered. Taking note of the well recognized distinct connotations between 'tax' and 'fee', the Bench observed that a 'fee' is a charge for special service rendered to individuals by the Governmental agency and therefore, for levy of fee an element of quid pro quo for the services rendered was necessary; service rendered does not mean any personal or domestic service and it meant service in relation to the transaction, property or the institution in respect of which the fee is paid. A significant principle deduced in the said judgment was that the element of quid pro quo may not be possible, or even necessary, to be established with arithmetical exactitude but even broadly and reasonably it must be established, with some amount of certainty, reasonableness or preponderance of probability that quite a substantial portion of the amount of fee realized is spent for the special benefit of its payers. Each case has to be judged from a reasonable and practical point of view for finding an element of quid pro quo.

22. In *Sreenivasa General Traders and Ors. Vs. State of*

4. 1980 (1) SCC 416.

Andhra Pradesh and Ors.[5], a Bench of three learned Judges, analysed, in great detail, the principles culled out in *Kewal Krishan Puri* (supra). Opining that the observation made in the said decision, seeking to quantify the extent of correlation between the amount of fee collected and the cost of rendition of service, namely: "At least a good and substantial portion of the amount collected on account of fees, may be in neighbourhood of two-thirds or three-fourths, must be shown with reasonable certainty as being spent for rendering services in the market to the payer of fee" appeared to be an obiter, the Court echoed the following views insofar as the actual quid pro quo between the services rendered and payer of the fee was concerned:

> "The traditional view that there must be actual quid pro quo for a fee has undergone a sea change in the subsequent decisions. The distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is for payment of a specific benefit or privilege although the special advantage is secondary to the primary motive of regulation in public interest. If the element of revenue for general purpose of the State predominates, the levy becomes a tax. In regard to fees there is, and must always be, correlation between the fee collected and the service intended to be rendered. In determining whether a levy is a fee, the true test must be whether its primary and essential purpose is to render specific services to a specified area of class; it may be of no consequence that the State may ultimately and indirectly be benefited by it. *The power of any legislature to levy a fee is conditioned by the fact that it must be "by and large" a quid pro quo for the services rendered. However, correlationship between the levy and the services rendered (sic or) expected is one of general character and not of mathematical exactitude. All that is necessary is that there should be a "reasonable*

5. (1983) 4 SCC 353.

relationship" between the levy of the Fee and the services rendered."

(Emphasis supplied)

23. Viewed from this perspective, the inevitable conclusion is that in the instant case there does exist a reasonable nexus between the payer of the Cess and the services rendered for that industry and therefore, the said levy cannot be assailed on the ground that being in the nature of a 'tax', it was beyond the legislative competence of Parliament.

24. Having reached the conclusion that the levy by the impugned Act is in effect a 'fee' and not a 'tax', we deem it unnecessary to deal with the second limb of the challenge, *viz.* the impost is a tax on "lands and buildings", covered by Entry 49 in List II of the Seventh Schedule.

25. In view of the aforegoing discussion, we do not find any infirmity in the conclusions arrived at by the High Court while upholding the validity of the impugned Acts. All the appeals, being bereft of any merit are dismissed with costs, quantified at Rs. 25,000/- in each set of appeals.

N.J. Appeals dismissed.

SUNIL KR. GHOSH & ORS.

v.

K. RAM CHANDRAN & ORS.

(Civil Appeal Nos. 9921-22 of 2011)

NOVEMBER 18, 2011

[P. SATHASIVAM AND J. CHELAMESWAR, JJ.]

Industrial Disputes Act, 1947 – Workmen's rights in case of transfer of an undertaking – On facts, transfer of ownership of a factory to a new employer – Dispute between the Management and the workers – Application by Workers' Union to refer the dispute for adjudication, rejected by the Management – Thereafter, workers asking the Management for Voluntary Retirement Scheme (VRS) since they were not interested in joining the new employer – However, the request not acceded to since the VRS introduced by the Management had lapsed – Writ petition by the workers – Direction by the Single Judge of the High Court to the Management for payment of retirement and retrenchment benefits to the workers – On appeal, held: Without consent, the workmen cannot be forced to work under different management and in that event, those workmen are entitled to retirement/ retrenchment compensation in terms of the Act – Single Judge of the High Court was conscious of the fact that these workmen failed to avail the VRS within the stipulated time and also did not retire from the service – However, the workmen cannot be compelled to join the transferee company against their wish/consent and all along workers had been fighting for their cause in various forums – Also the Single Judge had passed the said order after hearing all the parties in the nature of mandatory directions to the Management – Thus, the Single Judge was justified in passing the order –Management directed to comply with the directions issued by the Single Judge of the High Court.

P.I. Company introduced Voluntary Retirement Scheme (VRS) for its workmen in the year 1997. The next year, the Company informed the workers about the transfer of ownership of its factory to 'K' Company. Appellant-workers filed an application under Section 10(2) of the Industrial Disputes Act for referring the disputes for adjudication but the Labour Department, Government of West Bengal refused to refer the same. The appellant-workers asked for VRS from P.I. Company alleging that they did not wish to join the new employer but the request was turned down by the Company on the ground that the VRS had lapsed in 1998. The appellant-workers filed a writ petition before the High Court challenging the refusal to refer and seeking direction for payment of VRS. The Single Judge of the High Court by order dated 08.10.2001 disposed of the writ petition with a direction to the respondent-Management for payment of retirement and retrenchment benefits to the workers. The appellant-workers filed a contempt application alleging violation of the order dated 08.10.2001 and the same was dismissed. The appeal filed by the appellant-workers before the Division Bench of the High Court was also dismissed. Therefore, the appellants filed the instant appeals.

Allowing the appeals, the Court

HELD: 1.1 Inasmuch as while rejecting the challenge made to refer the matter for adjudication before the Labour Court/Tribunal, the Single Judge, in order to protect and safeguard the interests of the workmen, issued such directions taking note of various aspects including several safeguards provided in the Act and also the payment of compensation in case of transfer of an undertaking. No doubt, the Management raised an objection that these workmen neither availed the VRS within the stipulated time nor retired/retrenched from the service due to the transfer of ownership of the Company.

It is true that the appellants-workers did not avail both the conditions. But at the same time, it cannot be disputed that these workmen resorted to several remedies such as filing a suit, making representation to the Management as well as to the officers of the Labour Department for consultation and consideration and finally to the Government for referring the matter to the Labour Court/ Tribunal for adjudication. After several attempts, these workmen filed a writ petition before the High Court. The Single Judge of the High Court took note of proposal for transfer between the respondents and Workers' Union and all other subsequent events including the fact that the Company launched VRS to its employees who did not opt to 'K' Company. After noting that the dispute was sought to be raised but the appropriate government declined to refer the same, the Single Judge, after considering the rival contentions of the workmen and the Management, declined to interfere with the impugned order therein and dismissed the same. However, the Single Judge, taking note of the fact that the workmen did not give their consent for change of management, issued a positive direction about the settlement of retirement benefits with effect from the date of approval of the undertaking to 'K' Company and directed the Company to pay all such retirement benefits payable to the employees as per normal rules and conditions of service including the retrenchment benefits within six months. The said order was passed as early as on 08.10.2001 and has become final since neither the Management nor the Government challenged the same before the Division Bench of the High Court or in this Court. [Paras 8 and 9] [244-E-F; 245-A-E]

1.2 Without consent, the workmen cannot be forced to work under different management and in that event, those workmen are entitled to retirement/retrenchment compensation in terms of the Act. In view of the same,

the workmen are entitled to the benefit of such direction and it is the obligation on the part of the Management, to comply with the same. The Single Judge was conscious of the fact that these workmen failed to avail the VRS within the stipulated time and also did not retire from the service. However, taking note of the fact that the workmen cannot be compelled to join the transferee company against their wish and without their consent and all along fighting for their cause in various forums such as civil court, Labour Court, the Government and the High Court and even in this Court, Single Judge was fully justified in passing such order. [Para 10] [245-F-H; 246-A-B]

1.3 A perusal of the directions passed by the Single Judge leaves no room for doubt that a mandatory duty was cast upon respondent Nos. 1 and 2 to comply with the same. In such circumstances, it is highly improper on the part of the Management now to turn around and to contend that since the appellants-workmen had neither been retired nor resigned nor retrenched from service, as such, there is no question of any payment or to comply with the directions passed by the Single Judge. [Para 11] [246-B-C]

1.4 The entire genesis of the contempt application pertains to violation of order dated 08.10.2001 passed by the Single Judge of the High Court. The said order was passed by the Single Judge after hearing all the parties in the nature of mandatory directions to respondent Nos. 1 and 2. The High Court in the impugned order, instead of dismissing the contempt application ought to have directed the respondents to implement the order dated 08.10.2001 passed by the Single Judge. [Para 12] [246-D-E]

1.5 The appellants-workmen have made out a case for interference by this Court. Thus, the respondent are

directed to comply with the directions made by the Single Judge, within the stipulated period. [Para 13] [246-F-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9921-9922 of 2011.

From the Judgment & Order dated 25.08.2008 of the High Court at Calcutta in M.A.T. No. 519 of 2008 and order dated 20.06.2008 of the Contemt Court in C.P.A.N. No 539 of 2002.

Collin Gonsalves, Hiren Dasan, Dhirendra Kr. Mishra, Suvendu S. Dash, Sarla Chadra for the Appellants.

Jay Savla, S. Singh, Renuka Sahu, Rameshwar Prasad Goyal, M.V. Deshmukh, Srikanth R. Deshmukh for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. These appeals are directed against the final judgments and orders dated 20.06.2008 and 25.08.2008 passed by the High Court at Calcutta in CPAN No. 539 of 2002 and MAT No. 519 of 2008 respectively whereby the High Court dismissed the contempt application and the appeal filed by the appellants herein - employees/workers of Philips India Ltd.

3. **Brief facts:**

(a) The appellants are the employees/workers of Philips India Ltd. (in short 'the Company') having its Registered office at No. 7, Justice Chandra Madhab Road, Calcutta and its Consumer Electronics Factory at Salt Lake City, Calcutta. In the year 1997, the Company introduced Voluntary Retirement Scheme (in short "VRS") for its workmen and majority of them opted for and accepted the same. On 30.09.1998, the Company entered into an Agreement for Sale of its Consumer Electronics Factory at Salt Lake City with Kitchen Appliances

India Limited, a subsidiary of Videocon International Ltd. as a going concern together with all assets and liabilities. Vide letter dated 12.10.1998, the Company informed the Secretary of Workers' Union about having signed the agreement and also withdrew the Voluntary Retirement Scheme (VRS) launched in the year 1997. For effecting transfer, the Company circulated a Notice for Extra-ordinary General Meeting of its share holders and circulated a Proposed Resolution under Section 293 of the Companies Act, 1956. On 16.11.1998, the Workers' Union filed an application under Section 10(2) of the Industrial Disputes Act, 1947 (in short 'the Act') for referring the dispute to Court of Enquiry, Labour Court/Tribunal.

(b) On 01.12.1998, a Suit being Civil Suit No. 483 of 1998 was instituted in the High Court at Calcutta by two Employees' Unions in representative capacity against the proposed resolution to be passed at the extra-ordinary general meeting of the Company. Vide order dated 16.03.1999, the learned single Judge of the High Court passed an order of injunction restraining the Company from giving effect to the said Resolution and to the Agreement for Sale dated 30.09.1998. Being aggrieved by the order of the learned single Judge, the Company filed an appeal being APO No. 230 of 1999 before the Division Bench of the High Court. Vide order dated 13.09.1999, the Division Bench allowed the appeal filed by the Company. Thereafter, employees' unions filed SLP (C) No. 14274 of 1999 before this Court which was dismissed by this Court on 15.10.1999. Against the same, Review Petition No. 1585 of 1999 was filed which was also dismissed.

(c) *On 22.12.1999, both the Company and Kitchen Appliances India Ltd. issued a notice informing the employees that consequent upon transfer of ownership of the Consumer Electronics Factory, the employment of all the workmen has been taken over by the Kitchen Appliances India Ltd with immediate effect and their services will be treated as continuous and not interrupted by the transfer of ownership and the terms and conditions of services will not*

be in any way less favourable than those applicable immediately prior to the transfer of ownership. Workers' Union filed two title suits being T.S. Nos. 788 and 795 of 1999, inter alia*, praying for declaration and permanent injunction restraining the Company from giving effect to notice dated 22.12.1999. On 29.12.1999, the Workers' Union addressed a letter to the Company submitting their strong protest against the transfer and also stating that the Company has been restrained to give effect to the said notice in view of order dated 23.12.1999 passed by the Civil Judge (Junior Division) at Sealdah in Title Suit No. 795 of 1999.*

(d) *Workers' Union filed Writ Petition No. 2275 of 1999 before the High Court for early disposal of workers' application for a reference. Vide order dated 19.09.2000, the writ petition was disposed off with a direction to the Labour Commissioner to pass necessary order either in terms of Sections 12(4) or 12(5) of the Act. On 13.12.2000, Labour Department, Government of West Bengal refused to refer the dispute for adjudication by observing that the interests of the workmen are in no way affected due to transfer of ownership. Aggrieved by the said decision, the Workers filed a Writ Petition being No. 12125 of 2001 before the High Court. Vide order dated 08.10.2001, the writ petition was disposed off with a direction to pay retirement/retrenchment benefits to the workers. Contempt Application being No. 539 of 2002 was filed by the workers,* inter alia*, alleging violation of the order dated 08.10.2001 which was dismissed by the single Judge of the High Court on 20.06.2008. On 21.07.2008, the workers filed MAT No. 519 of 2008 before the Division Bench of the High Court which was also dismissed vide order dated 25.08.2008.*

(e) Being aggrieved, the Workers' Unions have filed these appeals before this Court by way of special leave petitions.

4. Heard Mr. Colin Gonsalves, learned senior counsel for the appellants-workers and Mr. Jay Savla, learned counsel for respondent Nos. 1 & 2 –Management.

5. The point for consideration in these appeals is whether the workmen are entitled to the benefit of the order dated 08.10.2001 passed by the learned single Judge of the High Court, particularly, in the absence of any appeal or challenge before the higher forum by the Management?

6. It is the specific case of the appellants-workmen that when the Company informed the workmen about the transfer of ownership of Consumer Electronics Factory at Salt Lake City, to Kitchen Appliances India Ltd., the said move was not acceptable by the appellants-workers and they refused to give their consent. According to the materials placed on record, on 16.11.1998, the Workers' Union filed an application under Section 10(2) of the Act for referring the dispute to Court of Enquiry/Labour Court/Tribunal and on 22.12.1999, the undertaking of the respondent-Management was transferred to Kitchen Appliances India Ltd. Pursuant to the said transfer, 311 employees joined the transferee company and 35 did not agree to join the new employer. On 29.12.1999, on behalf of the declined employees, their Union raised a dispute regarding transfer of ownership of the Company without their consent as illegal. Even on 13.12.2000, Labour Department, Government of West Bengal declined the reference. On 06.03.2001, the workers asked for VRS from Philips India Ltd. alleging that they do not wish to join the new employer and when the same request was turned down by the Company on the ground that the VRS lapsed even in October, 1998, challenging the refusal to refer and seeking direction for payment of VRS, the workers filed petition being Writ Petition No. 12125 of 2001 before the High Court.

7. On 08.10.2001, the learned single Judge of the High Court disposed of the writ petition with a direction to the respondent-Management for payment of retirement and retrenchment benefits to the workers. Inasmuch as the workers very much relied on the order of the learned single Judge dated 08.10.2001, it is useful to refer to the directions made therein. While declining to interfere with the order of rejection made for

reference, the learned single Judge of the High Court issued the following directions:

> "However, the petitioners shall be entitled to all retirement benefits with effect from the date of approval of the undertaking to Kitchen Appliances Ltd. and Philips India Limited shall pay all such retirement benefits payable to the employees within six months from this date. Such benefits will be given as per normal Rules and conditions of service including the retrenchment benefit. Such benefits shall be available to the employees upto the date of approval.
>
> With the aforesaid observations, this writ application is disposed of."

8. It is not in dispute that the order was passed by the learned single Judge on 08.10.2001 after hearing the counsel for the petitioners therein (Workers) and the respondent therein (Management) including the Government counsel. It is also not in dispute that the said order has become final since neither the Management nor the Government challenged the same before the Division Bench of the High Court or in this Court.

9. Now, let us consider whether the said order dated 08.10.2001 is acceptable or not. Inasmuch as while rejecting the challenge made to refer the matter for adjudication before the Labour Court/Tribunal, the learned single Judge, in order to protect and safeguard the interests of the workmen, issued such directions taking note of various aspects including several safeguards provided in the Act and also the payment of compensation in case of transfer of an undertaking. No doubt, the Management raised an objection that these workmen neither availed the VRS within the stipulated time nor retired/retrenched from the service due to the transfer of ownership of the Company. It is true that the appellants-workers did not avail both the conditions. But at the same time, it is not in dispute and it cannot be disputed that these workmen resorted to several remedies such as filing a suit, making representation

to the Management as well as to the officers of the Labour Department for consultation and consideration and finally to the Government for referring the matter to the Labour Court/Tribunal for adjudication. After several attempts, these workmen filed Writ Petition before the High Court. The learned single Judge of the High Court has taken note of proposal for transfer between Philips India Ltd. and Workers' Union and all other subsequent events including the fact that the Company launched VRS to its employees who did not opt to Kitchen Appliances India Ltd. After noting that the dispute was sought to be raised but the appropriate government declined to refer the same, the learned single Judge, after considering the rival contentions of the workmen and the Management, declined to interfere with the impugned order therein and dismissed the same. However, the learned single Judge, taking note of the fact that the workmen did not give their consent for change of management, issued a positive direction about the settlement of retirement benefits with effect from the date of approval of the undertaking to Kitchen Appliances Ltd. and directed the Company to pay all such retirement benefits payable to the employees as per normal rules and conditions of service including the retrenchment benefits within six months. We have already referred to the admitted fact that the said order was passed as early as on 08.10.2001 and has become final.

10. It is settled law that without consent, workmen cannot be forced to work under different management and in that event, those workmen are entitled to retirement/retrenchment compensation in terms of the Act. In view of the same, we are of the view that the workmen are entitled to the benefit of such direction and it is the obligation on the part of the Management-Philips India Ltd., to comply with the same. We are also satisfied that the learned single Judge was conscious of the fact that these workmen failed to avail the VRS within the stipulated time and also did not retire from the service. However, taking note of the fact that the workmen cannot be compelled to join the transferee company against their wish and

without their consent and all along fighting for their cause in various forums such as Civil Court, Labour Court, the Government and the High Court and even in this Court, we are of the view that the learned single Judge was fully justified in passing such order.

11. A perusal of the directions passed by the learned single Judge leaves no room for doubt that a mandatory duty was cast upon respondent Nos. 1 & 2 to comply with the same. In such circumstances, it is highly improper on the part of the Management now to turn around and to contend that since the appellants-workmen had neither been retired nor resigned nor retrenched from service, as such, there is no question of any payment or to comply with the directions passed by the learned single Judge.

12. The entire genesis of the contempt application pertains to violation of order dated 08.10.2001 passed by the learned single Judge of the High Court. We are satisfied that the said order was passed by the learned single Judge after hearing all the parties in the nature of mandatory directions to respondent Nos. 1 & 2. The High Court, in the impugned order, instead of dismissing the contempt application ought to have directed the respondents to implement the order dated 08.10.2001 passed by the learned single Judge.

13. In view of the above, we are satisfied that the appellants-workmen have made out a case for interference by this Court. Accordingly, we direct the respondent-Philips India Ltd. to comply with the directions made by the learned single Judge vide order dated 08.10.2001, which we have quoted in earlier paragraphs, within a period of three months from the date of the receipt of this judgment.

14. The civil appeals are allowed on the above terms. No order as to costs.

N.J. Appeals allowed.

SHIV SHANKAR SINGH
v.
STATE OF BIHAR & ANR.
(Criminal Appeal No. 2160 of 2011)

NOVEMBER 22, 2011

[DR. B.S. CHAUHAN AND T.S. THAKUR, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

Chapter XV – Second protest petition – Maintainability of – Magistrate taking cognizance and issuing summons – Held: The protest petition can always be treated as a complaint and proceeded with in terms of Chapter XV of Cr.P.C. – Therefore, in case there is no bar to entertain a second complaint, in exceptional circumstances, the second protest petition can also similarly be entertained — In the instant case, the High Court without taking note of the evidence referred to by the Magistrate, set aside his order on a technical ground that the second protest petition was not maintainable, without considering the fact that the first protest petition having been filed prior to filing of the Final Report was not competent – More so, the High Court without any justification made sweeping remarks against the Magistrate which remain unjustified and unwarranted in the facts and circumstances of the case – The order of the High Court is set aside and that of the Magistrate restored – Strictures.

F.I.R.

Two FIRs in respect of the same incident – Held: Filing of another FIR in respect of the same incident having a different version of events is permissible.

Two FIRs were registered in respect of an incident in which one 'GS', the nephew of the appellant, died in

the night of 6.12.2004 – one was lodged by the appellant on the same night stating that a dacoity was committed in his house and in the house of his brother, namely, 'KS', by respondent no. 2 and others wherein lots of valuable properties were looted and 'GS' was killed by the dacoits; and the another FIR was registered on 29.12.2004 consequent upon a case filed by 'KS', the father of the deceased, u/s 156 (3) of the Code of Criminal Procedure, 1973, stating that the appellant and his associates had killed 'GS', as the accused wanted to grab the immovable property. The appellant filed a Protest Petition on 4.4.2005, but no orders were passed thereon. The investigation in the FIR dated 6.12.2004 resulted in a Final Report u/s 173 Cr.P.C filed by the police on 9.4.2005 to the effect that the case was totally false and 'GS' had been killed for property disputes. In regard to the other FIR, the police, after completing the investigation, filed a charge-sheet for offences punishable u/ss 302, 302/34, 506 IPC etc. on 29.8.2005 against the appellant and others. However, the trial stood concluded in favour of the accused persons therein. On 22.9.2005, the appellant filed a second Protest Petition in respect of the Final Report dated 9.4.2005. The Magistrate, by order dated 2.8.2008, took cognizance and issued summons to respondent no. 2 and others. The criminal petition filed by respondent no. 2 for quashing the order dated 2.8.2008 was allowed by the High Court on the ground that the second Protest Petition was not maintainable and the appellant ought to have pursued the first Protest Petition dated 4.4.2005.

Allowing the appeal, the Court

HELD: 1. Law does not prohibit registration and investigation of two FIRs in respect of the same incident in case the versions are different. The test of sameness has to be applied, otherwise there would not be cross cases and counter cases. Thus, filing another FIR in

respect of the same incident having a different version of events is permissible. [para 6] [255-A-C]

Ram Lal Narang v. State (Delhi Admn.), **AIR 1979 SC 1791;** *Sudhir & Ors., v. State of M.P.*, **2001 (1) SCR 813 = AIR 2001 SC 826;** *T.T. Antony v. State of Kerala & Ors.*, **2001 (3) SCR 942 = AIR 2001 SC 2637;** *Upkar Singh v. Ved Prakash & Ors*., **AIR 2004 SC 4320; and** *Babubhai v. State of Gujarat & Ors*., **2010 (10) SCR 651 = (2010) 12 SCC 254 – relied on**

Joy Krishna Chakraborty & Ors. v. The State & Anr., **1980 Crl. L.J. 482 – distinguished.**

2.1 An informant is the person interested in the result of the investigation. In case the Magistrate takes a view that there is no sufficient ground for proceeding further and drops the proceedings, the informant would certainly be prejudiced and, therefore, he has a right to be heard. [para 9] [256-B-C]

Bhagwant Singh vs. Commissioner of Police & Anr. **AIR 1985 SC 1285 –** ***relied on*****.**

2.2 From the decisions of this Court, it is evident that the law does not prohibit filing or entertaining of the second complaint even on the same facts provided the earlier complaint has been decided on the basis of insufficient material or the order has been passed without understanding the nature of the complaint or the complete facts could not be placed before the court or where the complainant came to know certain facts after disposal of the first complaint which could have tilted the balance in his favour. However, second complaint would not be maintainable wherein the earlier complaint has been disposed of on full consideration of the case of the complainant on merit. [para 13] [257-F-G]

Bindeshwari Prasad Singh v. Kali Singh, **1977 (1) SCR 125 = AIR 1977 SC 2432,** *Bhagwant Singh vs. Commissioner of Police & Anr.* **AIR 1985 SC 1285 ;** *Pramatha Nath Talukdar v. Saroj Ranjan Sarkar*, **1962 Suppl. SCR 297 = AIR 1962 SC 876 ;** *Mahesh Chand v. B. Janardhan Reddy & Anr.,* **2002 (4) Suppl. SCR 566 = AIR 2003 SC 702,** *Poonam Chand Jain & Anr v. Fazru*, **2004 (5) Suppl. SCR 525 = AIR 2005 SC 38,** *Jatinder Singh & Ors. v. Ranjit Kaur,* **2001 (1) SCR 707 = AIR 2001 SC 784;** *Ranvir Singh v. State of Haryana,* **(2009) 9 SCC 642**

2.3 The Protest Petition can always be treated as a complaint and proceeded with in terms of Chapter XV of Cr.P.C. Therefore, in case there is no bar to entertain a second complaint on the same facts, in exceptional circumstances, the second Protest Petition can also similarly be entertained only under exceptional circumstances. In case the first Protest Petition has been filed without furnishing the full facts/particulars necessary to decide the case, and prior to its entertainment by the court, a fresh Protest Petition is filed giving full details, the same cannot be said to be not maintainable. [para 14] [258-A-B]

2.4 Order dated 2.8.2008 passed by the Magistrate is based on the depositions made by the appellant and a very large number of witnesses. More so, the record of the Sessions Trial No. 866 of 2005, wherein the appellant himself has been put to trial was also summoned and examined by the Magistrate. The Magistrate held that there was material on record to proceed against the accused and a prima-facie case u/s 395 IPC was made out against all the accused persons of the case. He, therefore, directed to issue summons. But, the High Court without taking note of the said evidence, set a side the order of the Magistrate on a technical ground that the second Protest Petition was not maintainable, without

considering the fact that the first Protest Petition having been filed prior to filing of the Final Report, was not competent. More so, the High Court without any justification made certain remarks. There was no occasion for the High Court to make such sweeping remarks against the Magistrate and the same remain unjustified and unwarranted in the facts and circumstances of the case. The order of the High Court is set aside and that of the Magistrate restored. [para 14 & 16] [258-A-H; 259-A-C]

Case Law Reference:

1980 Crl. L.J. 482	**distinguished**	**para 3**
AIR 1979 SC 1791	**relied on**	**para 6**
2001 (1) SCR 813	**relied on**	**para 6**
2001 (3) SCR 942	**relied on**	**para 6**
AIR 2004 SC 4320	**relied on**	**para 6**
2010 (10) SCR 651	**relied on**	**para 6**
AIR 1985 SC 1285	**relied on**	**para 9**
1977 (1) SCR 125	**relied on**	**para 10**
1962 Suppl. SCR 297	**relied on**	**para 10**
2002 (4) Suppl. SCR 566	**relied on**	**para 11**
2004 (5) Suppl. SCR 525	**relied on**	**para 11**
2001 (1) SCR 707	**relied on**	**para 12**
(2009) 9 SCC 642	**relied on**	**para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2160 of 2011.

From the Judgment & Order dated 06.05.2009 of the High Court of Judicature at Patna in Cr. Misc. No. 36335 of 2008.

Gaurav Agrawal for the Appellant.

Awanish Singh, Gopal Singh, Ravi Bhushan for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the judgment and order dated 6.5.2009 passed by the High Court of Judicature at Patna in Criminal Miscellaneous No. 36335 of 2008, by which the cognizance taken by the Magistrate vide order dated 2.8.2008 against the respondent no.2 under Section 395 of the Indian Penal Code, 1860 (hereinafter called 'IPC') has been quashed.

2. Facts and circumstances giving rise to this case are that:

A. A dacoity was committed in the house of present appellant Shivshankar Singh and his brother Kameshwar Singh on 6.12.2004 wherein Gopal Singh son of Kameshwar Singh was killed by the dacoits and lots of valuable properties were looted. The police reached the place of occurrence at about 3.00 AM i.e. about 2 hours after the occurrence. An FIR No. 147/2004 dated 6.12.2004 was lodged by the appellant namely Ramakant Singh and Anand Kumar Singh alongwith 15 other persons under Sections 396/398 IPC.

B. However, Kameshwar Singh, the real brother of the appellant and father of Gopal Singh, the deceased, approached the court by filing a case under Section 156 (3) of the Code of Criminal Procedure, 1973, (hereinafter called 'Cr.P.C.'). Appropriate orders were passed therein in pursuance of which FIR No. 151/2004 was lodged on 29.12.2004 in respect of the same incident with the allegations that the present appellant, Bhola Singh, son of the second complainant and Shankar Thakur, the maternal uncle of Bhola Singh had killed Gopal Singh as the accused wanted to grab the immovable property.

C. Investigation in pursuance of both the reports ensued. When the investigation in pursuance of both the FIRs was pending, the appellant filed Protest Petition on 4.4.2005, but did not pursue the matter further. The court did not pass any order on the said petition. After completing investigation in the Report dated 6.12.2004, the police filed Final Report under Section 173 Cr.P.C. on 9.4.2005 to the effect that the case was totally false and Gopal Singh had been killed for property disputes.

D. After investigating the other FIR filed by Kameshwar Singh, father of the deceased, charge-sheet was filed under Sections 302, 302/34, 506 IPC etc. on 29.8.2005 against the appellant, Bhola Singh, son of complainant and others. The matter stood concluded after trial in favour of the accused persons therein.

E. It was on 22.9.2005, the appellant filed a second Protest Petition in respect of the Final Report dated 9.4.2005. After considering the same and examining a very large number of witnesses, the Magistrate took cognizance and issued summons to respondent Anand Kumar Singh and others vide order dated 2.8.2008.

F. Being aggrieved, the respondent Anand Kumar Singh filed Criminal Miscellaneous No. 36335 of 2008 for quashing the order dated 2.8.2008 which has been allowed by the High Court on the ground that second Protest Petition was not maintainable and the appellant ought to have pursued the first Protest Petition dated 4.4.2005.

Hence, this appeal.

3. Shri Gaurav Agrawal, learned counsel appearing for the appellant has submitted that the High Court failed to appreciate that the so-called first Protest Petition having been filed prior to filing the Final Report was not maintainable and just has to be ignored. The learned Magistrate rightly did not proceed on

the basis of the said Protest Petition and it remained merely a document in the file. The second petition was the only Protest Petition which could be entertained as it had been filed subsequent to filing the Final Report. The High Court further committed an error observing that the Magistrate's order of summoning the respondent No.1 was vague and it was not clear as in which Protest Petition the order had been passed. More so, the facts of the case in *Joy Krishna Chakraborty & Ors. v. The State & Anr.,* 1980 Crl. L.J. 482, decided by the Division Bench of the Calcutta High Court and solely relied by the High Court were distinguishable as in the said case the first Protest Petition had been entertained by the Magistrate and an order had been passed. Protest Petition is to be treated as a complaint and the law does not prohibit filing and entertaining of second complaint even on the same facts in certain circumstances. Thus, the judgment and order impugned is liable to be set aside.

4. On the contrary, Shri Awanish Sinha and Shri Gopal Singh, learned counsel appearing for the respondents have vehemently opposed the appeal contending that the second petition was not maintainable and the appellant ought to have pursued the first Protest Petition. The High Court has rightly observed that the order of the Magistrate summoning the respondent No.1 and others was totally vague. Even otherwise, as the appellant himself had faced the criminal trial in respect of the same incident, he cannot be held to be a competent/ eligible person to file the Protest Petition. He had purposely lodged the false FIR promptly after committing the offence himself. Therefore, the facts of the case do not warrant any interference by this court and the appeal is liable to be dismissed.

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

6. We do not find any force in the submission made on behalf of the respondents that as in respect of same incident

i.e. dacoity and murder of Gopal Singh, the appellant himself alongwith others is facing criminal trial, proceedings cannot be initiated against the respondent No.1 at his behest as registration of two FIRs in respect of the same incident is not permissible in law, for the simple reason that law does not prohibit registration and investigation of two FIRs in respect of the same incident in case the versions are different. The test of sameness has to be applied otherwise there would not be cross cases and counter cases. Thus, filing another FIR in respect of the same incident having a different version of events is permissible. (Vide: *Ram Lal Narang v. State* (Delhi Admn.), AIR 1979 SC 1791; *Sudhir & Ors., v. State of M.P.,* AIR 2001 SC 826; *T.T. Antony v. State of Kerala & Ors.,* AIR 2001 SC 2637; *Upkar Singh v. Ved Prakash & Ors.,* AIR 2004 SC 4320; and *Babubhai v. State of Gujarat & Ors.,* (2010) 12 SCC 254).

7. Undoubtedly, the High Court has placed a very heavy reliance on the judgment of the Calcutta High Court in *Joy Krishna Chakraborty & Ors.* (supra), wherein the Protest Petition dated 19.3.1976 was entertained by the Magistrate issuing direction to the Officer-in-Charge of the Khanakul Police Station under Section 156(3) Cr.P.C. to make the investigation and submit the report to the court concerned by 10.4.1976. The Officer-in-Charge of the said police station did not carry out any investigation on the ground that the incident had occurred outside the territorial jurisdiction of the said police station. The second Protest Petition filed by the same complainant on 23.3.1976 was entertained by the learned Magistrate. In fact, it was in this factual backdrop that the Calcutta High Court held that the matter could have been proceeded with on the basis of the first Protest Petition itself by the Magistrate and second Protest Petition could not have been entertained.

8. The facts of the present case are completely distinguishable. Therefore, the ratio of the said judgment has no application in the facts of this case.

9. In *Bhagwant Singh v. Commissioner of Police & Anr.,*

AIR 1985 SC 1285, this Court dealt with an issue elaborately entertaining the writ petition and accepting the submission in regard to acceptance of the Final Report to the extent that if no case was made out by the Magistrate, it would be violative of principles of natural justice of the complainant and therefore before the Magistrate drops the proceedings the informant is required to be given hearing as the informant must know what is the result of the investigation initiated on the basis of first FIR. He is the person interested in the result of the investigation. Thus, in case the Magistrate takes a view that there is no sufficient ground for proceeding further and drops the proceedings, the informant would certainly be prejudiced and therefore, he has a right to be heard.

10. In *Bindeshwari Prasad Singh v. Kali Singh,* AIR 1977 SC 2432, this Court held that the second complaint lies if there are some new facts or even on the previous facts if the special case is made out.

Similarly, in *Pramatha Nath Talukdar v. Saroj Ranjan Sarkar,* AIR 1962 SC 876, this Court has held as under:

> "An order of dismissal under Section 203 of the Criminal Procedure Code, is, however, no bar to the entertainment of a second complaint on the same facts but it will be entertained only in exceptional circumstances e.g. where the previous order was passed on an incomplete record or on a misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish or where new facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings, have been adduced. It cannot be said to be in the interest of justice that after a decision has been given against the complainant upon a full consideration of his case, he or any other person should be given another opportunity to have his complaint enquired into."

11. After considering the aforesaid judgment along with

various other judgments of this Court, in *Mahesh Chand v. B. Janardhan Reddy & Anr.,* AIR 2003 SC 702, this Court held as under:

> "..It is settled law that there is no statutory bar in filing a second complaint on the same facts. In a case where a previous complaint is dismissed without assigning any reasons, the Magistrate under Section 204 CrPC may take cognizance of an offence and issue process if there is sufficient ground for proceeding…."

In *Poonam Chand Jain & Anr v. Fazru,* AIR 2005 SC 38, a similar view has been re-iterated by this Court.

12. In *Jatinder Singh & Ors. v. Ranjit Kaur,* AIR 2001 SC 784, this Court held that dismissal of a complaint on the ground of default was no bar for a fresh Complaint being filed on the same facts.

Similarly in *Ranvir Singh v. State of Haryana,* (2009) 9 SCC 642, this Court examined the issue in the backdrop of facts that the complaint had been dismissed for the failure of the complainant to put in the process fees for effecting service and held that in such a fact- situation second complaint was maintainable.

13. Thus, it is evident that the law does not prohibit filing or entertaining of the second complaint even on the same facts provided the earlier complaint has been decided on the basis of insufficient material or the order has been passed without understanding the nature of the complaint or the complete facts could not be placed before the court or where the complainant came to know certain facts after disposal of the first complaint which could have tilted the balance in his favour. However, second complaint would not be maintainable wherein the earlier complaint has been disposed of on full consideration of the case of the complainant on merit.

14. The Protest Petition can always be treated as a complaint and proceeded with in terms of Chapter XV of Cr.P.C. Therefore, in case there is no bar to entertain a second complaint on the same facts, in exceptional circumstances, the second Protest Petition can also similarly be entertained only under exceptional circumstances. In case the first Protest Petition has been filed without furnishing the full facts/particulars necessary to decide the case, and prior to its entertainment by the court, a fresh Protest Petition is filed giving full details, we fail to understand as to why it should not be maintainable.

15. The instant case is required to be decided in the light of the aforesaid settled legal propositions.

Order dated 2.8.2008 passed by the Magistrate concerned is based on the depositions made by the appellant-Shivshankar Singh, and a very large number of witnesses, namely, Sonu Kumar Singh, Suman Devi, Nirmala Devi, Ganesh Kumar, Udai Kumar Ravi, Ram Achal Singh, Jateshwar Acharya, Neeraj Kumar Singh, Krishna Devi and Dr. Narendra Kumar. More so, the record of the Sessions Trial No. 866 of 2005, wherein the appellant himself has been put to trial was also summoned and examined by the learned Magistrate. Thus, the Magistrate further took note of the fact that for the same incident, trial was pending in another court. After appreciating the evidence of the complainant and other witnesses deposed in the enquiry, the learned Magistrate passed the following order :

> "On the basis of aforesaid discussion, I find that there are materials available on the record to proceed against the accused person. A prima-facie case under Section 395 IPC has been made out against all the accused person of this case. O/c is directed to issue summons on filing of the requisite. Put up the record on 13.8.2008 for filing of the requisites."

16. The High Court without taking note of the aforesaid

evidence set side the order of the Magistrate on a technical ground that the second Protest Petition was not maintainable without considering the fact that the first Protest Petition having been filed prior to filing of the Final Report was not competent. More so, the High Court without any justification made the following remarks:

> "The Court can only record that the learned Judicial Magistrate has not conducted himself in a fair manner because he has intentionally left the impugned order vague as to which protest petition he was acting upon, so that advantage may accrue to Opposite Party No.2."

17. In our opinion, there was no occasion for the High Court to make such sweeping remarks against the Magistrate and the same remain unjustified and unwarranted in the facts and circumstances of the case.

18. In view of the above, the appeal succeeds and is allowed. The order impugned of the High Court is set aside and the order of the Magistrate is restored. Respondent No.1 is directed to appear before the Magistrate on 1.12.2011 and the learned Magistrate is requested to proceed in accordance with law. However, we clarify that any observation made in this judgment shall not adversely prejudice the cause of the respondent to seek any further relief permissible in law as the said observations have been made only to decide the controversy involved herein.

R.P. Appeal allowed.

DINESH KUMAR

v.

CHAIRMAN, AIRPORT AUTHORITY OF INDIA AND ANR.

(Criminal Appeal Nos. 2170-2171 of 2011)

NOVEMBER 22, 2011

[R.M. LODHA AND H.L. GOKHALE, JJ.]

Prevention of Corruption Act, 1988:

s.19 – Sanction for prosecution – Significance and importance of – Held: The sanction is not an empty formality but a sacrosanct act which affords protection to government servants against frivolous prosecutions – Validity of sanction order depends upon the material placed before the sanctioning authority – Where sanction order exists but its validity and legality is put in question, such issue has to be raised in the course of trial – In the instant case, cognizance was already taken against the appellants by the trial court – High Court while considering challenge to the sanction order, therefore, rightly held that it was open to the appellant to question the validity of the sanction order during trial on all possible grounds.

The appellant was prosecuted for the offences punishable under Section 13(2) read with Section 13(1)(d) and 13(1)(a) of the Prevention of Corruption Act, 1988. The sanctioning authority granted sanction to prosecute the appellant for these offences. After the sanction order was challenged by the appellant in the High Court, the charge-sheet was filed by the CBI-respondent no.2 against the appellant in the Court of Special Judge. The summons were issued to the appellant. During the pendency of the matter before the High Court, wherein the sanction order was challenged by the appellant, the Court of Special Judge took cognizance against the appellant. The

appellant filed a writ petition before the High Court. The Single Judge of the High Court dismissed the writ petition. The Division Bench of the High Court dismissed the intra-court appeal observing that it was open to the appellant to question the validity of the sanction order during trial on all possible grounds and the CBI could also justify the order of granting sanction before the Trial Judge. The instants appeal were filed challenging the order of the High Court.

Dismissing the appeals, the Court

HELD: 1. This Court has in ****Mansukhlal Vithaldas Chauhan* **considered the significance and importance of sanction under the Prevention of Corruption Act, 1988. It was observed therein that the sanction is not intended to be, nor is an empty formality but a solemn and sacrosanct act which affords protection to government servants against frivolous prosecutions and it is a weapon to ensure discouragement of frivolous and vexatious prosecution and is a safeguard for the innocent but not a shield for the guilty. This Court highlighted that validity of a sanction order would depend upon the material placed before the sanctioning authority and the consideration of the material implies application of mind. While drawing a distinction between the absence of sanction and invalidity of the sanction, this Court in *****Parkash Singh Badal* **expressed in no uncertain terms that the absence of sanction could be raised at the inception and threshold by an aggrieved person. However, where sanction order exists, but its legality and validity is put in question, such issue has to be raised in the course of trial. [Paras 9-11] [265-B-D; 266-A-E]**

Mansukhlal Vithaldas Chauhan vs. State of Gujarat* **(1997) 7 SCC 622: 1997 (3) Suppl. SCR 705; ***Parkash Singh Badal and another vs. State of Punjab and others* **(2007) 1 SCC 1: 2006 (10) Suppl. SCR 197 – relied on.**

2. Having regard to the facts of the instant case, since cognizance was already taken against the appellant by the trial court, the High Court did not commit any error in leaving the question of validity of sanction open for consideration by the trial court and giving liberty to the appellant to raise the issue concerning validity of sanction order in the course of trial. Such course was in accord with the decision of this Court in *****Parkash Singh Badal* **and not unjustified. The impugned order did not call for any interference. However, it is left open to the appellant to raise the issue of invalidity of sanction order before the trial court. In the peculiar facts and circumstances of the case, appellant is permitted to appear before the trial court through his advocate. His personal appearance shall not be insisted upon by the trial court except when necessary. [Para 13, 16] [267-C, G]

Pepsi Foods Ltd. and Anr. v. Special Judicial Magistrate and Ors. **1998(5) SCC 749: 1997 (5) Suppl. SCR 12;** *Abdul Wahab Ansari vs. State of Bhar and another* **(2000) 8 SCC 500: 2000 (3) Suppl. SCR 747:** *State of Karnataka vs. Ameerjan* **(2007) 11 SCC 273: 2007 (9) SCR 1105;** *Ashok Tshering Bhutia vs. State of Sikkim* **(2011) 4 SCC 402 – referred to.**

Case Law Reference:

1997 (3) Suppl. SCR 705	**relied on**	**Para 6**
1997 (5) Suppl. SCR 12	**referred to**	**Para 6**
2000 (3) Suppl. SCR 747	**referred to**	**Para 6**
2007 (9) SCR 1105	**referred to**	**Para 6**
(2011) 4 SCC 402	**relied on**	**Para 8**
2006 (10) Suppl. SCR 197	**referred to**	**Para 8**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2170-2171 of 2011.

From the Judgment & Order dated 29.09.2010 of the High Court of Delhi at New Delhi in LPA No. 529 of 2010 and order dated 29.10.2010 in CM No. 19338 of 2010 in LPA No. 529 of 2010.

Deepak Bhattacharya, Navin Prakash for the Appellant.

H.P. Raval, ASG, P.K. Dey, Gourav Sharma, Arvind Kumar Sharma, Praveen Jain, Akshat Kulshreshta (for M.V. Kini & Associates) for the Respondents.

The Judgment of the Court was delivered by

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

2. The appellant is being prosecuted for the offences punishable under Section 13(2) read with Sections 13(1)(d) and 13(1)(a) of the Prevention of Corruption Act, 1988 (for short, "P.C. Act").

3. On November 4, 2009, the sanctioning authority granted sanction to prosecute the appellant for the offences indicated above. After the sanction order was challenged by the appellant in the High Court on November 26, 2009, the charge-sheet has been filed by the Central Bureau of Investigation (CBI) - respondent No. 2- against the appellant on November 30, 2009 in the Court of Special Judge, Ernakulam. Following that, summons came to be issued to the appellant on December 18, 2009. During the pendency of the matter before the High Court, wherein the sanction order has been challenged by the appellant, the Court of Special Judge has taken cognizance against the appellant.

4. The Single Judge of the High Court was not persuaded with the contentions raised by the appellant and dismissed the appellant's Writ Petition on July 19, 2010.

5. Against the order of the Single Judge, the appellant preferred an intra-court appeal. The Division Bench of the High Court dismissed the intra-court appeal on September 29, 2010 observing that it was open to the appellant to question the validity of the sanction order during trial on all possible grounds and the CBI could also justify the order of granting sanction before the Trial Judge.

6. Mr. Deepak Bhattacharya, learned counsel for the appellant referred to Section 19(4) of the P.C. Act and submitted that the appellant challenged the legality and validity of the sanction order at the first available opportunity, even before the charge-sheet was filed and, therefore, the Division Bench was not justified in relegating the appellant to agitate the question of validity of sanction order in the course of trial. He relied upon the decisions of this Court in *Mansukhlal Vithaldas Chauhan vs. State of Gujarat*[1]; *Pepsi Foods Ltd. and Anr. v. Special Judicial Magistrate and Ors*.[2]; *Abdul Wahab Ansari vs. State of Bhar and another*[3] and *State of Karnataka vs. Ameerjan*[4].

7. Mr. Deepak Bhattacharya, in view of the law laid down by this Court in the above decisions, submitted that the High Court ought to have gone into the merits of the challenge to sanction order. According to learned counsel, on its face, the sanction order suffers from non-application of mind.

8. On the other hand, Mr. H.P. Raval, learned Additional Solicitor General for the Central Bureau of Investigation – respondent No. 2- supported the view of the Division Bench. He submitted that in a case where validity of the sanction order is sought to be challenged on the ground of non-application of mind, such challenge can only be made in the course of trial.

1. (1997) 7 SCC 622.
2. 1998 (5) SCC 749.
3. (2000) 8 SCC 500.
4. (2007) 11 SCC 273.

In this regard, he heavily relied upon a decision of this Court in *Parkash Singh Badal and another vs. State of Punjab and others*[5]. He also relied upon a recent decision of this Court in *Ashok Tshering Bhutia vs. State of Sikkim*[6].

9. This Court has in Mansukhlal Vithaldas Chauhan[1] considered the significance and importance of sanction under the P.C. Act. It has been observed therein that the sanction is not intended to be, nor is an empty formality but a solemn and sacrosanct act which affords protection to government servants against frivolous prosecutions and it is a weapon to ensure discouragement of frivolous and vexatious prosecution and is a safeguard for the innocent but not a shield for the guilty. This Court highlighted that validity of a sanction order would depend upon the material placed before the sanctioning authority and the consideration of the material implies application of mind.

10. The provisions contained in Section 19(1),(2),(3) and (4) of the P.C. Act came up for consideration before this Court in Parkash Singh Badal and another[5]. In paras 47 and 48 of the judgment, the Court held as follows:

> "47: The sanctioning authority is not required to separately specify each of the offences against the accused public servant. This is required to be done at the stage of framing of charge. Law requires that before the sanctioning authority materials must be placed so that the sanctioning authority can apply his mind and take a decision. Whether there is an application of mind or not would depend on the facts and circumstances of each case and there cannot be any generalised guidelines in that regard.
>
> 48: The sanction in the instant case related to the offences relatable to the Act. There is a distinction between the absence of sanction and the alleged invalidity on account of non-application of mind. The former question can be agitated at the threshold but the latter is a question which

5. (2007) 1 SCC 1.

6. (2011) 4 SCC 402.

> has to be raised during trial."

11. While drawing a distinction between the absence of sanction and invalidity of the sanction, this Court in Parkash Singh Badal5 expressed in no uncertain terms that the absence of sanction could be raised at the inception and threshold by an aggrieved person. However, where sanction order exists, but its legality and validity is put in question, such issue has to be raised in the course of trial. Of course, in Parkash Singh Badal5, this Court referred to invalidity of sanction on account of non-application of mind. In our view, invalidity of sanction where sanction order exists, can be raised on diverse grounds like non-availability of material before the sanctioning authority or bias of the sanctioning authority or the order of sanction having been passed by an authority not authorised or competent to grant such sanction. The above grounds are only illustrative and not exhaustive. All such grounds of invalidity or illegality of sanction would fall in the same category like the ground of invalidity of sanction on account of non-application of mind – a category carved out by this Court in Parkash Singh Badal[5], the challenge to which can always be raised in the course of trial.

12. In a later decision, in the case of Aamir Jaan4, this Court had an occasion to consider the earlier decisions of this Court including the decision in the case of Parkash Singh Badal5. Ameerjan4 was a case where the Trial Judge, on consideration of the entire evidence including the evidence of sanctioning authority, held that the accused Ameerjan was guilty of commission of offences punishable under Sections 7,13(1)(d) read with Section 13(2) of the P.C. Act. However, the High Court overturned the judgment of the Trial Court and held that the order of sanction was illegal and the judgment of conviction could not be sustained. Dealing with the situation of the case wherein the High Court reversed the judgment of the conviction of the accused on the ground of invalidity of sanction order, with reference to the case of Parkash Singh Badal5, this Court stated in Ameerjan4 in para 17 of the Report as follows:

"17. Parkash Singh Badal, therefore, is not an authority for the proposition that even when an order of sanction is held to be wholly invalid inter alia on the premise that the order is a nullity having been suffering from the vice of total non-application of mind. We, therefore, are of the opinion that the said decision cannot be said to have any application in the instant case."

13. In our view, having regard to the facts of the present case, now since cognizance has already been taken against the appellant by the Trial Judge, the High Court cannot be said to have erred in leaving the question of validity of sanction open for consideration by the Trial Court and giving liberty to the appellant to raise the issue concerning validity of sanction order in the course of trial. Such course is in accord with the decision of this Court in *Parkash Singh Badal*[5] and not unjustified.

14. Mr. Deepak Bhhatcharya submits that the appellant resides in Delhi and he would be put to grave hardship if the question of validity of sanction is left open to be decided in the course of trial as the appellant will have to remain present before the Trial Court at Ernakulam on each and every date of hearing. He, however, submits that if the personal appearance of the appellant is dispensed with, unless required by the Trial Court, the appellant will not be averse in raising the issue of validity of sanction before the Trial Judge.

15. Mr. H.P. Raval has no objection if a direction in this regard is given by us.

16. In view of the above contentions and the factual and legal position indicated above, we are satisfied that the impugned order does not call for any interference. Appeals are, accordingly, dismissed. However, it will be open to the appellant to raise the issue of invalidity of sanction order before the Trial Judge. In the peculiar facts and circumstances of the present case, appellant is permitted to appear before the Trial Court through his advocate. His personal appearance shall not be insisted upon by the Trial Court except when necessary.

D.G. Appeals dismissed.

BANGARU LAXMAN

v.

STATE (THROUGH CBI) & ANOTHER

(Criminal Appeal No. 2164-65 of 2011)

NOVEMBER, 22, 2011

[ASOK KUMAR GANGULY AND GYAN SUDHA MISRA, JJ.]

PREVENTION OF CORRUPTION ACT, 1988:

s. 5(2) – Power of Special Judge to grant pardon at investigation stage – Held: On a harmonious reading of s. 5 (2) of the P. C. Act with the provisions of s. 306, specially s. 306 (2) (a) of the Code and s. 26 of the P. C. Act, the Special Judge under the P. C. Act, while trying offences, has the dual power of the Sessions Judge as well as that of a Magistrate, and conducts the proceedings under the Code both prior to as well as after the filing of charge sheet, for holding the trial – Therefore, the power of granting pardon, prior to the filing of the charge sheet, is within the domain of judicial discretion of the Special Judge before whom such a prayer is made, as in the instant case, by the prosecution – Code of Criminal Procedure, 1973 – s. 306 (2) (a) – Interpretation of Statutes.

CRIMINAL LAW:

Grant of pardon to one of the several accused involved in an offence – Purpose of – Explained.

INTERPRETATION OF STATUTES;

Deeming provision – HELD: Is a legal fiction and an admission of the non-existence of the fact deemed – Therefore, while interpreting a provision creating a legal fiction, the court has to ascertain the purpose for which the fiction is created – Prevention of Corruption Act, 1988 – s.5(2).

On 21.04.2005, the confessional statement of respondent no. 2 was recorded u/s 164 Cr. P. C., wherein he admitted his and appellant's involvement in the incident. The prosecution formed an opinion that the evidence of respondent no. 2 would be of great value and, therefore, it moved an application before the Court of the Special Judge for grant of pardon to respondent No. 2, so that he could be examined as an approver in the case against the appellant. By an order dated 17.7.2006, pardon was granted by the Special Court. On 18.7.2006 charge sheet in the case was filed against the appellant and another. The order granting pardon to respondent no. 2 was challenged before the High Court, which declined to interfere.

In the instant appeals it was contended for the appellant, *inter-alia,* that the Special Court had no jurisdiction and authority to grant pardon at the investigation stage before the filing of the charge sheet and, as such, the pardon was not granted after following the proper procedure.

Dismissing the appeals, the Court

HELD: 1.1 Under s. 5(2) of the Prevention of Corruption Act, 1988, the power of the Special Judge to grant pardon is an unfettered power subject to stipulation made in the section itself. Such power can be exercised at any stage and there is no stipulation that power can be exercised by the Special Judge only at the stage of trial. The deeming clause which has been introduced in s.5(2) is for a very limited purpose mentioned therein. It is not for fettering the power of the Special Judge to grant pardon in terms of s. 306 of the Code of Criminal Procedure, 1973. The purpose of introducing the deeming provision in s. 5(2) is manifest from its text, namely, the same is introduced *only for the purposes of sub-ss. (1) to (5) of s. 308 of the Code* and it is only for the said

purpose that the sanction is deemed to have been tendered u/s. 307 of the Code. Sub-ss. (1) to (5) of s. 308 of the Code make it clear that the said provisions have been enacted for a different purpose, namely, for holding trial of a person for not complying with the conditions of pardon. [Para 21 and 25] [280-G-H; 281-A-B; 282-D-E]

State of U.P. vs. Singhara Singh **AIR 1964 SC 358;** *Taylor vs. Taylor* **(1876) 1 Ch. D.426;** *Queen Empress vs. Batera & Ors*. **Crl. Judgment No. 3 (Case No. 2838 of 1897) – referred to.**

1.2 It is well known that a deeming provision is a legal fiction and an admission of the non-existence of the fact deemed. Therefore, while interpreting a provision creating a legal fiction, the court has to ascertain the purpose for which the fiction is created. [para 22] [281-C-D]

M/s. J.K. Cotton Spinning and Weaving Mills Ltd. and another vs. Union of India and others **- 1988 SCR 700 = AIR 1988 SC 191;** *Travancore Cochin and others vs. Shanmugha Vilas Cashew nut Factory, Quilon,* **AIR 1953 SC 333 - relied on.**

Re Levy ***(1881) 17 Ch. D 746*** **– referred to.**

1.3 On a conjoint reading of s. 306(2)(a) of the Code with s. 26 of the P.C. Act, the conclusion is inescapable that s.306(2)(a) clearly makes s.306 applicable to the Court of Special Judge under the P.C. Act. [Para 30] [283-G]

Lt. Commander Pascal Fernandes vs. State of Maharashtra and Ors. – 1968 SCR 695 = **AIR 1968 SC 594 – held inapplicable.**

1.4 From the ratio of Harshad Mehta **to the interpretation of s. 5(2) of the P.C. Act, it is clear that the**

power to grant pardon u/s. 306 of the Code has not been specifically denied, and, as such, as a court of original criminal jurisdiction, the Special Court under P.C. Act has the power to grant pardon u/s. 306 of the Code. Any different interpretation will be contrary to the plain words of s.306 of the Code and also the law laid down by this Court in Harshad Mehta on the principles decided in Antulay. [Para 39] [286-D-E]

Harshad S. Mehta and others vs. State of Maharashtra **2001 (2) Suppl. SCR 577 = (2001) 8 SCC 257*; A. R.*** *Antulay vs. Ramdas Sriniwas Nayak and Anr.* **1984 (2) SCR 914 =(1984) 2 SCC 500*;*** *State of Tamil Nadu vs. V. Krishnaswami Naidu and another* **1979 (3) SCR 928 =(1979) 4 SCC 5 - relied on.**

1.5 On the ratio of *V. Krishnaswami,* **it is clear that the Special Judge has been given a very wide power, namely,the power of remand. Compared to that, the power to grant pardon is an ancillary power. Therefore, under the scheme of the Code, read with s.5(2) of the PC Act, and in light of the consistent view of this Court, a Special Judge will include a magistrate. On the same parity of reasoning, a Special Judge, unless specifically denied, will have the power to grant pardon at the stage of investigation. Section 5(2) of the P.C. Act clearly confers this power subject to the deeming clause, which is for the limited purpose. [Para 41 and 43] [287-A-C-E]**

1.6 Thus, on a harmonious reading of s. 5(2) of the P.C. Act with the provisions of s. 306, specially s. 306(2)(a) of the Code and s. 26 of the P.C. Act, this Court is of the opinion that the Special Judge under the P.C. Act, while trying offences, has the dual power of the Sessions Judge as well as that of a Magistrate. Such a Special Judge conducts the proceedings under the Code both prior to the filing of charge sheet as well as after the filing of charge sheet, for holding the trial. Therefore, the power

of granting pardon, prior to the filing of the charge sheet, is within the domain of judicial discretion of the Special Judge before whom such a prayer is made, as in the instant case, by the prosecution. Any other conclusion would be detrimental to the administration of justice, in as much as, the power to grant pardon is contemplated in situations where serious offence is alleged to have been committed by several persons and with the aid of the evidence of the person, who had been granted pardon, the offence committed may be proved. The basis of exercise of this power is not to judge the extent of culpability of the persons to whom the pardon is tendered. The main purpose is to prevent failure of justice by allowing the offender to escape from a lack of evidence. [Para 42, 44 and 45] [287-D; G-H; 288-A-B]

1.7 However, this Court makes it clear that in the course of holding trial, the Special Judge will not be in any way influenced by the observations in the order granting pardon but will act independently of the same. In the instant case, the Special Judge who has granted pardon is not holding the trial. Therefore, at the time of holding trial, it is directed that the Special Judge will independently apply his mind to the facts of the case in arriving at his conclusions. [Para 46] [288-C-D]

Case Law Reference:

1968 SCR 695	**relied on**	**para 15**
1984 (2) SCR 914	**relied on**	**para 16**
AIR 1964 SC 358	**relied on**	**para 19**
AIR 1964 SC 358	**referred to**	**para 20**
(1876) 1 Ch. D.426	**referred to**	**para 20**

Crl. Judgment No. 3		
(Case No. 2838 of 1897)	**referred to**	**para 20**
1988 SCR 700	**relied on**	**para 22**
(1881) 17 Ch. D 746	**referred to**	**para 23**
AIR 1953 SC 333	**relied on**	**para 24**
2001 (2) Suppl. SCR 577	**relied on**	**para 33**
1979 (3) SCR 928	**relied on**	**para 40**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2164-2165 of 2011.

From the Judgment & Order dated 30.08.2010 of the High Court of Delhi at New Delhi in Revision Petition (Crl.) No. 769 of 2006 & Crl. M.A. No. 12167 of 2006.

Sunil Kumar, Atul Kumar, Manish Mohan, Parveen Kumar, Ugra Shankar Prasad for the Appellant.

P.K. Dey, Arvind Kumar Sharma, G. Seshagiri Rao, Promila for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. The challenge in these appeals is to an order dated 17.7.2006 by which the learned Special Judge granted pardon to respondent No. 2-Shri T. Satyamurty on the condition that the said respondent shall make full disclosure of the facts and circumstances relating to the offence committed by him in conspiracy with the appellant and one Shri N. Umamaheshwar Raju.

3. The charge-sheet in this case was filed next day i.e. 18.7.2006 against the appellant and Shri N. Umamaheshwar Raju. The said order granting pardon was challenged before

the High Court but the said challenge was turned down by the High Court by its order dated 30.8.2010. The main argument by the appellant in this case is that pardon could not be granted by the Special Court prior to the filing of the charge-sheet.

4. Certain facts which are relevant to decide this controversy may be recorded.

5. On 21.4.2005 the confessional statement of the respondent no.2 was recorded under Section 164 Cr.P.C. The said confessional statement of respondent No.2 recorded his involvement and the involvement of the appellant in the incident. On considering the said statement, the prosecution formed an opinion that the evidence of PW-2 is of great value to the prosecution and thereafter on 3.7.2006 the prosecution moved an application before the Court of the Special Judge for grant of pardon to respondent No.2 so that respondent No.2 could be examined as an approver in the case against the appellant.

6. Thereafter, by an order dated 17.7.2006, pardon was granted by the Special Court.

7. Mr. Sunil Kumar, learned counsel for the appellant mainly assailed the order granting pardon, inter-alia, on the ground that the Special Court has no jurisdiction and authority to do so before the filing of the charge sheet.

8. Learned counsel has of course raised an ancillary grievance that at the stage of granting pardon the Court had already formed its opinion on the guilt or otherwise of the appellant rendering the trial a mere mockery. However, his main argument was focused on the jurisdiction of the Special Court to grant pardon prior to the filing of the charge sheet.

9. In support of his submission, the learned counsel referred to the provisions of Sections 306 and 307 of the Code of Criminal Procedure (hereinafter referred to as the 'Code') and also referred to Section 5(2) of the Prevention of Corruption Act, 1988(hereinafter referred to as the 'P.C.' Act)

10. For proper appreciation of the questions involved in this case, those provisions are set out below:

"**306. Tender of pardon to accomplice**. (1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true dis-closure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

(2) This section applies to-

(a) any offence triable exclusively by the Court of Session or by the Court of a Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952);

(b) any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.

(3) Every Magistrate who tenders a pardon under sub-section (1) shall record-

(a) his reasons for so doing;

(b) whether the tender was or was not accepted by the person to whom it was made,

and shall, on application made by the accused, furnish him with a copy of such record free of cost.

(4) Every person accepting a tender of pardon made under sub- section (1)-

(a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any;

(b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

(5) Where a person has accepted a tender of pardon made under sub-section (1) and has been examined under sub-section (4), the Magistrate taking cognizance of the offence shall, without making any further inquiry in the case,-

(a) commit it for trial-

(i) to the Court of Session if the offence is triable exclusively by that Court or if the Magistrate taking cognizance is the Chief Judicial Magistrate;

(ii) to a Court of Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952), if the offence is triable exclusively by that Court;

(b) in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself.

307. Power to direct tender of pardon. At any time after commitment of a case but before judgment is passed, the Court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person.

S.5(2) of P.C. Act:

S.5(2) A special Judge may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to, an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof and any pardon so tendered shall, for the purposes of sub-sections (1) to (5) of section 308 of the Code of Criminal Procedure, 1973 (2 of 1974), be deemed to have been tendered under section 307 of that Code."

11. Adverting to those provisions, the learned counsel submitted that power to grant pardon is not an inherent power of the Court. The said power has to be specifically conferred and the learned counsel submitted that power under Section 306 of the Code cannot be exercised by a Special Judge under the P.C. Act.

12. Learned counsel for the State on the other hand submitted that the Court of Special Judge under the P.C. Act is a Court of original jurisdiction. Section 5 of the P.C. Act clearly enables a Special Judge with the power to grant pardon and he further submitted that Sub-section 3 of Section 5 of the P.C. Act saves the provision of Sub-section 2 of Section 5 and that Section 5(2) must be read with Section 5(3). Sub-section (3) of Section 5 of the P.C. Act is also set out below:

"5(3) Save as provided in sub-sections (1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far as they are not inconsistent with this Act, apply to the proceedings before a special Judge; and for purposes of the said provisions, the Court of the special Judge shall be deemed to be a Court of Session and the person conducting a prosecution before

a special Judge shall be deemed to be a public prosecutor."

13. It is further submitted by the learned counsel for the State that the power of a Special Judge to grant pardon under Section 5(2) of the Act is an unfettered power and the deeming clause has been employed only for the purpose of sub-sections (1) to (5) of section 308 of the code. Sub-sections 1 to 5 of Section 308 run as follows:

"308. Trial of person not complying with conditions of pardon. (1) Where, in regard to a person who has accepted a tender of pardon made under section 306 or section 307, the Public Prosecutor certifies that in his opinion such person has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered or for any other offence of which he appears to have been guilty in connection with the same matter, and also for the offence of giving false evidence:

Provided that such person shall not be tried jointly with any of the other accused:

Provided further that such person shall not be tried for the offence of giving false evidence except with the sanction of the High Court, and nothing contained in section 195 or section 340 shall apply to that offence.

(2) Any statement made by such person accepting the tender of pardon and recorded by a Magistrate under section 164 or by a Court under sub-section (4) of section 306 may be given in evidence against him at such trial.

(3) At such trial, the accused shall be entitled to plead that he has complied with the condition upon which such tender was made, in which case it shall be for the

prosecution to prove that the condition has no been complied with.

(4) At such trial, the Court shall-

(a) if it is a Court of Session, before the charge is read out an explained to the accused;

(b) if it is the Court of a Magistrate, before the evidence of the witnesses for the prosecution is taken,

ask the accused whether he pleads that he has complied with the conditions on which the tender of pardon was made.

(5) If the accused does so plead, the Court shall record the plea and proceed with the trial and it shall, before passing judgment in the case, find whether or not the accused has complied with the conditions of the pardon, and, if it finds that he has so complied, it shall, notwithstanding anything contained in this Code, pass judgment of acquittal."

14. Mr. Sunil Kumar, learned counsel for the appellant in support of his submissions relied on several decisions which are considered by this Court now.

15. He relied on a decision of this Court in the case of *Lt. Commander Pascal Fernandes vs. State of Maharashtra and Ors.*- AIR 1968 SC 594.

16. Learned counsel for the appellant also relied on the decision of this Court in *A.R. Antulay vs. Ramdas Sriniwas Nayak and Anr*. – (1984) 2 SCC 500 in order to contend that the procedure for granting pardon which has been indicated in Section 5(2) read with Section 307 of the Code must be followed namely that the Special Judge being a Court of Sessions can only grant pardon after the commencement of the

trial. But in the instant case pardon has been granted at the stage of investigation. Therefore, pardon has not been granted, according to the learned counsel for the appellant, after following the proper procedure.

17. Learned counsel relying on para 22 in *Antulay's* case (supra) urged that when the procedure has been provided then everything has to be done following the said procedure and other modes of performance are necessarily forbidden.

18. Learned counsel also referred to paragraph 27 at page 524 of the report in *Antulay* (supra) to point out that the Special Judge is a Court of original jurisdiction and the trial of offences before him shall follow the procedure in the Code for trial of warrant cases by the Magistrate. Learned counsel also submitted that pardon is to be granted by the Special Judge, under provision of Section 307 of the Code which is corresponding to Section 308 of the old Code.

19. Learned counsel also relied on a decision of this Court in *State of U.P. vs. Singhara Singh* – AIR 1964 SC 358 (para 8 at page 361 of the report) in order to contend that the principles in *Taylor vs. Taylor* (1876) 1 Ch. D. 426 must be followed in the instant case. The said principle stipulates that where a statute required the doing of a certain thing in a certain way, the thing must be done in that way or not at all.

20. Learned counsel also referred to the decision in the case of *Queen Empress vs. Batera & Ors.* reported in Criminal Judgments No.3 (Case No. 2838 of 1897) where the Court held that provision of Section 337 of the old Code must be strictly construed.

21. We are unable to appreciate the aforesaid contentions raised by the learned counsel. It goes without saying that under Section 5(2) of the P.C. Act the power of the Special Judge to grant pardon is an unfettered power subject to stipulation made in the Section itself. Such power can be exercised at any stage

and there is no stipulation that power can be exercised by the Special Judge only at the stage of trial as urged by the appellant's counsel. The deeming clause which has been introduced in Section 5(2) is for a very limited purpose mentioned in Section 5(2) of the P.C. Act. Sub-Sections 1 to 5 of Section 308 have already been set out above and it is clear therefrom that the said provisions have been enacted for a different purpose namely for holding trial of a person for not complying with the conditions of pardon.

22. It is well known that a deeming provision is a legal fiction and an admission of the non-existence of the fact deemed. (See *M/s. J.K. Cotton Spinning and Weaving Mills Ltd. and another vs. Union of India and others* - AIR 1988 SC 191 at 202). Therefore, while interpreting a provision creating a legal fiction, the Court has to ascertain the purpose for which the fiction is created.

23. The law on this aspect has been very neatly summed-up by Lord Justice James in Ex Parte Walton, in re Levy (1881) 17 Ch. D. 746. At page 756 the learned Judge formulated as follows:

> "…When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to…."

24. The aforesaid formulation has been approved by Constitution Bench of this Court in *State of Travancore Cochin and others vs. Shanmugha Vilas Cashewnut Factory, Quilon* reported in AIR 1953 SC 333. At page 343 of the report the aforesaid principles have been referred to by this Court along with the various other decisions and which are set out:

> ""When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done,

> the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to….
>
> The above observations were quoted with approval by *Lord Cairns and Lord Blackburn in Arthur Hill v. East and West India Dock Co.,* (1884) 9 A.C. 448. Lord Blackburn went on to add at page 458:
>
> "I think the words here 'shall be deemed to have surrendered' ..... mean, shall be surrendered *so far as is necessary to effectuate the purposes of the Act and no further;*....."
>
> (emphasis added)

25. Following the aforesaid well-settled principle, as we must, we hold that the deeming provision introduced in Section 5(2) of the P.C. Act is not for fettering the power of the Special Judge to grant pardon in terms of Section 306 of the Code. The purpose of introducing the deeming provision in Section 5(2) of the P.C. Act is manifest from the text of Section 5(2), namely, the same is introduced *only for the purposes of sub-sections 1 to 5 of Section 308 of the Code* and it is only for the said purpose that the sanction is deemed to have been tendered under Section 307 of the Code.

26. If this Court accepts the contention of learned counsel for the appellant that the Special Judge under the P.C. Act has no power to grant the pardon under Section 306 of the Code in view of the deeming clause under Section 5(2) of the P.C. Act, that will amount to reading Section 5(2) of P.C. Act in a manner which is revolting to reason and by doing violence to the plain words of the statutes.

27. The contention of the learned counsel for the appellant cannot be accepted for other reasons also which are discussed hereinbelow.

28. The decision in *Pascal* (supra) was rendered on an interpretation of Section 8(2) of Criminal Law Amendment Act, 1952. Section 8(2) of Criminal Law Amendment Act, 1952 is set out below:

> "(2) A Special Judge may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned whether as principal or abettor, in the commission thereof; and any parson so tendered shall, for the purposes of Secs. 339 and 339-A of the Code of Criminal Procedure, 1898, (5 of 1898) be deemed to have been tendered under Sec. 338 of that Code."

29. Section 8(2) of Criminal Law Amendment Act, 1952 is virtually in parimateria with Section 5(2) of the P.C. Act

30. The said decision in *Pascal* (supra) was rendered when the old Criminal Procedure Code of 1898 was in force. After the enactment of the new Code of 1973, Sections 337 to 339 of the old Code were substituted by the Criminal Law Amendment Act and Sections 306 to 308 of the present Code conferred powers to grant pardon on the Magistrate and also on the Court to which commitment is made. The decision in *Pascal* (supra) was rendered in the context of a substantially different statutory provision. Section 337 of the old Code is different from Section 306 of the present Code. Specially Section 306(2)(a) which has been quoted above was not there in Section 337 of 1898 Code. Section 306(2)(a) clearly makes Section 306 applicable to the Court of Special Judge under the P.C. Act. Such a conclusion is inescapable on a conjoint reading of Section 306(2)(a) with Section 26 of the P.C. Act, which is set out below:

> **26. Special Judges appointed under Act 46 of 1952 to be special Judges appointed under this Act.-** Every special Judge appointed under the Criminal Law Amendment Act, 1952, for any area or areas and is holding office on the commencement of this Act shall be deemed to be a special Judge appointed under section 3 of this Act for that area or areas and, accordingly, on and from such commencement, every such Judge shall continue to deal with all the proceedings pending before him on such commencement in accordance with the provisions of this Act."

31. Apart from that, the questions which fell for consideration in *Pascal* (supra) are: (a) the difference between Sections 337 and 338 of the old Code and Section 8(2) of the Criminal Law Amendment Act (b) that the power of Special Judge in tendering pardon under Section 8(2) of the Criminal Law Amendment Act is limited to an application by the prosecution and the Special Judge cannot act suo motu (c) the further question was that the powers of the Special Judge under Section 8(2) are circumscribed by considerations under Section 540 of the old Code and (d) the further contention was that Special Judge had not exercised his discretion properly in the case.

32. None of the above considerations are relevant in the present case. Therefore, the said decision does not render any assistance to the appellant in connection with the points which have been urged on his behalf.

33. The learned counsel for the State relied on a three Judge Bench decision of this Court in the case of *Harshad S. Mehta and others vs. State of Maharashtra* reported in (2001) 8 SCC 257. In the case of *Harshad Mehta* (supra) this Court was considering the Special Court (Trial of Offences Relating to Transactions in Securities) Act and it is admitted that the Court under the aforesaid Act is like the Special Court under P.C. Act. Both are Courts of Original Criminal Jurisdiction. In

paragraph 21 of the judgment in *Harshad Mehta* (supra) this Court held as follows:

> "**21.** We have no difficulty in accepting the contention that the Special Court, per se, is not a Magistrate falling in any of the categories of Magistrates as enumerated in Section 306(1) and also that it is not a court to which the commitment of a case is made. But, it does not necessarily follow therefrom that the power to tender pardon under Sections 306 and 307 has not been conferred on the Special Court."

34. In coming to the conclusion that a Special Court is a court of original criminal jurisdiction, this Court in *Harshad Mehta* (supra) relied on the law laid down by the Constitution Bench of this Court in *Antulay's* (supra) in which the Court was considering the provisions of the P.C. Act.

35. Relying on the ratio in *Antulay* (supra), where Special Judge has been considered a court of original criminal jurisdiction this Court held in *Harshad Mehta* (supra) that in order to make the said Court functionally oriented some powers are conferred by the statute setting it up and except those powers which are specifically denied, it has to function as a court of original criminal jurisdiction not being hidebound by the terminological status description of Magistrates or a Court of Session. Under the Code, it will enjoy all the powers which a court of original criminal jurisdiction enjoys save and except the ones which are specifically denied. (see para 22, page 269 of the report)

36. The Court in *Harshad Mehta* (supra) also considered the decision of this Court in *Pascal* (supra). After considering the decision in *Pascal* (supra), this Court in *Harshad Mehta* (supra) came to the conclusion that the Special Court enjoys all powers which a court of original criminal jurisdiction enjoys whether of a Magistrate or as a Court of Session, save and except the one specifically denied. (See para 50 page 281).

37. The conclusion reached by three Judge Bench in *Harshad Mehta* (supra) after considering the decision in *Pascal* (supra) is as follows:

> **"62.** Our conclusion, therefore, is that the Special Court established under the Act is a court of exclusive jurisdiction. Sections 6 and 7 confer on that court wide powers. It is a court of original criminal jurisdiction and has all the powers of such a court under the Code including those of Sections 306 to 308."

38. If we may note, the Court reached the aforesaid conclusion in *Harshad Mehta* (supra) even though under the aforesaid Act there is no provision like Section 5(2) in the P.C. Act.

39. If we follow the ratio of *Harshad Mehta* (supra) to the interpretation of Section 5(2) of the P.C. Act, it is clear that the power to grant pardon under Section 306 of the Code has not been specifically denied. If it is not specifically denied, then as a court of original criminal jurisdiction the Special Court under P.C. Act has the power to grant pardon under Section 306 of the present Code. Any different interpretation will be contrary to the plain words of Section 306 of the Code and also the law laid down by this Court in *Harshad Mehta* (supra) on the principles decided in *Antulay* (supra).

40. Reference in this connection can also be made to the decision of the Supreme Court in the case of *State of Tamil Nadu vs. V. Krishnaswami Naidu and another*, reported in (1979) 4 SCC 5. In that case the question was whether the Special Judge has the power of remand. This court, by referring to Section 3(32) of the General Clauses Act, 1897 defining a Magistrate, held that Magistrate will include a Special Judge. Therefore, a Special Judge shall be a Magistrate for the purposes of Section 167 of the Code even though the word 'Special Judge' is not mentioned in Section 167 (see para 7, pg. 8 of the report).

41. It is therefore clear that, on the ratio of *V. Krishnaswami* (supra), the Special Judge has been given a very important magisterial function, namely the power of remand. Compared to that, the power to grant pardon is an ancillary power. Therefore under the scheme of the Code, read with Section 5(2) of the PC Act, and in light of the consistent view of this Court, a Special Judge will include a magistrate. On the same parity of reasoning a Special Judge, unless specifically denied, will have the power to grant pardon. Here there is no question of specific denial, rather Section 5(2) of the P.C. Act clearly confers this power subject to the deeming clause, the limited purpose of which has been discussed above.

42. Thus, on a harmonious reading of Section 5(2) of the P.C. Act with the provisions of Section 306, specially Section 306(2)(a) of the Code and Section `26 of the P.C. Act, this Court is of the opinion that the Special Judge under the P.C. Act, while trying offences, has the dual power of the Session Judge as well as that of a Magistrate. Such a Special Judge conducts the proceedings under the court both prior to the filing of charge sheet as well as after the filing of charge sheet, for holding the trial.

43. It has already been held by this Court that the Special Judge is fully vested with the powers of remand. The power of granting remand is very wide power compared to the power of granting pardon. Since this Court has already held that the Special Court is clothed with the magisterial power of remand, thus in the absence of a contrary provision, this Court cannot hold that power to grant pardon at the stage of investigation can be denied to the Special Court.

44. In view of the discussion made above, this Court is of the opinion that power of granting pardon, prior to the filing of the charge sheet, is within the domain of judicial discretion of the Special Judge before whom such a prayer is made, as in the instant case by the prosecution.

45. Any other conclusion would be detrimental to the administration of justice, in as much as, the power to grant pardon is contemplated in situations where serious offence is alleged to have been committed by several persons and with the aid of the evidence of the person, who had been granted pardon, the offence committed may be proved. The basis of exercise of this power is not to judge the extent of culpability of the persons to whom the pardon is tendered. The main purpose is to prevent failure of justice by allowing the offender to escape from a lack of evidence.

46. Therefore, this Court does not find any merit in the contention urged on behalf of the Appellant. However, this Court makes it clear that in the course of holding trial, the Special Judge will not be in any way influenced by the observations in the order granting pardon but will act independently of the same. In this case, the Special Judge who granted pardon is not holding the trial. Therefore, at the time of holding trial, it is directed that the Special Judge will independently apply his mind to the facts of the case in arriving at his conclusions.

47. With this direction the appeals, being without merit, are dismissed.

R.P. Appeals dismissed.