SHISH RAM
v.
UNION OF INDIA & ORS.
(Civil Appeal No. 4523 of 2006)

NOVEMBER 23, 2011

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

Defence Services Regulations, 1961 – Regulation 206 – Appellant enrolled in Army, transferred to the Reserve establishment after serving more than ten years of Army Service – Failure of appellant to attend reservist training as also failure to furnish exemption certificate exempting him from training – Appellant dismissed from service by the Brigade Commander – Writ petition challenging order of dismissal on the ground that only officer-in-charge of Reservists could dismiss him, and also claimed pension – Writ petition dismissed – On appeal held: There is no mention in Regulation 206 that the officer-in-charge of the reservists has the power to either remove or dismiss a reservist from the service – Regulation 206 cannot take away the power vested under the Army Act in the brigade commander to dismiss or remove any person working under him – Therefore, the High Court rightly held that the brigade commander had the power to dismiss the appellant from service – Regulation 113 (a) is clear that an individual who is dismissed under the provisions of the Army Act is ineligible for pension or gratuity in respect of all previous service – Thus, the High Court rightly rejecting the claim of the appellant for pension – Pension Regulations, 1961 – Regulation 113 (a) – Army Act, 1950 – s. 20 (3).

Appellant was enrolled in the Army on 28.01.1963. After completing more than ten years of Army Service, he was transferred to the reserve establishment where he was required to attend reservist training but he failed to do so. He failed to furnish the exemption certificate

exempting him from the training. He was declared as a deserter with effect from 19.06.1978 and was dismissed from service with effect from 20.10.1981 by the Brigade Commander. The appellant filed a writ petition challenging the order of dismissal and claimed pension. He contended that only the officer-in-charge of the reservists could dismiss him from service. The High Court dismissed the petition. Therefore, the appellant filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1 A reading of Regulation 206 of the Defence Services Regulations, 1961, would show that a man, who has been transferred to the reserve, comes under the administration and disciplinary orders of the Officer-in-Charge reservists. There is no mention in Regulation 206 that the Officer-in-Charge of the reservists has the power to either remove or dismiss a reservist from service. A plain reading of sub-section (3) of Section 20 of the Army Act would show that an officer having power not less than a brigade or equivalent commander or any prescribed officer may dismiss or remove from the service any person serving under his command other than an officer or a junior commissioned officer. Regulation 206 cannot take away the power vested under the Army Act in the brigade commander to dismiss or remove any person working under him. Therefore, the High Court rightly held in the impugned judgment that the brigade commander had the power to dismiss the appellant from service. [Para 7] [293-G-H; 294-A-C]

1.2 Regarding pension and gratuity claimed by the appellant, Regulation 113 (a) of the Pension Regulations, 1961 is clear that an individual, who is dismissed under the provisions of the Army Act, is ineligible for pension or gratuity in respect of all previous service. As the

appellant had been dismissed from the service under the provisions of the Army Act, he was not eligible for pension and gratuity and the High Court was right in rejecting the claim of the appellant for pension in the impugned judgment. [Para 8] [294-D-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4523 of 2006.

From the Judgment & Order dated 22.11.2004 of the High Court of Delhi at New Delhi in Writ Petition (Civil) No. 5580 of 2000.

S.M. Hooda, R.C. Kaushik for the Appellant.

R. Balasubramaniam, Purnima Bhat, Anil Katiyar for the Respondents.

The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. This is an appeal by way of special leave under Article 136 of the Constitution against the judgment dated 22.11.2004 of the Delhi High Court in Writ Petition (Civil) No.5580 of 2000 (for short 'the impugned judgment').

2. The facts very briefly are that the appellant was enrolled in the Army on 28.01.1963. As per the terms of his enrolment, he was to put in not less than ten years in Army Service and if required, a further period in Reserve Service which would be sufficient to complete a total period of twenty years of service. After he completed more than ten years of Army Service, he was transferred to the reserve establishment with effect from 24.07.1974. While in the reserve establishment, he was required to attend reservist training held from time to time. He attended the biennial reservist training for the year 1976. An intimation dated 20.01.1978 was sent to him to attend the biennial reservist training from 05.06.1978 to 02.07.1978 but he failed to attend the reservist training. He was given another chance and was advised to attend the reservist training with the next batch from 19.06.1978 by an intimation dated 16.05.1978

and yet he did not attend the reservist training. On coming to learn that the appellant was employed as a driver in the Delhi Transport Corporation, letters were sent to the appellant as well as the Depot Manager of the Delhi Transport Corporation for furnishing the required exemption certificate exempting him from the training during 1978, but there was no response to the letters. Consequently, the appellant was declared as a deserter with effect from 19.06.1978 and was eventually dismissed from service with effect from 20.10.1981.

3. The appellant filed Writ Petition (C) 1294 of 1997 which was disposed of by the High Court with a direction to the authorities to consider the representation of the appellant with liberty to the appellant to file a fresh writ petition in case he is aggrieved. After the representation of the appellant was rejected, the appellant filed Writ Petition (C) No.2728 of 1997 which was also disposed of by the High Court on 28.04.2000 granting permission to the appellant to withdraw the writ petition and to challenge the order of dismissal. Thereafter, the appellant filed Writ Petition (C) No.5580 of 2000 challenging the order of dismissal and claiming pension and by the impugned judgment the High Court has dismissed the writ petition.

4. Mr. S. M. Hooda, learned counsel for the appellant, submitted that the appellant has been dismissed from service by the brigade commander who had no authority to dismiss the appellant from service. According to him, the authority who could dismiss the appellant was the officer-in-charge of the reservists. In support of this submission, he relied on Regulation 206 of the Defence Services Regulations, 1961. Mr. Hooda next submitted that in any case since the appellant had put in service during the period from 21.01.1963 to 27.01.1978, he was entitled to pension and gratuity but pension and gratuity had been denied to the appellant.

5. Mr. R. Balasubramaniam, learned counsel for the respondents, on the other hand, submitted that the authority to

dismiss the appellant from service is the brigade commander and this should be clear from Section 20(3) of the Army Act, 1950. He submitted that the appellant has in fact been dismissed by the brigade commander. Regarding pension, he submitted that Regulation 113(a) of the Pension Regulations, 1961 clearly provided that an individual, who is dismissed under the provisions of the Army Act, is ineligible for pension and gratuity in respect of all previous service. He submitted that as the appellant has been dismissed under the provisions of the Army Act, he was ineligible for pension and gratuity in respect of his previous service.

6. Sub-section (3) of Section 20 of the Army Act, 1950 and Regulation 206 of the Defence Services Regulations, 1961 are quoted hereinbelow:

> "Section 20 – Dismissal, removal or reduction by the Chief of the Army Staff and by other officers-
>
> (3).An officer having power not less than a brigade or equivalent commander or any prescribed officer may dismiss or remove from the service any person serving under his command other than an officer or a junior commissioned officer."
>
> "Regulation 206. Responsibility for effecting transfer to the reserve-OsC reservists are responsible for maintaining the establishment of reservists in accordance with the quota laid down by Army headquarters. Transfers to the reserve will be effected by OsC units in consultation with OsC reservists or Officer-in-Charge records. Once a man has been transferred to the reserve, he comes under the administration and disciplinary orders of the OC reservists."

7. A reading of Regulation 206 of the Defence Services Regulations, 1961, on which the learned counsel for the appellant has relied upon, would show that a man, who has been transferred to the reserve, comes under the administration and disciplinary orders of the Officer-in-Charge reservists. There

is no mention in Regulation 206 that the Officer-in-Charge reservists has the power to either remove or dismiss a reservist from service. A plain reading of sub-section (3) of Section 20 of the Army Act quoted above, on the other hand, would show that an officer having power not less than a brigade or equivalent commander or any prescribed officer may dismiss or remove from the service any person serving under his command other than an officer or a junior commissioned officer. Regulation 206 cannot take away the power vested under the Army Act in the brigade commander to dismiss or remove any person working under him. We, therefore, hold that the High Court rightly held in the impugned judgment that the brigade commander had the power to dismiss the appellant from service.

8. Regarding pension and gratuity claimed by the appellant, Regulation 113 (a) of the Pension Regulations, 1961 is quoted hereinbelow:

> "An individual, who is dismissed under the provisions of the Army Act, is ineligible for pension or gratuity in respect of all previous service. In exceptional cases, however, he may, at the discretion of the President be granted service pension or gratuity at a rate not exceeding that for which he would have otherwise qualified had be been discharged on the same date."

Regulation 113(a) is clear that an individual, who is dismissed under the provisions of the Army Act, is ineligible for pension or gratuity in respect of all previous service. As the appellant had been dismissed from the service under the provisions of the Army Act, he was not eligible for pension and gratuity and the High Court was right in rejecting the claim of the appellant for pension in the impugned judgment.

9. We, therefore, do not find any merit in this appeal and we, accordingly, dismiss the same with no order as to costs.

N.J. Appeal dismissed.

UNION OF INDIA
v.
COL. L.S.N. MURTHY & ANR.
(Civil Appeal No. 2755 of 2007)

NOVEMBER 23, 2011

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

Constitution of India, 1950: Articles 13(2), 13(3)(a) – Agreement between Union of India and respondent no.2 for supply of fruit – Dispute arose between them and matter referred to arbitrator – Arbitrator held that the said agreement was void and not enforceable as the consideration of the agreement was hit by letter dated 31.08.1990 of the Government of India, Ministry of Defence (GOI) – As per the letter issued by GOI, if the rate quoted by a tenderor was lower than 20% of the reasonable rates, the rate would be treated as fictitious and the tender would be rejected by a panel of officers – Whether the agreement is hit by the said letter – Held: Article 13(2) prohibits the State from making any law which takes away or abridges the fundamental rights conferred by Part-III of the Constitution – The word "law" is defined in clause (3)(a) of Article 13 to include any Ordinance order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law – The said clause, therefore, makes it clear that not only law made by the legislature but also an order or notification which takes away or abridges the fundamental rights conferred by Part-III of the Constitution would be void – Thus, clause (3)(a) of Article 13 is relevant, where an order or notification of the Government attempts to take away or abridge the fundamental rights conferred by Part-III of the Constitution and this provision of the Constitution has no relevance in deciding a question whether an agreement is void and is not enforceable in law – s.23 of the Contract Act states that the consideration or object

of an agreement is lawful, unless the consideration or object of an agreement is of such a nature that, if permitted, it would defeat the provision of law and in such a case the consideration or object is unlawful and the agreement is void – It is thus clear that the word "law" in the expression "defeat the provisions of any law" in s.23 of the Contract Act is limited to the expressed terms of an Act of the legislature – Unless the effect of an agreement results in performance of an unlawful act, an agreement which is otherwise legal cannot be held to be void and if the effect of an agreement did not result in performance of an unlawful act, as a matter of public policy, the court should refuse to declare the contract void with a view to save the bargain entered into by the parties and the solemn promises made thereunder – The arbitrator was, therefore, not right in law in coming to the conclusion that the agreement between the appellant and the respondent No.2 was void and not enforceable as the consideration or object of the agreement was hit by the letter dated 31.08.1990 of the Government of India, Ministry of Defence – This letter may be an instruction to the officers of the Defence Department to reject a tender where the rate quoted by the tenderor is more than 20% below the reasonable rates but the letter was not an Act of the legislature declaring that any supply made at a rate below 20% of the reasonable rates was unlawful – The finding of the arbitrator on Issue No.4 was thus patently illegal and opposed to public policy – The Award of the arbitrator as upheld by the courts below is set aside and the matter remitted to arbitrator for deciding the claims of the appellant and the respondent No.2 – Contract Act, 1872 – s.23.

The appellant invited tenders for supply of fresh fruits for its troops for the period 1.10.1999 to 30.9.2000. The tender of respondent no.2 was accepted. Respondent no.2 started the supply of fresh fruits on 1.10.1999. However, the supply was stopped on 6.6.2000. In reply to the show cause notice issued by the appellant, respondent no.2 stated that the price of all variety of

fruits had increased and, therefore, it was not possible for him to perform his part of the contract. The appellant then rescinded the contract and informed respondent no.2 about forfeiture of its security deposit and that the appellant would recover from him the expenditures made by it for purchase of fruits from elsewhere during the contract period.

The dispute was referred to arbitration. Before the arbitrator, respondent No.2 made a claim of Rs.12,23,732/- and the appellant made a claim of Rs.5,89,130.72 for purchase of fruits during the period 07.06.2000 to 30.09.2000. The arbitrator (respondent no.1) framed 4 issues and answered the 4 issues in his award and awarded a sum of Rs.38,173/- towards prices of fresh fruits supplied by respondent No.2 to the appellant with interest at the rate of 18% per annum till payment and also directed the appellant to release the security deposit to respondent No.2. The appellant filed application under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the award. The trial court dismissed the application. The High Court dismissed the appeal.

In the instant appeal, it was contended for the appellant that finding of the arbitrator that the contract was void *ab initio* and was not enforceable was not correct.

Allowing the appeal, the Court

HELD: 1.1. The reasons given by the arbitrator in his Award for recording the finding that the contract was void *ab initio* were not tenable in law. The basis of such finding of the arbitrator was the letter dated 31.08.1990 issued by the Government of India, Ministry of Defence in which it was stated that if the rate quoted by a tenderor was lower than 20% of the reasonable rates, the rate would be treated as fictitious and the tender would be rejected by

a panel of officers. The arbitrator had held that as the rates quoted by respondent No.2 were below 20% of the reasonable rates, the agreement entered into with respondent No.2 for supply of fruits at the tendered rates was hit by the said letter dated 31.08.1990. The arbitrator had further held that under Article 13(3)(a) of the Constitution of India, law includes a notification of the Government and, therefore, the letter dated 31.08.1990 of the Government of India, Ministry of Defence was law and as the consideration or object of the agreement between the appellant and the respondent No.2 defeated a provision of law, the agreement was void under Section 23 of the Indian Contract Act. A reading of clause (2) of Article 13 of the Constitution would show that by the said clause the State is prohibited from making any law which takes away or abridges the fundamental rights conferred by Part-III of the Constitution. Clause (2) of Article 13 of the Constitution further provides that any law made in contravention of clause (2) shall to the extent of the contravention be void. In clause (3)(a) of Article 13 of the Constitution, the word "law" has been defined for the purpose of Article 13 to include any Ordinance order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. Clause (3)(a) of Article 13 of the Constitution, therefore, makes it clear that not only law made by the legislature but also an order or notification which takes away or abridges the fundamental rights conferred by Part-III of the Constitution would be void. Thus, clause (3)(a) of Article 13 of the Constitution is relevant, where an order or notification of the Government attempts to take away or abridge the fundamental rights conferred by Part-III of the Constitution and this provision of the Constitution has no relevance in deciding a question whether an agreement is void and is not enforceable in law. Section 23 of the Indian Contract Act *inter alia* states that the consideration or object of an agreement is lawful, unless

the consideration or object of an agreement is of such a nature that, if permitted, it would defeat the provision of law and in such a case the consideration or object is unlawful and the agreement is void. It is thus clear that the word "law" in the expression "defeat the provisions of any law" in Section 23 of the Indian Contract Act is limited to the expressed terms of an Act of the legislature. [Paras 7-9] [304-A-E; 305-D-H; 306-E-F; 307-A-B]

Shri Lachoo Mal vs. Shri Radhey Shyam **(1971) 1 SCC 619 – relied on.**

Pollock & Mulla in Mulla Indian Contract; *Specific Relief Acts,* **13th Edition, Volume-I published by Lexis Nexis Butterworths – referred to.**

1.2. Unless the effect of an agreement results in performance of an unlawful act, an agreement which is otherwise legal cannot be held to be void and if the effect of an agreement did not result in performance of an unlawful act, as a matter of public policy, the court should refuse to declare the contract void with a view to save the bargain entered into by the parties and the solemn promises made thereunder. The arbitrator was, therefore, not right in law in coming to the conclusion that the agreement between the appellant and the respondent No.2 was void and not enforceable as the consideration or object of the agreement was hit by the letter dated 31.08.1990 of the Government of India, Ministry of Defence. This letter may be an instruction to the officers of the Defence Department to reject a tender where the rate quoted by the tenderor is more than 20% below the reasonable rates but the letter was not an Act of the legislature declaring that any supply made at a rate below 20% of the reasonable rates was unlawful. The finding of the arbitrator on Issue No.4 was thus patently illegal and opposed to public policy. The Award of the arbitrator and the judgments of the City Civil Court and the High Court

is set aside and the matter is remitted to the arbitrator for deciding the claims of the appellant and the respondent No.2. [Paras 10-12] [307-D-F-H; 308-A-C-F]

Oil and Natural Gas Corporation Ltd. vs. *Saw Pipes Ltd.* **(2003) 5 SCC 705: 2003 (3) SCR 691 – relied on.**

National Insurance Company Limited v. Boghara Polyfab Private Limited **(2009) 1 SCC 267: 2008 (13) SCR 638 – referred to.**

Vita Food Products Incorporated v. Unus Company Ltd. (in liquidation) **(1939) AC 277 – referred to.**

Case Law Reference:

2008 (13) SCR 638	**cited**	**Para 4**
(1971) 1 SCC 619	**relied on**	**Para 10**
(1939) AC 277	**referred to**	**Para 10**
2003 (3) SCR 691	**relied on**	**Para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2755 of 2007.

From the Judgment & Order dated 27.04.2006 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Civil Appeal No. 322 of 2005.

S. Wasim A Qadri, Rekha Pandey, Ashwani Garg, Anil Katiyar for the Appellant.

V. Shekhar, R. Santhanakrishnan, Vinamr, D. Mahesh Babu for the Respondents.

The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. This is an appeal by way of special leave under Article 136 of the Constitution against the judgment

dated 27.04.2006 of the Division Bench of the Andhra Pradesh High Court in Civil Miscellaneous Appeal No.322 of 2005 (for short 'the impugned judgment').

2. The facts in brief are that in August, 1999, the appellant invited tenders for supply of fresh fruits for its troops for the period from 01.10.1999 to 30.09.2000 and respondent No.2 amongst others submitted tenders and the tender of respondent No.2 was accepted. The respondent No.2 started supply of fresh fruits on 01.10.1999 and stopped the supply on 06.06.2000. On 13.06.2000, the appellant issued a notice to respondent No.2 to show-cause why action should not be initiated for such non-supply of fresh fruits. The respondent No.2 submitted its reply dated 20.06.2000 saying that the prices of all variety of fruits had increased and that it was impossible on its part to perform the contract and that the appeals made by the respondent No.2 were not considered by the authorities. The appellant then rescinded the contract with respondent No.2 by letter dated 29.06.2000 and informed the respondent No.2 that its security deposit has been forfeited and that the appellant will recover the expenditures made by the appellant for purchase of fruits during the contract period.

3. As the contract provided for an arbitration clause, the dispute between the parties was referred to the arbitrator. The respondent No.2 made a claim of Rs.12,23,732/- before the arbitrator and the appellant made a claim of Rs.5,89,130.72 for purchase of fruits during the period 07.06.2000 to 30.09.2000 before the arbitrator. The arbitrator (respondent No.1) framed 4 Issues and answered the 4 Issues in his Award dated 06.06.2001 and awarded a sum of Rs.38,173/- towards prices of fresh fruits supplied by respondent No.2 to the appellant with interest at the rate of 18% per annum till payment and also directed the appellant to hand over the Fixed Deposit Certificates retained as security deposit to respondent No.2. The appellant filed O.P. No.1457 of 2001 under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act')

for setting aside the Award dated 06.06.2001 in the City Civil Court, Hyderabad. The Third Additional Chief Judge, City Civil Court, Hyderabad, by his order dated 05.11.2004 did not find any patent illegality in the Award and dismissed the application of the appellant under Section 34 of the Act. Aggrieved, the appellant filed Civil Misc. Appeal No.322 of 2005 under Section 37 of the Act against the order dated 05.11.2004 of the Third Additional Chief Judge, City Civil Court, Hyderabad, but by the impugned judgment, the Division Bench of the High Court has dismissed the appeal.

4. Learned counsel for the appellant challenged the findings of the arbitrator on Issue No.4. He submitted that Issue No.4 framed by the arbitrator was whether the contract between the appellant and the respondent No.2 was legally enforceable and the arbitrator has held in the Award that the contract was void *ab initio* and was not enforceable. He referred to the reasons given by the arbitrator in the Award to show that this finding of the arbitrator on issue No.4 was contrary to law. Learned counsel for the appellant alternatively submitted that if it is held that the contract was void *ab initio*, then the arbitration clause which is part of the contract cannot be invoked. He cited the decision in *National Insurance Company Limited v. Boghara Polyfab Private Limited* [(2009) 1 SCC 267] in which this Court has held that where a contract is void *ab initio* and has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void. He submitted that on these two grounds the Award of the arbitrator should have been set aside and the application of the appellant under Section 34 of the Act should have been allowed.

5. Learned counsel for the respondent No.2, on the other hand, sought to sustain the Award of the arbitrator. He submitted that the arbitrator has held that even though the contract was void under Section 70 of the Indian Contract Act, 1892, the appellant is liable to pay compensation to the respondent No.2 for the supply of fruits made by respondent

No.2 to the appellant and to the security deposit with interest at the rate of 18% per annum to the respondent No.2.

6. We have perused the Award of the arbitrator and we find that the arbitrator has framed the following 4 Issues:

Issue No.1 – Whether the parties to the contract were discharged?

Issue No.2 – Whether the disputed contract was discharged in the following ways:

(a) By performance of the contract

(b) By breach of the contract

(c) By impossibility of performance

Issue No.3 – Construction of ASE Specification No.68;

Issue No.4 – Whether the contract was legally enforceable?

On Issue No. 1, the arbitrator has held that the respondent No.2 by not supplying fruits to the appellant had discharged the appellant from its obligations under the contract and the appellant had the right to sue for breach of contract for damages for loss caused to it in accordance with the provisions of the Indian Contract Act. On Issue No. 2, the arbitrator has held that the contention of respondent No.2 that he was disabled to perform from his part of the contract due to impossibility of performance caused by short supply of fruits is not correct. On Issue No.3, the arbitrator has held that the contention of respondent No.2 regarding ASE Specification No.68 and the note thereto failed because respondent No.2 has accepted and signed the chart and performed his part of the contract upto June, 2000. On Issue No.4, however, the arbitrator has held that the contract was void *ab initio* and was not enforceable and therefore no right accrued to any of the parties for breach of contract.

7. We, however, find that the reasons given by the arbitrator in his Award for recording this finding on issue No.4 that the contract was void *ab initio* are not tenable in law. The arbitrator has found that the Government of India, Ministry of Defence in its letter dated 31.08.1990 has issued an instruction that if the rate quoted by a tenderor was lower than 20% of the reasonable rates, the rate should be treated as fictitious and the tender should be rejected by a panel of officers. The arbitrator has held that as the rates quoted by respondent No.2 were below 20% of the reasonable rates the agreement entered into with respondent No.2 for supply of fruits at the tendered rates was hit by the letter dated 31.08.1990 of the Government of India, Ministry of Defence. The arbitrator has further held that under Article 13(3)(a) of the Constitution of India, law includes a notification of the Government and therefore the letter dated 31.08.1990 of the Government of India, Ministry of Defence was law and as the consideration or object of the agreement between the appellant and the respondent No.2 defeated a provision of law, the agreement was void under Section 23 of the Indian Contract Act. In our considered opinion, the arbitrator has failed to appreciate not only the provisions of Article 13(3)(a) of the Constitution but also of Section 23 of the Indian Contract Act.

8. Article 13 of the Constitution is quoted hereinbelow:

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

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) in this article, unless the context otherwise requires –

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

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

(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368."

A reading of clause (2) of Article 13 of the Constitution quoted above would show that by the said clause the State is prohibited from making any law which takes away or abridges the fundamental rights conferred by Part-III of the Constitution. Clause (2) of Article 13 of the Constitution further provides that any law made in contravention of clause (2) shall to the extent of the contravention be void. In clause (3)(a) of Article 13 of the Constitution, the word "law" has been defined for the purpose of Article 13 to include any Ordinance order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. Clause (3)(a) of Article 13 of the Constitution therefore makes it clear that not only law made by the legislature but also an order or notification which takes away or abridges the fundamental rights conferred by Part-III of the Constitution would be void. Thus, clause (3)(a) of Article 13 of the Constitution is relevant, where an order or notification of the Government attempts to take away or abridge the fundamental rights conferred by Part-III of the Constitution and this provision of the Constitution has no relevance in deciding a question whether an agreement is void and is not enforceable in law.

9. For deciding whether an agreement is void and is not enforceable, we have to refer to Section 23 of the Indian Contract Act, which is quoted hereinbelow:

"23. What **consideration and objects are lawful, and what not** – The consideration of object of an agreement is lawful, unless –

it is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or

Involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

Section 23 of the Indian Contract Act *inter alia* states that the consideration or object of an agreement is lawful, unless the consideration or object of an agreement is of such a nature that, if permitted, it would defeat the provision of law and in such a case the consideration or object is unlawful and the agreement is void. In Pollock & Mulla in Mulla Indian Contract and Specific Relief Acts, 13th Edition, Volume-I published by LexisNexis Butterworths, it is stated at page 668:

"The words 'defeat the provisions of any law' must be taken as limited to defeating the intention which the legislature has expressed, or which is necessarily implied from the express terms of an Act. It is unlawful to contract to do that which it is unlawful to do; but an agreement will not be void, merely because it tends to defeat some purpose ascribed to the legislature by conjecture, or even appearing, as a matter of history, from extraneous evidence, such as

> legislative debates or preliminary memoranda, not forming part of the enactment."

It is thus clear that the word "law" in the expression "defeat the provisions of any law" in Section 23 of the Indian Contract Act is limited to the expressed terms of an Act of the legislature.

10. In *Shri Lachoo Mal vs. Shri Radhey Shyam* [(1971) 1 SCC 619] this Court while deciding whether an agreement was void and not enforceable under Section 23 of the Indian Contact Act held:

> "What makes an agreement, which is otherwise legal, void is that its performance is impossible except by disobedience of law. Clearly no question of illegality can arise unless the performance of the unlawful act was necessarily the effect of an agreement."

We are, therefore, of the opinion that unless the effect of an agreement results in performance of an unlawful act, an agreement which is otherwise legal cannot be held to be void and if the effect of an agreement did not result in performance of an unlawful act, as a matter of public policy, the court should refuse to declare the contract void with a view to save the bargain entered into by the parties and the solemn promises made thereunder. As has been observed by Lord Wright in *Vita Food Products Incorporated vs. Unus Company Ltd. (in liquidation)* [(1939) AC 277 at p. 293]:

> "Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds."

11. The arbitrator was, therefore, not right in law in coming to the conclusion that the agreement between the appellant and

the respondent No.2 was void and not enforceable as the consideration or object of the agreement was hit by the letter dated 31.08.1990 of the Government of India, Ministry of Defence. This letter may be an instruction to the officers of the Defence Department to reject a tender where the rate quoted by the tenderor is more than 20% below the reasonable rates but the letter was not an Act of the legislature declaring that any supply made at a rate below 20% of the reasonable rates was unlawful. The finding of the arbitrator on Issue No.4 is thus patently illegal and opposed to public policy. In *Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.* (2003) 5 SCC 705 at page 727], this Court after examining the grounds on which an award of the arbitrator can be set aside under Section 34 of the Act has said:

> "31……However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case it is required to be held that the award could be set aside if it is patently illegal."

12. We accordingly set aside the Award of the arbitrator and the judgments of the City Civil Court, Hyderabad and the High Court and remit the matter to the arbitrator for deciding the claims of the appellant and the respondent No.2 in accordance with the findings in the Award on Issue Nos. 1, 2 and 3 and in accordance with this judgment. The appeal is allowed with no order as to costs.

D.G. Appeal allowed.

SANJAY CHANDRA
v.
CBI
(Criminal Appeal No. 2178 of 2011)

NOVEMBER 23, 2011

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

CODE OF CRIMINAL PROCEUDRE, 1973:

s. 439 – Bail – Governing principles – Explained – Telecom scam – Applications for bail rejected by Special Judge and High Court – Held: No doubt, the offence alleged against the accused is a serious one in terms of alleged huge loss to the State exchequer, that, by itself, should not deter the Court from enlarging them on bail when there is no serious contention of the prosecution that the accused, if released on bail, would interfere with the trial or tamper with evidence – It is also significant that the investigation has already been completed and the charge sheet has been filed before the Special Judge and, as such, custody of the accused may not be necessary for further investigation – Further, when the under trial prisoners are detained in jail custody to an indefinite period, Article 21 of the Constitution is violated – Every person, detained or arrested, is entitled to speedy trial – In the instant case, there are seventeen accused persons – Statements of the witnesses run to several hundred pages and the documents on which reliance is placed by the prosecution, is voluminous – The trial may take considerable time and the appellants, who are in jail, have to remain in jail longer than the period of detention, had they been convicted – It is not in the interest of justice that the accused should be in jail for an indefinite period – Therefore, the accused are entitled to the grant of bail pending trial on stringent conditions in order to ally the apprehension expressed by the prosecution – The accused are directed to

be released on bail on the conditions stipulated in the judgment – Constitution of India, 1950 – Article 21 – Doctrine/ Principle – Test of necessity.

Prosecution was launched against the appellants for commission of offences punishable u/s 120-B, 420, 468, 471 and 109 IPC and s. 13(2) read with s. 13(1) (d) of the Prevention of Corruption Act,1988. Bail was refused to them by the Special Judge CBI as well as by the Single Judge of the High Court. In the Instant appeals, it was, *inter alia*, contended for the appellants that they were cooperating with the investigation all through out, that there was no threat from them of tempering with the witnesses; that gravity of the offence would be determined by the punishment and not by any other standard or measure and, in the instant case, the offences alleged against the appellants are punishable with a maximum sentence of 9 years; and that the charge sheet in the case has been filed and the trial is likely to take considerable time to be concluded. Therefore, it was contended that the courts below should not have declined bail to the appellants. The stand of the prosecution was that the Supreme Court had refused to entertain the special leave petition against the order rejecting the bail of the co-accused.

Disposing of the appeals the Court

HELD: 1. In the earlier petition of the co-accused*, the petitioner therein was before this Court before framing of charges by the trial court. The earlier and the instant proceedings cannot be compared and it cannot be concluded that there are no changed circumstances. [para 12] [327-B-C]

Sharad Kumar etc. vs. Central Bureau of Investigation* **2012 (1) SCC 65 – distinguished.

2.1 This Court, time and again, has stated that bail is the rule and committal to jail an exception. It is also observed that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution. [para 16] [329-F-G]

State of Rajasthan v. Balchand, **1978 (1) SCR 535 = (1977) 4 SCC 308,** *Gudikanti Narasimhulu v. Public Prosecutor,* **1978 (2) SCR 371 = (1978) 1 SCC 240,** *Gurcharan Singh v. State (Delhi Admn.)* **1978 (2) SCR 358 = (1978) 1 SCC 118,** *Babu Singh v. State of U.P.,* **1978 (2) SCR 777 = (1978) 1 SCC 579,** *Moti Ram v. State of M. P.,* **1979 (1) SCR 335 = (1978) 4 SCC 47,** *Vaman Narain Ghiya v. State of Rajasthan,* **2008 (17) SCR 369 =(2009) 2 SCC 281, and** *Siddharam Satlingappa Mhetre v. State of Maharashtra,* **2010 (15) SCR 201 = (2011) 1 SCC 694- relied on.**

2.2 It would be quite contrary to the concept of personal liberty enshrined in the Constitution of India that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. [para 14] [328-B-C]

2.3 In bail applications, generally, it has been laid down from the earliest times that the object of bail is neither punitive nor preventative, but to secure the appearance of the accused at his trial by reasonable amount of bail. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found

guilty. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, 'necessity' is the operative test. [para 14] [327-G-H; 328-A-B]

Prahlad Singh Bhati v. NCT, Delhi, **2001 (2) SCR 684 = *(2001) 4 SCC 280,*** *State of U. P. v. Amarmani Tripathi,* **2005 (3) Suppl. SCR 454 = *(2005) 8 SCC 21 – referred to.***

2.4 In the instant case, the "pointing finger of accusation" against the appellants is 'the seriousness of the charge'. The offences alleged are economic offences which have resulted in loss to the State exchequer. Though, it has been contended that there is possibility of the appellants tampering with witnesses, no material has been placed in support of the allegation. Seriousness of the charge is, no doubt, one of the relevant considerations while considering bail applications but that is not the only test or the factor: The other factor that also requires to be taken note of is the punishment that could be imposed after trial and conviction, both under the Penal Code and the Prevention of Corruption Act. Otherwise, the Court would not be balancing the Constitutional Rights but rather "recalibration of the scales of justice." [para 15] [328-E-H]

Kalyan Chandra Sarkar Vs. Rajesh Ranjan **(2005) 2 SCC 42 – referred to.**

3.1 This Court has taken the view that when there is a delay in the trial, bail should be granted to the accused. [para 22] [340-C-D]

Babba v. State of Maharashtra, **(2005) 11 SCC 569,** *Vivek Kumar v. State of U. P.,* **(2000) 9 SCC 443,** *Mahesh Kumar Bhawsinghka v. State of Delhi,* **(2000) 9 SCC 383 – relied on.**

3.2 In the instant case, both the courts have refused the request for grant of bail on two grounds: The primary ground is that the offence alleged against the accused persons is very serious involving deep rooted planning in which huge financial loss is caused to the State exchequer; the secondary ground is that the possibility of the accused persons tempering with the witnesses. The charge against the accused is that of cheating and dishonestly inducing delivery of property, forgery for the purpose of cheating using a forged document as genuine. The punishment of the offence is imprisonment for a term which may extend to seven years. It is, no doubt, true that the nature of the charge may be relevant, but at the same time, the punishment to which the party may be liable, if convicted, also bears upon the issue. Therefore, in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration. The grant or refusal to grant bail lies within the discretion of the court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. [Para 25] [342-F-H; 343-A-C]

3.3 The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required. [Para 25] [343-C-E]

3.4 When the under trial prisoners are detained in jail custody to an indefinite period, Article 21 of the Constitution is violated. Every person, detained or

arrested, is entitled to speedy trial. In the instant case, there are seventeen accused persons. Statements of the witnesses run to several hundred pages and the documents on which reliance is placed by the prosecution, is voluminous. The trial may take considerable time and the appellants, who are in jail, have to remain in jail longer than the period of detention, had they been convicted. It is not in the interest of justice that the accused should be in jail for an indefinite period. [Para 26] [343-F-H; 344-A]

State of Kerala v. Raneef ***(2011) 1 SCC 784*** **– relied on.**

3.5 No doubt, the offence alleged against the appellants is a serious one in terms of alleged huge loss to the State exchequer, that, by itself, should not deter the Court from enlarging the appellants on bail when there is no serious contention of the respondent that the accused, if released on bail, would interfere with the trial or tamper with evidence. There is no good reason to detain the accused in custody, that too, after the completion of the investigation and filing of the charge-sheet. [Para 26] [344-A-C]

3.6 It is true that the accused are charged with economic offences of huge magnitude and the offences alleged, if proved, may jeopardize the economy of the country. At the same time, it is also significant that the investigating agency has already completed investigation and the charge sheet is already filed before the Special Judge. Therefore, custody of the accused may not be necessary for further investigation. Therefore, the appellants are entitled to the grant of bail pending trial on stringent conditions in order to ally the apprehension expressed by CBI. The appellants are directed to be released on bail on the conditions stipulated in the judgment. [Para 28-29] [344-H; 345-A-C]

R vs. Griffiths and Ors., ***(1966) 1 Q.B. 589*** **– referred to.**

Case Law Reference:

(1966) 1 Q.B. 589	**referred to**	**para 6**
2012 (1) SCC 65	**distinguished**	**para 10**
(2005) 2 SCC 42	**referred to**	**para 15**
1978 (1) SCR 535	**relied on**	**para 16**
1978 (2) SCR 371	**relied on**	**para 17**
1978 (2) SCR 358	**relied on**	**para 18**
1978 (2) SCR 777	**relied on**	**para 19**
1979 (1) SCR 335	**relied on**	**para 20**
2008 (17) SCR 369	**relied on**	**para 21**
(2010 (15) SCR 201	**relied on**	**para 22**
(2005) 11 SCC 56	**relied on**	**para 22**
(2000) 9 SCC 443	**relied on**	**para 22**
(2000) 9 SCC 383	**relied on**	**para 22**
2001 (2) SCR 684	**referred to**	**para 23**
2005 (3) Suppl. SCR 454	**referred to**	**para 24**
(2011) 1 SCC 784	**relied on**	**para 26**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2178 of 2011.

From the Judgment & Order dated 23.05.2011 of the High Court of Delhi at New Delhi in Bail Application No. 508 of 2011.

WITH

Crl. A. Nos. 2179, 2180, 2181 & 2182 of 2011.

Harin P. Raval, ASG, Ram Jethmalani, Mukul Rohatgi, Soli J. Sorabjee, Ashok H. Desai, Ritu Bhalla, Manu Sharma, Karan Kalia, Pranav Diesh, Ananya Ghosh, Sahil Sharma, Vijay Agarwal, Saurabh Kirpal, Ninad Laud, Purnima Bhat Kak, Shally Bhasin Maheshwari, Mahesh Agarwal, Siddharth Singla, Tapesh Kumar Singh, Rajiv Nanda, Anirudh Sharma, Harsh N. Parekh, Anando Mukherjee, Padmalakshmi Nigam, Arvind Kumar Sharma for the appearing parties.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. Leave granted in all the Special Leave Petitions.

2. These appeals are directed against the common Judgment and Order of the learned Single Judge of the High Court of Delhi, dated 23rd May 2011 in Bail Application No. 508/2011, Bail Application No. 509/2011 & Crl. M.A. 653/2011, Bail Application No. 510/2011, Bail Application No. 511/2011 and Bail Application No. 512/2011, by which the learned Single Judge refused to grant bail to the accused-appellants. These cases were argued together and submitted for decision as one case.

3. The offence alleged against each of the accused, as noticed by the Ld. Special Judge, CBI, New Delhi, who rejected bail applications of the appellants, vide his order dated 20.4.2011, is extracted for easy reference :

Sanjay Chandra (A7) in Crl. Appeal No. 2178 of 2011 [arising out of SLP (Crl.)No.5650 of 2011]:

"6. The allegations against accused Sanjay Chandra are that he entered into criminal conspiracy with accused A. Raja, R.K. Chandolia and other accused persons during September 2009 to get UAS licence for providing telecom services to otherwise an ineligible company to get UAS licences. He, as Managing Director of M/s Unitech Wireless (Tamil Nadu) Limited, was looking after the

business of telecom through 8 group companies of Unitech Limited. The first-come-first-served procedure of allocation of UAS Licences and spectrum was manipulated by the accused persons in order to benefit M/s Unitech Group Companies. The cutoff date of 25.09.2007 was decided by accused public servants of DoT primarily to allow consideration of Unitech group applications for UAS licences. The Unitech Group Companies were in business of realty and even the objects of companies were not changed to 'telecom' and registered as required before applying. The companies were ineligible to get the licences till the grant of UAS licences. The Unitech Group was almost last within the applicants considered for allocation of UAS licences and as per existing policy of first-come-first-served, no licence could be issued in as many as 10 to 13 circles where sufficient spectrum was not available. The Unitech companies got benefit of spectrum in as many as 10 circles over the other eligible applicants. Accused Sanjay Chandra, in conspiracy with accused public servants, was aware of the whole design of the allocation of LOIs and on behalf of the Unitech group companies was ready with the drafts of Rs. 1658 crores as early as 10th October, 2007."

Vinod Goenka (A5) in Crl. Appeal No. 2179 of 2011 [arising out of SLP(Crl)No.5902 of 2011] :

"5.The allegations against accused Vinod Goenka are that he was one of the directors of M/s Swan Telecom (P) Limited in addition to accused Shahid Usman Balwa w.e.f. 01.10.2007 and acquired majority stake on 18.10.2007 in M/s Swan Telecom (P) Limited (STPL) through DB Infrastructure (P) Limited. Accused Vinod Goenka carried forward the fraudulent applications of STPL dated 02.03.2007 submitted by previous management despite knowing the fact that STPL was ineligible company to get UAS licences by virtue of clause 8 of UASL guidelines 2005. Accused Vinod Goenka was an associate of

accused Shahid Usman Balwa to create false documents including Board Minutes of M/s Giraffe Consultancy (P) Limited fraudulently showing transfer of its shares by the companies of Reliance ADA Group during February 2007 itself. Accused/applicant in conspiracy with accused Shahid Usman Balwa concealed or furnished false information to DoT regarding shareholding pattern of STPL as on the date of application thereby making STPL an eligible company to get licence on the date of application, that is, 02.03.2007. Accused/applicant was an overall beneficiary with accused Shahid Usman Balwa for getting licence and spectrum in 13 telecom circles.

12. Investigation has also disclosed pursuant to TRAI recommendations dated 28.08.2007 when M/s Reliance Communications Ltd. got the GSM spectrum under the Dual Technology policy, accused Gautam Doshi, Hari Nair and Surendra Pipara transferred the control of M/s Swan Telecom Pvt. Ltd., and said structure of holding companies, to accused Shahid Balwa and Vinod Goenka. In this manner they transferred a company which was otherwise ineligible for grant of UAS license on the date of application, to the said two accused persons belonging to Dynamix Balwa (DB) group and thereby facilitated them to cheat the DoT by getting issued UAS Licences despite the ineligibility on the date of application and till 18.10.2007.

13. Investigation has disclosed that accused Shahid Balwa and Vinod Goenka joined M/s Swan Telecom Pvt. Ltd. and M/s Tiger Traders Pvt. Ltd. as directors on 01.10.2007 and DB group acquired the majority stake in TTPL/ M/s Swan Telecom Pvt. Ltd. (STPL) on 18.10.2007. On 18.10.2007 a fresh equity of 49.90 lakh shares was allotted to M/s DB Infrastructure Pvt. Ltd. Therefore on 01.10.2007, and thereafter, accused Shahid Balwa and Vinod Goenka were in-charge of, and were responsible to, the company M/s Swan Telecom Pvt. Ltd. for the conduct of business. As

such on this date, majority shares of the company were held by D.B. Group."

Gautam Doshi (A9), Surendra Pipara (A10) and Hari Nair (A 11) in Crl. Appeal Nos.2180,2182 & 2181 of 2011 [arising out of SLP (Crl) Nos. 6190,6315 & 6288 of 2011] :

"7. It is further alleged that in January-February, 2007 accused Gautam Doshi, Surendra Pipara and Hari Nath in furtherance of their common intention to cheat the Department of Telecommunications, structured/created net worth of M/s Swan Telecom Pvt. Ltd., out of funds arranged from M/s Reliance Telecom Ltd. or its associates, for applying to DoT for UAS Licences in 13 circles, where M/s Reliance Telecom Ltd. had no GSM spectrum, in a manner that its associations with M/s Reliance Telecom Ltd. may not be detected, so that DOT could not reject its application on the basis of clause 8 of the UASL Guidelines dated 14.12.2005.

8. In pursuance of the said common intention of accused persons, they structured the stake-holding of M/s Swan Telecom Pvt. Ltd. in a manner that only 9.9% equity was held by M/s Reliance Telecom Ltd. (RTL) and rest 90.1% was shown as held by M/s Tiger Traders Pvt. Ltd. (later known as M/s Tiger Trustees Pvt. Ltd. – TTPL), although the entire company was held by the Reliance ADA Group of companies through the funds raised from M/s Reliance Telecom Ltd. etc.

9. It was further alleged that M/s Swan Telecom Pvt. Ltd. (STPL) was, at the time of application dated 02.03.2007, an associate of M/s Reliance ADA Group / M/s Reliance Communications Limited / M/s Reliance Telecom Limited, having existing UAS Licences in all telecom circles. Investigations have also disclosed that M/s Tiger Traders Pvt. Ltd., which held majority stake (more than 90%) in M/s Swan Telecom Pvt. Ltd. (STPL), was also an associate

company of Reliance ADA Group. Both the companies has not business history and were activated solely for the purpose of applying for UAS Licences in 13 telecom circles, where M/s Reliance Telecom Ltd. did not have GSM spectrum and M/s Reliance Communications Ltd. had already applied for dual technology spectrum for these circles. Investigation has disclosed that the day to day affairs of M/s Swan Telecom Pvt. Ltd. and M/s Tiger Traders Pvt. Ltd. were managed by the said three accused persons either themselves or through other officers/consultants related to the Reliance ADA group. Commercial decisions of M/s Swan Telecom Pvt. Ltd. and M/s Tiger Traders Pvt. Ltd. were also taken by these accused persons of Reliance ADA group. Material inter-company transactions (bank transactions) of M/s Reliance Communications / M/s Reliance Telecommunications Ltd. and M/s Swan Telecom Pvt. Ltd. (STPL) and M/s Tiger Traders Pvt. Ltd. were carried out by same group of persons as per the instructions of said accused Gautam Doshi and Hari Nair.

10. Investigations about the holding structure of M/s Tiger Traders Pvt. Ltd. has revealed that the aforesaid accused persons also structured two other companies i.e. M/s Zebra Consultancy Private Limited & M/s Parrot Consultants Private Limited. Till April, 2007, by when M/s Swan Telecom Pvt. Ltd. applied for telecom licences, 50% shares of M/s Zebra Consultancy Private Limited & M/s Parrot Consultants Private Limited, were purchased by M/s Tiger Traders Pvt. Ltd. Similarly, 50% of equity shares of M/s Parrot Consultants Private Limited & M/s Tiger Traders Private Limited were purchased by M/s Zebra Consultancy Private Limited. Also, 50% of equity shares of M/s Zebra Consultancy Private Limited and M/s Tiger Traders Private Limited were purchased by M/s Parrot Consultants Private Limited. These 3 companies were, therefore, cross holding each other in an inter-locking

structure w.e.f. March 2006 till 4th April, 2007.

11. It is further alleged that accused Gautam Doshi, Surendra Pipara and Hari Nair instead of withdrawing the fraudulent applications preferred in the name of M/s Swan Telecom (P) Limited, which was not eligible at all, allowed the transfer of control of that company to the Dynamix Balwa Group and thus, enabled perpetuating and (sic.) illegality. It is alleged that TRAI in its recommendations dated 28.08.2007 recommended the use of dual technology by UAS Licencees. Due to this reason M/s Reliance Communications Limited, holding company of M/s Reliance Telecom Limited, became eligible to get GSM spectrum in telecom circles for which STPL had applied. Consequently, having management control of STPL was of no use for the applicant/accused persons and M/s Reliance Telecom Limited. Moreover, the transfer of management of STPL to DB Group and sale of equity held by it to M/s Delphi Investments (P) Limited, Mauritius, M/s Reliance Telecom Limited has earned a profit of around Rs. 10 crores which otherwise was not possible if they had withdrawn the applications. M/s Reliance Communications Limited also entered into agreement with M/s Swan Telecom (P) Limited for sharing its telecom infrastructure. It is further alleged that the three accused persons facilitated the new management of M/s Swan Telecom (P) Limited to get UAS licences on the basis of applications filed by the former management. It is further alleged that M/s Swan Telecom (P) Limited on the date of application, that is, 02.03.2007 was an associate company of Reliance ADA group, that is, M/s Reliance Communications Limited/ M/s Reliance Telecom Limited and therefore, ineligible for UAS licences.

12. Investigation has also disclosed pursuant to TRAI recommendations dated 28.08.2007 when M/s Reliance Communications Ltd. got the GSM spectrum under the

Dual Technology policy, accused Gautam Doshi, Hari Nair and Surendra Pipara transferred the control of M/s Swan Telecom Pvt. Ltd., and said structure of holding companies, to accused Shahid Balwa and Vinod Goenka. In this manner they transferred a company which was otherwise ineligible for grant of UAS license on the date of application, to the said two accused persons belonging to Dynamix Balwa (DB) group and thereby facilitated them to cheat the DoT by getting issued UAS Licences despite the ineligibility on the date of application and till 18.10.2007."

4. The Special Judge, CBI, New Delhi, rejected Bail Applications filed by the appellants by his order dated 20.04.2011. The appellants moved the High Court by filing applications under Section 439 of the Code of Criminal Procedure (in short, "Cr. P.C."). The same came to be rejected by the learned Single Judge by his order dated 23.05.2011. Aggrieved by the same, the appellants are before us in these appeals.

5. Shri. Ram Jethmalani, Shri. Mukul Rohatgi, Shri Soli J. Sorabjee and Shri. Ashok H. Desai, learned senior counsel appeared for the appellants and Shri. Harin P. Raval, learned Additional Solicitor General, appears for the respondent-CBI.

6. Shri. Ram Jethmalani, learned senior counsel appearing for the appellant Sanjay Chandra, would urge that the impugned Judgment has not appreciated the basic rule laid down by this Court that grant of bail is the rule and its denial is the exception. Shri. Jethmalani submitted that if there is any apprehension of the accused of absconding from trial or tampering with the witnesses, then it is justified for the Court to deny bail. The learned senior counsel would submit that the accused has cooperated with the investigation throughout and that his behavior has been exemplary. He would further submit that the appellant was not arrested during the investigation, as

there was no threat from him of tampering with the witnesses. He would submit that the personal liberty is at a very high pedestal in our Constitutional system, and the same cannot be meddled with in a causal manner. He would assail the impugned Judgment stating that the Ld. Judge did not apply his mind, and give adequate reasons before rejecting bail, as is required by the legal norms set down by this Court. Shri. Jethmalani further contends that it was only after the appellants appeared in the Court in pursuance of summons issued, they were made to apply for bail, and, thereafter, denied bail and sent to custody. The learned senior counsel states that the trial Judge does not have the power to send a person, who he has summoned in pursuance of Section 87 Cr.P.C to judicial custody. The only power that the trial Judge had, he would contend, was to ask for a bond as provided for in Section 88 Cr.P.C. to ensure his appearance. Shri. Jethmalani submits that when a person appeared in pursuance of a bond, he was a free man, and such a free man cannot be committed to prison by making him to apply for bail and thereafter, denying him the same. Shri. Jethmalani further submits that if it was the intention of the Legislature to make a person, who appears in pursuance of summons to apply for bail, it would have been so legislated in Section 88 Cr.P.C. The learned senior counsel assailed the Judgment of the Delhi High Court in the '*Court on its own motion v. CBI'*, 2004 (I) JCC 308, by which the High Court gave directions to Criminal Courts to call upon the accused who is summoned to appear to apply for bail, and then decide on the merits of the bail application. He would state that the High Court has ignored even the CBI Manual before issuing these directions, which provided for bail to be granted to the accused, except in the event of there being commission of heinous crime. The learned senior counsel would also argue that it was an error to have a "rolled up charge", as recognized by the *Griffiths'* case (*R vs. Griffiths and Ors.,* (1966) 1 Q.B. 589). Shri.Jethmalani submitted that there is not even a prima facie case against the accused and would make references to the charge sheet and the statement of several witnesses. He would

emphatically submit that none of the ingredients of the offences charged with were stated in the charge sheet. He would further contend that even if, there is a prima facie case, the rule is still bail, and not jail, as per the dicta of this Court in several cases.

7. Shri. Mukul Rohatgi, learned senior counsel appearing for the appellant Vinod Goenka, while adopting the arguments of Shri. Jethmalani, would further supplement by arguing that the Ld. Trial Judge erred in making the persons, who appeared in pursuance of the summons, apply for bail and then denying the same, and ordering for remand in judicial custody. Shri. Rohatgi would further contend that the gravity of the offence charged with, is to be determined by the maximum sentence prescribed by the Statute and not by any other standard or measure. In other words, the learned senior counsel would submit that the alleged amount involved in the so-called Scam is not the determining factor of the gravity of the offence, but the maximum punishment prescribed for the offence. He would state that the only bar for bail pending trial in Section 437 is for those persons who are charged with offences punishable with life or death, and there is no such bar for those persons who were charged with offences with maximum punishment of seven years. Shri. Rohatgi also cited some case laws.

8. Shri. Ashok H. Desai, learned senior counsel appearing for the appellants Hari Nair and Surendra Pipara, adopted the principal arguments of Shri.Jethmalani. In addition, Shri. Desai would submit that a citizen of this country, who is charged with a criminal offence, has the right to be enlarged on bail. Unless there is a clear necessity for deprivation of his liberty, a person should not be remanded to judicial custody. Shri. Desai would submit that the Court should bear in mind that such custody is not punitive in nature, but preventive, and must be opted only when the charges are serious. Shri. Desai would further submit that the power of the High Court and this Court is not limited by the operation of Section 437. He would further contend that Surendra Pipara deserves to be released on bail in view of his serious health conditions.

9. Shri. Soli J. Sorabjee, learned senior counsel appearing for Gautam Doshi, adopted the principal arguments of Shri. Jethmalani. Shri. Sorabjee would assail the finding of the Learned Judge of the High Court in the impugned Judgment that the mere fact that the accused were not arrested during the investigation was proof of their influence in the society, and hence, there was a reasonable apprehension that they would tamper with the evidence if enlarged on bail. Shri. Sorabjee would submit that if this reasoning is to be accepted, then bail is to be denied in each and every criminal case that comes before the Court. The learned senior counsel also highlighted that the accused had no criminal antecedents.

10. Shri. Haren P. Raval, the learned Additional Solicitor General, in his reply, would submit that the offences that are being charged, are of the nature that the economic fabric of the country is brought at stake. Further, the learned ASG would state that the quantum of punishment could not be the only determinative factor for the magnitude of an offence. He would state that one of the relevant considerations for the grant of bail is the interest of the society at large as opposed to the personal liberty of the accused, and that the Court must not lose sight of the former. He would submit that in the changing circumstances and scenario, it was in the interest of the society for the Court to decline bail to the appellants. Shri. Raval would further urge that consistency is the norm of this Court and that there was no reason or change in circumstance as to why this Court should take a different view from the order of 20th June 2011 in *Sharad Kumar Etc. v. Central Bureau of Investigation* [in SLP (Crl) No. 4584-4585 of 2011] rejecting bail to some of the co-accused in the same case. Shri. Raval would further state that the investigation in these cases is monitored by this Court and the trial is proceeding on a day-to-day basis and that there is absolutely no delay on behalf of the prosecuting agency in completing the trial. Further, he would submit that the appellants, having cooperated with the investigation, is no ground for grant of bail, as they were expected to cooperate with the

investigation as provided by the law. He would further submit that the test to enlarge an accused on bail is whether there is a reasonable apprehension of tampering with the evidence, and that there is an apprehension of threat to some of the witnesses. The learned ASG would further submit that there is more reason now for the accused not to be enlarged on bail, as they now have the knowledge of the identity of the witnesses, who are the employees of the accused, and there is an apprehension that the witnesses may be tampered with. The learned ASG would state that Section 437 of the Cr.P.C. uses the word "appears", and, therefore, that the argument of the learned senior counsel for the appellants that the power of the trial Judge with regard to a person summoned under Section 87 is controlled by Section 88 is incorrect. Shri. Raval also made references to the United Nations Convention on Corruption and the Report on the Reforms in the Criminal Justice System by Justice Malimath, which, we do not think, is necessary to go into. The learned ASG also relied on a few decisions of this Court, and the same will be dealt with in the course of the judgment. On a query from the Bench, the learned ASG would submit that in his opinion, bail should be denied in all cases of corruption which pose a threat to the economic fabric of the country, and that the balance should tilt in favour of the public interest.

11. In his reply, Shri. Jethmalani would submit that as the presumption of innocence is the privilege of every accused, there is also a presumption that the appellants would not tamper with the witnesses if they are enlarged on bail, especially in the facts of the case, where the appellants have cooperated with the investigation. In recapitulating his submissions, the learned senior counsel contended that there are two principles for the grant of bail – firstly, if there is no prima facie case, and secondly, even if there is a prima facie case, if there is no reasonable apprehension of tampering with the witnesses or evidence or absconding from the trial, the accused are entitled to grant of bail pending trial. He would submit that since both

the conditions are satisfied in this case, the appellants should be granted bail.

12. Let us first deal with a minor issue canvassed by Mr. Raval, learned ASG. It is submitted that this Court has refused to entertain the Special Leave Petition filed by one of the co-accused *[Sharad Kumar Vs. CBI (supra)]* and, therefore, there is no reason or change in the circumstance to take a different view in the case of the appellants who are also charge- sheeted for the same offence. We are not impressed by this argument. In the aforesaid petition, the petitioner was before this Court before framing of charges by the Trial Court. Now the charges are framed and the trial has commenced. We cannot compare the earlier and the present proceedings and conclude that there are no changed circumstances and reject these petitions.

13. The appellants are facing trial in respect of the offences under Sections 420-B, 468, 471 and 109 of Indian Penal Code and Section 13(2) read with 13(i)(d) of Prevention of Corruption Act, 1988. Bail has been refused first by the Special Judge, CBI, New Delhi and subsequently, by the High Court. Both the courts have listed the factors, on which they think, are relevant for refusing the Bail applications filed by the applicants as seriousness of the charge; the nature of the evidence in support of the charge; the likely sentence to be imposed upon conviction; the possibility of interference with witnesses; the objection of the prosecuting authorities; possibility of absconding from justice.

14. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent

until duly tried and duly found guilty. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, 'necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson.

15. In the instant case, as we have already noticed that the "pointing finger of accusation" against the appellants is 'the seriousness of the charge'. The offences alleged are economic offences which has resulted in loss to the State exchequer. Though, they contend that there is possibility of the appellants tampering witnesses, they have not placed any material in support of the allegation. In our view, seriousness of the charge is, no doubt, one of the relevant considerations while considering bail applications but that is not the only test or the factor : The other factor that also requires to be taken note of is the punishment that could be imposed after trial and conviction, both under the Indian Penal Code and Prevention of Corruption Act. Otherwise, if the former is the only test, we would not be balancing the Constitutional Rights but rather "recalibration of the scales of justice." The provisions of Cr.P.C. confer discretionary jurisdiction on Criminal Courts to grant bail

to accused pending trial or in appeal against convictions, since the jurisdiction is discretionary, it has to be exercised with great care and caution by balancing valuable right of liberty of an individual and the interest of the society in general. In our view, the reasoning adopted by the learned District Judge, which is affirmed by the High Court, in our opinion, a denial of the whole basis of our system of law and normal rule of bail system. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty. If such power is recognized, then it may lead to chaotic situation and would jeopardize the personal liberty of an individual. This Court, in *Kalyan Chandra Sarkar Vs. Rajesh Ranjan*- (2005) 2 SCC 42, observed that *"under the criminal laws of this country, a person accused of offences which are non-bailable, is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 of the Constitution, since the same is authorized by law. But even persons accused of non-bailable offences are entitled to bail if the Court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the Court is satisfied by reasons to be recorded that in spite of the existence of prima facie case, there is need to release such accused on bail, where fact situations require it to do so*."

16. This Court, time and again, has stated that bail is the rule and committal to jail an exception. It is also observed that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution. In the case of *State of Rajasthan v. Balchand,* (1977) 4 SCC 308, this Court opined:

> "2. The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences

> or intimidating witnesses and the like, by the petitioner who seeks enlargement on bail from the Court. We do not intend to be exhaustive but only illustrative.
>
> 3. It is true that the gravity of the offence involved is likely to induce the petitioner to avoid the course of justice and must weigh with us when considering the question of jail. So also the heinousness of the crime. Even so, the record of the petitioner in this case is that, while he has been on bail throughout in the trial court and he was released after the judgment of the High Court, there is nothing to suggest that he has abused the trust placed in him by the court; his social circumstances also are not so unfavourable in the sense of his being a desperate character or unsocial element who is likely to betray the confidence that the court may place in him to turn up to take justice at the hands of the court. He is stated to be a young man of 27 years with a family to maintain. The circumstances and the social milieu do not militate against the petitioner being granted bail at this stage. At the same time any possibility of the absconsion or evasion or other abuse can be taken care of by a direction that the petitioner will report himself before the police station at Baren once every fortnight."

17. In the case of *Gudikanti Narasimhulu v. Public Prosecutor*, (1978) 1 SCC 240, V.R. Krishna Iyer, J., sitting as Chamber Judge, enunciated the principles of bail thus:

> "3. What, then, is "judicial discretion" in this bail context? In the elegant words of Benjamin Cardozo:
>
> "The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy,

disciplined by system, and subordinated to "the primordial necessity of order in the social life". Wide enough in all conscience is the field of discretion that remains."

Even so it is useful to notice the tart terms of Lord Camden that

"the discretion of a Judge is the law of tyrants: it is always unknown, it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature is liable...."

Perhaps, this is an overly simplistic statement and we must remember the constitutional focus in Articles 21 and 19 before following diffuse observations and practices in the English system. Even in England there is a growing awareness that the working of the bail system requires a second look from the point of view of correct legal criteria and sound principles, as has been pointed out by Dr Bottomley.

6. Let us have a glance at the pros and cons and the true principle around which other relevant factors must revolve. When the case is finally disposed of and a person is sentenced to incarceration, things stand on a different footing. We are concerned with the penultimate stage and the principal rule to guide release on bail should be to secure the presence of the applicant who seeks to be liberated, to take judgment and serve sentence in the event of the Court punishing him with imprisonment. In this perspective, relevance of considerations is regulated by their nexus with the likely absence of the applicant for fear of a severe sentence, if such be plausible in the case. As Erle. J. indicated, when the crime charged (of which a conviction has been sustained) is of the highest magnitude and the punishment of it assigned by law is of extreme severity, the Court may reasonably presume, some

evidence warranting, that no amount of bail would secure the presence of the convict at the stage of judgment, should he be enlarged. Lord Campbell, C.J. concurred in this approach in that case and Coleridge J. set down the order of priorities as follows:

"I do not think that an accused party is detained in custody because of his guilt, but because there are sufficient probable grounds for the charge against him as to make it proper that he should be tried, and because the detention is necessary to ensure his appearance at trial .... It is a very important element in considering whether the party, if admitted to bail, would appear to take his trial; and I think that in coming to a determination on that point three elements will generally be found the most important: the charge, the nature of the evidence by which it is supported, and the punishment to which the party would be liable if convicted.

In the present case, the charge is that of wilful murder; the evidence contains an admission by the prisoners of the truth of the charge, and the punishment of the offence is, by law, death."

7. It is thus obvious that the nature of the charge is the vital factor and the nature of the evidence also is pertinent. The punishment to which the party may be liable, if convicted or conviction is confirmed, also bears upon the issue.

8. Another relevant factor is as to whether the course of justice would be thwarted by him who seeks the benignant jurisdiction of the Court to be freed for the time being.

9. Thus the legal principles and practice validate the Court considering the likelihood of the applicant interfering with witnesses for the prosecution or otherwise polluting the process of justice. It is not only traditional but rational, in this context, to enquire into the antecedents of a man who

is applying for bail to find whether he has a bad record – particularly a record which suggests that he is likely to commit serious offences while on bail. In regard to habituals, it is part of criminological history that a thoughtless bail order has enabled the bailee to exploit the opportunity to inflict further crimes on the members of society. Bail discretion, on the basis of evidence about the criminal record of a defendant is therefore not an exercise in irrelevance.

13. Viewed from this perspective, we gain a better insight into the rules of the game. When a person, charged with a grave offence, has been acquitted at a stage, has the intermediate acquittal pertinence to a bail plea when the appeal before this Court pends? Yes, it has. The panic which might prompt the accused to jump the gauntlet of justice is less, having enjoyed the confidence of the Court's verdict once. Concurrent holdings of guilt have the opposite effect. Again, the ground for denial of provisional release becomes weaker when the fact stares us in the face that a fair finding — if that be so — of innocence has been recorded by one Court. It may not be conclusive, for the judgment of acquittal may be ex facie wrong, the likelihood of desperate reprisal, if enlarged, may be a deterrent and his own safety may be more in prison than in the vengeful village where feuds have provoked the violent offence. It depends. Antecedents of the man and socio-geographical circumstances have a bearing only from this angle. Police exaggerations of prospective misconduct of the accused, if enlarged, must be soberly sized up lest danger of excesses and injustice creep subtly into the discretionary curial technique. Bad record and police prediction of criminal prospects to invalidate the bail plea are admissible in principle but shall not stampede the Court into a complacent refusal."

18. In *Gurcharan Singh v. State (Delhi Admn.), (1978) 1 SCC 118,* this Court took the view:

"22. In other non-bailable cases the Court will exercise its judicial discretion in favour of granting bail subject to sub-section (3) of Section 437 CrPC if it deems necessary to act under it. Unless exceptional circumstances are brought to the notice of the Court which may defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life. It is also clear that when an accused is brought before the Court of a Magistrate with the allegation against him of an offence punishable with death or imprisonment for life, he has ordinarily no option in the matter but to refuse bail subject, however, to the first proviso to Section 437(1) CrPC and in a case where the Magistrate entertains a reasonable belief on the materials that the accused has not been guilty of such an offence. This will, however, be an extraordinary occasion since there will be some materials at the stage of initial arrest, for the accusation or for strong suspicion of commission by the person of such an offence.

24. Section 439(1) CrPC of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437(1) there is no ban imposed under Section 439(1), CrPC against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439(1) CrPC of the new Code. The overriding considerations in granting bail to which we adverted to earlier and which are common both in the case

of Section 437(1) and Section 439(1) CrPC of the new Code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many valuable factors, cannot be exhaustively set out."

19. In *Babu Singh v. State of U.P., (1978) 1 SCC 579,* this Court opined:

"8. The Code is cryptic on this topic and the Court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden on the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. As Chamber Judge in this summit Court I had to deal with this uncanalised case-flow, ad hoc response to the docket being the flickering candle light. So it is desirable that the subject is disposed of on basic principle, not improvised brevity draped as discretion. Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorise impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of "procedure established by law". The last four words of Article 21 are the life of that human right.

…

16. Thus the legal principle and practice validate the Court considering the likelihood of the applicant interfering with witnesses for the prosecution or otherwise polluting the process of justice. It is not only traditional but rational, in this context, to enquire into the antecedents of a man who is applying for bail to find whether he has a bad record—particularly a record which suggests that he is likely to commit serious offences while on bail. In regard to habituals, it is part of criminological history that a thoughtless bail order has enabled the bailee to exploit the opportunity to inflict further crimes on the members of society. Bail discretion, on the basis of evidence about the criminal record of a defendant, is therefore not an exercise in irrelevance.

17. The significance and sweep of Article 21 make the deprivation of liberty a matter of grave concern and permissible only when the law authorising it is reasonable, even-handed and geared to the goals of community good and State necessity spelt out in Article 19. Indeed, the considerations I have set out as criteria are germane to the constitutional proposition I have deduced. Reasonableness postulates intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for the bi-focal interests of justice—to the individual involved and society affected.

18. We must weigh the contrary factors to answer the test of reasonableness, subject to the need for securing the presence of the bail applicant. It makes sense to assume that a man on bail has a better chance to prepare or present his case than one remanded in custody. And if public justice is to be promoted, mechanical detention should be demoted. In the United States, which has a constitutional perspective close to ours, the function of bail is limited, "community roots" of the applicant are stressed and, after the Vera Foundation's Manhattan Bail Project,

monetary suretyship is losing ground. The considerable public expense in keeping in custody where no danger of disappearance or disturbance can arise, is not a negligible consideration. Equally important is the deplorable condition, verging on the inhuman, of our sub-jails, that the unrewarding cruelty and expensive custody of avoidable incarceration makes refusal of bail unreasonable and a policy favouring release justly sensible.

20. Viewed from this perspective, we gain a better insight into the rules of the game. When a person, charged with a grave offence, has been acquitted at a stage, has the intermediate acquittal pertinence to a bail plea when the appeal before this Court pends? Yes, it has. The panic which might prompt the accused to jump the gauntlet of justice is less, having enjoyed the confidence of the Court's verdict once. Concurrent holdings of guilt have the opposite effect. Again, the ground for denial of provisional release becomes weaker when the fact stares us in the face that a fair finding — if that be so — of innocence has been recorded by one Court. It may be conclusive, for the judgment of acquittal may be ex facie wrong, the likelihood of desperate reprisal, it enlarged, may be a deterrent and his own safety may be more in prison than in the vengeful village where feuds have provoked the violent offence. It depends. Antecedents of the man and socio-geographical circumstances have a bearing only from this angle. Police exaggerations of prospective misconduct of the accused, if enlarged, must be soberly sized up lest danger of excesses and injustice creep subtly into the discretionary curial technique. Bad record and police prediction of criminal prospects to invalidate the bail plea are admissible in principle but shall not stampede the Court into a complacent refusal."

20. In *Moti Ram v. State of M.P.,* (1978) 4 SCC 47, this Court, while discussing pre-trial detention, held:

"14. The consequences of pre-trial detention are grave. Defendants presumed innocent arc subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family."

21. The concept and philosophy of bail was discussed by this Court in *Vaman Narain Ghiya v. State of Rajasthan,* (2009) 2 SCC 281, thus:

"6. "Bail" remains an undefined term in CrPC. Nowhere else has the term been statutorily defined. Conceptually, it continues to be understood as a right for assertion of freedom against the State imposing restraints. Since the UN Declaration of Human Rights of 1948, to which India is a signatory, the concept of bail has found a place within the scope of human rights. The dictionary meaning of the expression "bail" denotes a security for appearance of a prisoner for his release. Etymologically, the word is derived from an old French verb "bailer" which means to "give" or "to deliver", although another view is that its derivation is from the Latin term "baiulare", meaning "to bear a burden". Bail is a conditional liberty. Stroud's Judicial Dictionary (4th Edn., 1971) spells out certain other details. It states:

"… when a man is taken or arrested for felony, suspicion of felony, indicted of felony, or any such case, so that he is restrained of his liberty. And, being by law bailable, offereth surety to those which have authority to bail him, which sureties are bound for him to the King's use in a certain sums of money, or body for body, that he shall appear before the justices of goal delivery at the next sessions, etc. Then upon the bonds of these sureties, as

is aforesaid, he is bailed—that is to say, set at liberty until the day appointed for his appearance."

Bail may thus be regarded as a mechanism whereby the State devolutes upon the community the function of securing the presence of the prisoners, and at the same time involves participation of the community in administration of justice.

7. Personal liberty is fundamental and can be circumscribed only by some process sanctioned by law. Liberty of a citizen is undoubtedly important but this is to balance with the security of the community. A balance is required to be maintained between the personal liberty of the accused and the investigational right of the police. It must result in minimum interference with the personal liberty of the accused and the right of the police to investigate the case. It has to dovetail two conflicting demands, namely, on the one hand the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence viz. the presumption of innocence of an accused till he is found guilty. Liberty exists in proportion to wholesome restraint, the more restraint on others to keep off from us, the more liberty we have. (See *A.K. Gopalan v. State of Madras*)

8. The law of bail, like any other branch of law, has its own philosophy, and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of his guilt."

22. More recently, in the case of *Siddharam Satlingappa Mhetre v. State of Maharashtra,* (2011) 1 SCC 694, this Court observed that *"(j)ust as liberty is precious to an individual, so is the society's interest in maintenance of peace, law and order. Both are equally important."* This Court further observed :

> "116. Personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case."

This Court has taken the view that when there is a delay in the trial, bail should be granted to the accused [See *Babba v. State of Maharashtra,* (2005) 11 SCC 569, *Vivek Kumar v. State of U.P.,* (2000) 9 SCC 443, *Mahesh Kumar Bhawsinghka v. State of Delhi,* (2000) 9 SCC 383].

23. The principles, which the Court must consider while granting or declining bail, have been culled out by this Court in the case of *Prahlad Singh Bhati v. NCT, Delhi*, (2001) 4 SCC 280, thus:

> "The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of the evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words "reasonable grounds for believing" instead of "the

evidence" which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

24. In *State of U.P. v. Amarmani Tripathi,* (2005) 8 SCC 21, this Court held as under:

"18. It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail [see *Prahlad Singh Bhati v. NCT, Delhi* and *Gurcharan Singh v. State (Delhi Admn.)*]. While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following principles relating to grant or refusal of bail stated in *Kalyan Chandra Sarkar v. Rajesh Ranjan:* (SCC pp. 535-36, para 11)

"11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed

examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See *Ram Govind Upadhyay v. Sudarshan Singh and Puran v. Rambilas.*)"

22. While a detailed examination of the evidence is to be avoided while considering the question of bail, to ensure that there is no prejudging and no prejudice, a brief examination to be satisfied about the existence or otherwise of a prima facie case is necessary."

25. Coming back to the facts of the present case, both the Courts have refused the request for grant of bail on two grounds :- The primary ground is that offence alleged against the accused persons is very serious involving deep rooted planning in which, huge financial loss is caused to the State exchequer ; the secondary ground is that the possibility of the accused persons tempering with the witnesses. In the present case, the charge is that of cheating and dishonestly inducing delivery of property, forgery for the purpose of cheating using as genuine a forged document. The punishment of the offence is punishment for a term which may extend to seven years. It is,

no doubt, true that the nature of the charge may be relevant, but at the same time, the punishment to which the party may be liable, if convicted, also bears upon the issue. Therefore, in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration. The grant or refusal to grant bail lies within the discretion of the Court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the Court, whether before or after conviction, to assure that he will submit to the jurisdiction of the Court and be in attendance thereon whenever his presence is required. This Court in *Gurcharan Singh and Ors. Vs. State* AIR 1978 SC 179 observed that two paramount considerations, while considering petition for grant of bail in non-bailable offence, apart from the seriousness of the offence, are the likelihood of the accused fleeing from justice and his tampering with the prosecution witnesses. Both of them relate to ensure of the fair trial of the case. Though, this aspect is dealt by the High Court in its impugned order, in our view, the same is not convincing.

26. When the undertrial prisoners are detained in jail custody to an indefinite period, Article 21 of the Constitution is violated. Every person, detained or arrested, is entitled to speedy trial, the question is : whether the same is possible in the present case. There are seventeen accused persons. Statement of the witnesses runs to several hundred pages and the documents on which reliance is placed by the prosecution, is voluminous. The trial may take considerable time and it looks to us that the appellants, who are in jail, have to remain in jail longer than the period of detention, had they been convicted. It is not in the interest of justice that accused should be in jail for

an indefinite period. No doubt, the offence alleged against the appellants is a serious one in terms of alleged huge loss to the State exchequer, that, by itself, should not deter us from enlarging the appellants on bail when there is no serious contention of the respondent that the accused, if released on bail, would interfere with the trial or tamper with evidence. We do not see any good reason to detain the accused in custody, that too, after the completion of the investigation and filing of the charge-sheet. This Court, in the case of *State of Kerala Vs. Raneef* (2011) 1 SCC 784, has stated :-

> "15. In deciding bail applications an important factor which should certainly be taken into consideration by the court is the delay in concluding the trial. Often this takes several years, and if the accused is denied bail but is ultimately acquitted, who will restore so many years of his life spent in custody? Is Article 21 of the Constitution, which is the most basic of all the fundamental rights in our Constitution, not violated in such a case? Of course this is not the only factor, but it is certainly one of the important factors in deciding whether to grant bail. In the present case the respondent has already spent 66 days in custody (as stated in Para 2 of his counter-affidavit), and we see no reason why he should be denied bail. A doctor incarcerated for a long period may end up like Dr. Manette in Charles Dicken's novel A Tale of Two Cities, who forgot his profession and even his name in the Bastille."

27. In 'Bihar Fodder Scam', this Court, taking into consideration the seriousness of the charges alleged and the maximum sentence of imprisonment that could be imposed including the fact that the appellants were in jail for a period more than six months as on the date of passing of the order, was of the view that the further detention of the appellants as pre-trial prisoners would not serve any purpose.

28. We are conscious of the fact that the accused are charged with economic offences of huge magnitude. We are

also conscious of the fact that the offences alleged, if proved, may jeopardize the economy of the country. At the same time, we cannot lose sight of the fact that the investigating agency has already completed investigation and the charge sheet is already filed before the Special Judge, CBI, New Delhi. Therefore, their presence in the custody may not be necessary for further investigation. We are of the view that the appellants are entitled to the grant of bail pending trial on stringent conditions in order to ally the apprehension expressed by CBI.

29. In the view we have taken, it may not be necessary to refer and discuss other issues canvassed by the learned counsel for the parties and the case laws relied on in support of their respective contentions. We clarify that we have not expressed any opinion regarding the other legal issues canvassed by learned counsel for the parties.

30. In the result, we order that the appellants be released on bail on their executing a bond with two solvent sureties, each in a sum of '5 lakhs to the satisfaction of the Special Judge, CBI, New Delhi on the following conditions :-

a. The appellants shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts or the case so as to dissuade him to disclose such facts to the Court or to any other authority.

b. They shall remain present before the Court on the dates fixed for hearing of the case. If they want to remain absent, then they shall take prior permission of the court and in case of unavoidable circumstances for remaining absent, they shall immediately give intimation to the appropriate court and also to the Superintendent, CBI and request that they may be permitted to be present through the counsel.

c. They will not dispute their identity as the accused in the case.

d. They shall surrender their passport, if any (if not already surrendered), and in case, they are not a holder of the same, they shall swear to an affidavit. If they have already surrendered before the Ld. Special Judge, CBI, that fact should also be supported by an affidavit.

e. We reserve liberty to the CBI to make an appropriate application for modification/recalling the order passed by us, if for any reason, the appellants violate any of the conditions imposed by this Court.

31. The appeals are disposed of accordingly.

R.P. Appeals disposed.

STATE OF HARYANA
v.
RAJMAL AND ANOTHER
(Criminal Appeal No. 2203 of 2011)

NOVEMBER 25, 2011

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

Punjab Prohibition of Cow Slaughter Act, 1955:

s.8 – Conviction under, by courts below, reversed by High Court on grounds of absence of independent witness from the locality at the time of conducting raid, absence of evidence to prove that the accused persons were the owners of the house and were in exclusive possession of the house where raid was conducted and non-identification of accused – On appeal, held: None of the grounds put forward by High Court were sustainable – Trial court found that there was cogent evidence to show that both the accused persons were known to the witnesses from prior to the date of incident and they ran away, by scaling the wall, after seeing the police party and that accused persons did not make out any case of animosity of the official witnesses against them – The first appellate court also recorded that Investigating Officer had clearly stated that he knew the accused persons because he had apprehended them in another case and this statement was not challenged in cross-examination – In view of the admitted factual position, reasoning of High Court in its revisional jurisdiction that in the absence of independent local witness the prosecution case was not worthy of credence cannot be accepted – In upsetting the concurrent finding of the courts below, about the identification of the accused persons, High Court had not given any reason – The revisional jurisdiction of High Court u/s.439 Cr.P.C. is to be exercised, only in an exceptional case, when there is a glaring defect in the procedure or there is a

manifest error on a point of law resulting in a flagrant miscarriage of justice – It cannot be held that the interference by the High Court on the question of identification of the accused persons in facts of the case was either proper or legally sustainable – Code of Criminal Procedure, 1973 – s.439 – Revision.

Search and seizure – Held: An illegal search does not vitiate the seizure of the article.

ss.3, 4, 8 – Ownership of the place where act of slaughtering done – Requirement of – Held: Reading of s.3 and s.4 together would show that the person contravening s.3 cannot put up a defense that the act of slaughter was being done in a place, of which he is not the owner or in respect of which he does not have the conscious possession – Slaughter of Cows, subject to exceptions u/s.4, in any place, is prohibited u/s.3 and penalty for doing so is provided u/s.8 – The case of the accused persons was not covered under the exceptions in s.4 – No such defense was ever taken – Therefore, order of acquittal by the High Court was legally not sustainable.

Words and phrases: Word 'slaughter' – Meaning of.

The prosecution case was that on receipt of secret information that the accused persons were slaughtering cows in their house, a raid was conducted. On seeing the police party, both the accused persons scaled the wall and fled away from their house by taking advantage of darkness. The investigating officer found 70 Kgs. of fresh beef, one skin of cow, one axe, two blood stained daggers and four weak and infirm cows. The accused persons were convicted under Section 8 of the Punjab Prohibition of Cow Slaughter Act, 1955. The first appellate authority upheld the order of the trial court. The High Court in its revisional jurisdiction reversed the concurrent finding of the courts below on the ground that no

independent witness from the locality was present at the time of conducting raid; that no evidence was led to prove that the accused persons were the owners of the house; that it was also not established that the accused persons were in the exclusive possession of the house and as such they cannot be said to be in conscious possession of the house; and that the accused persons were not identified. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1. None of the grounds put forward by the High Court in the impugned judgment was sustainable. The trial court found that there was cogent evidence on record to show that both the accused persons were known to the witnesses from before and they ran away, by scaling the wall, after seeing the police party. The trial court also recorded a finding of fact that accused persons did not make out any case of animosity of the official witnesses against them. The first appellate court also recorded that P.W.-3/Investigating Officer has clearly stated that he knew the accused persons because he had apprehended them in another case and the said statement of the P.W.-3 was not challenged in cross-examination. Nor the accused persons ever questioned that the witnesses knew them prior to the date of the occurrence. The appellate forum also recorded that accused persons had not suggested that they were falsely implicated in the case. In view of this admitted factual position, this Court cannot accept the reasoning of the High Court in its revisional jurisdiction whereby the High Court found that in the absence of independent local witness the prosecution case is not worthy of credence. The factual conclusion of the High Court was contrary to the evidence on record. [Para 6-9] [354-E-H; 355-A-C]

2. In upsetting the concurrent finding of the courts below, about the identification of the accused persons, the High Court had not given any reason. The revisional jurisdiction of the High Court under Section 439 Cr.P.C. is to be exercised, only in an exceptional case, when there is a glaring defect in the procedure or there is a manifest error on a point of law resulting in a flagrant miscarriage of justice. Going by the said principles, it cannot be held that the interference by the High Court on the question of identification of the accused persons in facts of the case was either proper or legally sustainable. [Para 10, 12, 13] [355-D-G-H; 356-A]

State of A.P. vs. Pituhuk Sreeinvanasa Rao **(2000) 9 SCC 537;** *Amar Chand Agarwala vs. Shanti Bose and another* **AIR 1973 SC 799: 1973(3) SCR 179 – relied on.**

3. An illegal search does not vitiate the seizure of the article. The only requirement of law in such cases is that the Court has to examine carefully the evidence regarding the seizure. But beyond this no further consequences ensues. Following the said principle, there was no error committed by the courts below by proceeding on the material collected, as a result of the seizure of materials. [Para 15, 16] [356-C-E]

Radha Kishan vs. State of Uttar Pradesh **AIR 1963 SC 822: 1963 Suppl. SCR 408 – relied on.**

4. The other two points on which the High Court chose to interfere, namely the ownership of the house or the conscious possession of the house as a valid requisite before the accused persons could be held guilty under Section 8 of the said Act were clearly based on a misreading of the clear provision of the Act. The said Act, which was enacted to give effect to the provisions of Article 48 of Directive Principle of State Policy and which is still in force, prohibits cow slaughter in Section 3. The

expression "slaughter" is defined in Section 2(e) of the Act as killing by any method whatsoever and includes maiming and inflicting of physical injury which in the ordinary course will cause death." Reading of Section 3 and Section 4 together would show that the person contravening Section 3 cannot put up a defense that the act of slaughter was being done in a place, of which he is not the owner or in respect of which he does not have the conscious possession. Slaughter of Cows, subject to exceptions under Section 4, in any place, is prohibited under Section 3 and penalty for doing so is provided under Section 8. The High Court's finding that the guilt of the accused persons was not proved in the absence of proof of their ownership or conscious possession of the house where slaughter took place, is a finding which is de-hors the said Act and is clearly not legally sustainable. The case of the accused persons was not covered under the exceptions in Section 4. No such defense was ever taken. Therefore, the impugned order of the High Court was legally not sustainable. [Paras 17-18, 20, 21-23] [356-F-H; 357-G-H; 358-A-E]

Case Law Reference:

(2000) 9 SCC 537	**relied on**	**Para 11**
1973 (3) SCR 179	**relied on**	**Para 12**
1963 Suppl. SCR 408	**relied on**	**Para 15**

CRIMINAL APPELLATE JURISDICTION : Crimianl Appeal No. 2203 of 2011.

From the Judgment & Order dated 20.04.2010 of the High Court of Punjab & Haryana at Chandigarh in Criminal Revision No. 669 of 2000.

Dr. Monika Gusain for the Appellant.

Altaf Hussain, R.C. Kaushik for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. This Criminal Appeal is directed against the judgment and order dated 20.04.2010 of the High Court of Punjab and Haryana in Criminal Revision No.669/2000, whereby the High Court acquitted the respondents-accused persons (hereinafter "the accused persons") from all the charges levelled against them under Section 8 of the Punjab Prohibition of Cow Slaughter Act, 1955 (hereinafter "the Act"). By this impugned order, the judgment and order passed by the Sub-Divisional Judicial Magistrate, Ferozepur and the appellate order passed by the Addl. Sessions Judge, Gurgaon were set-aside by the High Court in revision.

3. The accused persons were convicted under Section 8 of the Act and sentenced to undergo rigorous imprisonment for a period of one year by the Court of Sub-Divisional Judicial Magistrate, Ferozepur vide judgment dated 14.09.1998 in Crl. Case No.23/96. On Appeal, this order of conviction and sentence was confirmed and upheld by the Additional Sessions Judge, Gurgaon vide order dated 01.06.2000 in Criminal Appeal No.20/98.

4. The facts and circumstances, which are relevant, are as under:

(a) According to the prosecution, on 01.01.1996 Head Constable Satyabir/p.w.-3 (hereinafter "the Investigating Officer") received a secret information that the accused persons were slaughtering cows in their house and if any raid was conducted, the accused persons could be caught red-handed. Consequently the investigating officer along with Head Constable Bir Singh/p.w.-2 formed a raiding party and raided the house of the accused persons.

(b) On seeing the Police party, both the accused persons

by scaling the wall, fled away from their house by taking advantage of the darkness.

(c) However the investigating officer found 70 kgs of fresh beef, one skin of cow, one axe, two blood stained daggers and four weak and infirm cows. Those were seized and taken into custody vide recovery memo. Thereafter ruqa was sent to the police station, on the basis of which FIR was registered and the case was investigated.

(d) Thereafter the accused persons were arrested and charged under Section 8 of the said Act.

(e) At the Trial, P.W.-3/investigating officer and P.W.-2/Bir Singh, who were eye-witnesses, supported the case of prosecution and categorically deposed that accused were known to them from before and on seeing the police party, they ran away from the place by scaling the wall.

(f) The accused persons did not lead any evidence in their defence.

(g) After the appreciation of evidence, vide judgment-dated 14.09.1998 the Trial Court convicted the accused persons under Section 8 of the said Act and sentenced each of them to undergo rigorous imprisonment for a period of one year.

(h) The accused persons challenged the aforesaid conviction and sentence, by filing an appeal before the Additional Sessions Judge, being Criminal Appeal no. 20 of 1998.

(i) By an order-dated 01.06.2000 the Additional Sessions Judge, after a re-appreciation of evidence, confirmed the order of conviction and sentence passed by the Trial Court.

(j) Against that order, the accused persons preferred a revision before the High Court.

(k) By impugned order-dated 20.04.2010 the High Court allowed the revision and set aside the order of conviction of the accused persons.

5. The High Court in its revisional jurisdiction while reversing the concurrent finding of the Courts below indicated the following reasons:

I. No independent witness from the locality was present at the time of conducting raid.

II. No evidence has been led to prove that the accused persons were the owners of the house.

III. It has also not been established that the accused persons were in the exclusivepossession of the house and as such theycannot be said to be in conscious possessionof the house.

IV. The accused persons were not identified and it is the prosecution case that the accused persons fled away by scaling the wall and bytaking advantage of the darkness.

6. We are not satisfied with the reasoning of the High Court, as none of the grounds put forward by the High Court in the impugned judgment is sustainable. If we take up the last ground first, it is clear that the aforesaid conclusion of the High Court, being a conclusion on pure questions of fact, is against the evidence on record.

7. The Trial Court has found that there is cogent evidence on record to show that both the accused persons were known to the witnesses from before and they ran away, by scaling the wall, after seeing the police party. The Trial Court also recorded a finding of fact that accused persons have not made out any case of animosity of the official witnesses against them.

8. In the appellate forum, the Sessions Judge has also

recorded that P.W.-3/Investigating Officer has clearly stated that he knew the accused persons because he had apprehended them in another case and the said statement of the P.W.-3 was not challenged in cross-examination. Nor has the accused persons ever questioned that the witnesses knew them prior to the date of the occurrence. The appellate forum also recorded that accused persons have not suggested that they were falsely implicated in the case.

9. In view of this admitted factual position, this Court cannot accept the reasoning of the High Court in its revisional jurisdiction whereby the High Court found that in the absence of independent local witness the prosecution case is not worthy of credence. The factual conclusion of the High Court is contrary to the evidence on record.

10. In this connection, it may be noted that in upsetting the concurrent finding of the courts below, about the identification of the accused persons, the High Court has not given any reason.

11. In *State of A.P. vs. Pituhuk Sreeinvanasa Rao* [(2000) 9 SCC 537] this Court held that the exercise of the revisional jurisdiction of the High Court in upsetting concurrent finding of the facts cannot be accepted when it was without any reference, to the evidence on record or to the finding entered by the trial court and appellate court regarding the evidence in view of the fact that revisional jurisdiction is basically supervisory in nature.

12. It has been also held by this Court in *Amar Chand Agarwala vs. Shanti Bose and another* [AIR 1973 SC 799] that the revisional jurisdiction of the High Court under Section 439 Cr.P.C. is to be exercised, only in an exceptional case, when there is a glaring defect in the procedure or there is a manifest error on a point of law resulting in a flagrant miscarriage of justice. [para 20, page 804 of the report]

13. Going by the aforesaid principles, it cannot be held that

the interference by the High Court on the question of identification of the accused persons in facts of the case is either proper or legally sustainable.

14. Now let us examine the first question on which the High Court has interfered, namely the legality of the search procedure.

15. A three-Judge Bench of this Court in the case of *Radha Kishan vs. State of Uttar Pradesh* [AIR 1963 SC 822] while construing similar provision in the Cr.P.C. of 1898 held that an illegal search does not vitiate the seizure of the article. The only requirement of law in such cases is that the Court has to examine carefully the evidence regarding the seizure. But beyond this no further consequences ensues. (para 4, page 824 of the report)

16. This principle is being consistently followed by this Court and by different High Courts since then. Herein if we follow the aforesaid principle, we do not discern any error committed by the Courts below by proceeding on the material collected, as a result of the seizure of materials.

17. The other two points on which the High Court chose to interfere, namely the ownership of the house or the conscious possession of the house as a valid requisite before the accused persons could be held guilty under Section 8 of the said Act, is clearly based on a misreading of the clear provision of the Act.

18. The said Act, which has been enacted to give effect to the provisions of Article 48 of Directive Principle of State Policy and which is still in force, prohibits cow slaughter in Section 3 thereof in following terms-

"**3. Prohibition of cow slaughter** - Notwithstanding anything contained in any other law for the time being in force or any usage or custom to the contrary, no person

shall slaughter or cause to be slaughtered or offer or cause to be offered for slaughter any cow in any place in Punjab:

Provided that killing of a cow by accident or in self defence will not be considered as slaughter under the Act."

19. Under Section 4 there are certain exceptions to section 3. Those exceptions are as under:

"**4. Exceptions**. – (1) Nothing in section 3 shall apply to the slaughter of a cow –

(a) whose suffering is such as to render its destruction desirable according to the certificate of the Veterinary Officer of the area or such other Officer of the Animal Husbandry Department as may be prescribed; or

(b) which is suffering from any contagious or infectious disease notified as such by the Government; or

(c) which is subject to experimentation in the interest of medical and public health research by a certified medical practitioner of the Animal Husbandry Department.

(2) Where it is intended to slaughter a cow for the reasons specified in clause (a) or clause (b) of sub-section (1) it shall be incumbent for a person doing so to obtain a prior permission in writing of the Veterinary Officer of the area or such other Officer of the Animal Husbandry Department as may be prescribed."

20. The expression "slaughter" is defined in Section 2(e) of the Act, which is as follows:

"2(e) - "slaughter" means killing by any method whatsoever and includes maiming and inflicting of physical injury which in the ordinary course will cause death."

21. If we read Section 3 and Section 4 together, it is clear that the person contravening Section 3 cannot put up a defense that the act of slaughter was being done in a place, of which he is not the owner or in respect of which he does not have the conscious possession. Slaughter of Cows, subject to exceptions under Section 4, *in any place,* is prohibited under Section 3 and penalty for doing so is provided under Section 8.

22. The High Court's finding that the guilt of the accused persons has not been proved in the absence of proof of their ownership or conscious possession of the house where slaughter took place, is a finding which is de-hors the said Act and is clearly not legally sustainable. Slaughter of the Cows is clearly prohibited under Section 3, subject to the exceptions in Section 4. The case of the accused persons is not covered under the exceptions in Section 4. No such defense was ever taken.

23. Therefore the impugned order of the High Court is, with respect, legally not sustainable. We therefore are unable to accept the reasons of the High Court. The appeal is allowed. The order of the High Court is set-aside and that of the learned Sessions Judge is affirmed.

D.G. Appeal allowed.

M/S. REVA ELECTRIC CAR CO. P. LTD.
v.
M/S. GREEN MOBIL
(Arbitration Petition No.18 of 2010)

NOVEMBER 25, 2011.

[SURINDER SINGH NIJJAR, J]

ARBITRATION AND CONCILIATION ACT, 1996:

s.11(4), (5), (6) and 9 – Decision as to existence of a valid arbitration – HELD: It is for Chief Justice of India/his designate to decide about the existence of a valid arbitration agreement – In the instant case, the MOU contained an arbitration clause, and there existed a valid arbitration agreement – The contract existed till the date of its termination – Therefore, it cannot be said that the disputes arising between the parties cannot be referred to Arbitral Tribunal – The disputes have arisen in relation to the termination of the MOU and the consequences thereof – Such disputes would be clearly covered under the arbitration clause – Clearly, therefore, the disputes raised by the petitioner needs to be referred to arbitration – Under the arbitration clause, a reference was to be made that the disputes were to be referred to a single arbitrator – Since the parties have failed to appoint an arbitrator under the agreed procedure, it is necessary to appoint an arbitrator – In exercise of powers u/s 11(4) and (6) of the Act, read with Paragraph 2 of the Scheme of 1996, arbitrator is appointed to adjudicate the disputes that have arisen between the parties – Appointment of the Arbitrators by the Chief Justice of India Scheme, 1996 – Para 2.

s.16(1)(a) – Arbitration agreement – Scope of – HELD: Section 16(1)(a) provides that an arbitration clause which forms part of the contract shall be treated as an agreement independent of the other terms of the contract – Even on the

termination of the contract, the arbitration agreement would still survive – By virtue of s.16(1)(b), it continues to be enforceable notwithstanding a declaration of the contract being null and void – In view of the provisions contained in s. 16(1) of the Act, it cannot be said that with the termination of the MOU, the arbitration clause would also cease to exist.

The petitioner filed the instant application for appointment of arbitrators stating that memos of understanding (MOU) were entered into between the parties on 25.9.2007, 22.4.2008, 24.8.2008 and 1.4.2009 for supply of cars to the respondent to be sold in Belgium Region. However, as the respondent did not have the necessary resources to build up the brand of the petitioner, the latter through e-mail dated 25.9.2009 terminated the contract and asked the respondent to immediately cease the sales and marketing activities on its behalf. The petitioner stated to have received a Writ of Summons dated 14.1.2010 of legal proceedings initiated by the respondent in the Commercial Court at Brussels in Belgium claiming damages on account of termination of the MOU dated 25.9.2007. The petitioner thereafter issued a notice dated 24.3.2010 to the respondent invoking the arbitration clause of the MOU. The respondent in its reply dated 7.4.2010 denied existence of any contractual relationship between the parties on the date of termination of MOU on 25.9.2009. The petitioner filed an arbitration application u/s 9 of the Arbitration and Conciliation Act 1996 before the Court of Principal City Civil and Sessions Judge, Bangalore praying for an order of injunction restraining the respondent from proceeding with the legal proceedings in the Commercial Court at Brussels, Belgium. The petitioner was granted a of temporary injunction. Thereafter the petitioner filed the instant application.

The stand of the respondent was that the MOU dated 25.9.2007 expired on 31.12.2007, as it related to the "Test

and Trial period" which came to end on 31.12.2007 after which the parties decided to enter into a distribution agreement which was sent by the petitioner to the respondent on 15.11.2007 i.e. after 15 days prior to the expiry of MOU. Therefore, the arbitration clause relied upon by the petitioner did not cover any disputes/claims that relate to any period beyond 31.12.2007.

Disposing of the petition, the Court

Held: 1.1 In a petition u/s 11(4),(5),(6) and (9) of the Arbitration and Conciliation Act, 1996, it is for the Chief Justice of India/his designate to decide about the existence of a valid arbitration agreement. [para 19] [376-A-B]

A.P. Tourism Development Corporation Ltd. Vs. *Pampa Hotels Ltd*. **2010 (4) SCR 942 = 2010 (5) SCC 425; and** *Alva Aluminium Limited, Bangkok Vs. Gabriel India Limited* **2010 (13) SCR 803 = 2011 (1) SCC 167;** *Brigadier Man Mohan Sharma, FRGS (Retd.) Vs. Lieutenant General Depinder Singh* **2008 (16) SCR 701 =*2009 (2) SCC 600;*** *National Insurance Company Limited Vs. Boghara Polyfab Private Limited* **2008 (13) SCR 638 = *2009(1) SCC 267;* and** *SBP & Co. Vs. Patel Engineering Ltd. & Anr.* **2005 (4) Suppl. SCR 688 = *2005 (8) SCC 618* – relied on**

1.2 There is no dispute that the parties had entered into a legally valid and enforceable MOU dated 25.9.2007. There is also no dispute that Clause 11 provides that the disputes arising between the parties, at any time, in relation to the MOU, shall be referred to arbitration. Clause (2) of the MOU, undoubtedly, fixes the trial period upto 31.12.2007. However, the clause also provides that the petitioner may unilaterally decide to extend the MOU, if it considers necessary. The correspondence between the parties would show that the petitioner had proposed a draft distribution agreement to the respondent for

discussion. Thereafter, a series of e-mails were exchanged between the parties, but making it apparent that no final consensus was reached. It would, therefore, appear that the MOU was duly extended till it was terminated as averred by the petitioner. [para 20] [376-C-E]

1.3 The petitioner has categorically pleaded that the MOU was terminated on 25.9.2009 and has placed on record the e-mail dated 25.9.2009 in which it is clearly stated that MOU was entered into on 25.9.2007 for a test period of six months from the date of arrival of the trial cars. It is further stated that this period was extended on an informal and voluntary basis by the petitioner for a period extending to two years from the date of signing of the MOU. During this two years period, a total of 15 REVA cars have been sold and as the respondents did not have in place the necessary resources to build the REVA brand and to launch the M1 vehicles introduced by REVA at the Frankfurt IAA, the respondent was asked to immediately cease all sales and marketing activities on behalf of REVA brand. This termination of the agreement has been acknowledged by the respondents in its e-mail dated 7.10.2009. A perusal of this e-mail would also demonstrate that the disputes had clearly arisen between the parties at that time. Clearly, therefore, the MOU has been extended till its termination on 25.9.2009. It is also evident that the parties had failed to reach any fresh agreement with regard to sale of REVA cars in Europe by the respondents. The pleadings and the material on record has clearly established that there was a valid arbitration agreement incorporated in Clause 11 of the MOU. [para 21] [376-F-H; 377-A-E]

2.1 The claims made by the respondents before the Court at Brussels, clearly pertained to the contract under the MOU dated 25.9.2007 which was terminated on 25.9.2009. It would be for the Arbitral Tribunal to decide

as to whether claims made are within the arbitration clause. The Arbitral Tribunal would also have to decide the merits of the claim put forward by the respective parties. [para 25 and 27] [379-D-F-G]

Bharat Petroleum Corporation Ltd. Vs. Great Eastern Shipping Co. Ltd. **2007 (11) SCR 117 = (2008 (1) SCC 503 – referred to.**

2.2 The conclusion is inescapable that notwithstanding the initial period under the MOU expiring by 31.12.2007, the same was extended by the petitioner in exercise of its discretion under Clause (2) of the MOU. The extended MOU was terminated only on 25.9.2009. Therefore, it cannot be said that the disputes arising between the parties cannot be referred to the Arbitral Tribunal. The disputes have arisen in relation to the termination of the MOU and the consequences thereof. Such disputes would be clearly covered under the Arbitration clause which provides that in the event of any dispute or difference *arising at any time* between the parties *in relation to the agreement* shall be referred to a Sole Arbitrator. The clause is clearly not limited to the disputes relating only to the initial period of the MOU till 31.12.2007. [para 30] [381-F-H; 382-A-B]

2.3 Irrespective of whether the MOU is now in existence or not, the arbitration clause would survive. The disputes that have arisen between the parties clearly pertain to the subject matter of the MOU. [para 31] [382-B-C; 383-E]

Everest Holding Limited Vs. Shyam Kumar Shrivastava & Ors. **2008 (14) SCR 1221 = 2008 (16) SCC 774 – relied on**

2.4 Even assuming that MOU was not extended beyond 31.12.2007, it would make little difference. Section

16(1)(a) of the Act provides that an arbitration clause which forms part of the contract shall be treated as an agreement independent of the other terms of the contract. The plain meaning of the said clause would tend to show that even on the termination of the agreement/contract, the arbitration agreement would still survive. To ensure that there is no misunderstanding, s. 16(1)(b) further provides that even if the arbitral tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause. By virtue of s.16(1)(b), it continues to be enforceable notwithstanding a declaration of the contract being null and void. In view of the provisions contained in s. 16(1) of the Act, it cannot be said that with the termination of the MOU on 31.12.2007, the arbitration clause would also cease to exist. [para 33-34] [383-F-H; 385-A-D]

UNCITRAL Model Law - referred to.

2.5 In the instant case, the disputes that have arisen between the parties clearly relate to the subject matter of the relationship between the parties which came into existence through the MOU. Clearly, therefore, the disputes raised by the petitioner need to be referred to arbitration. Under the arbitration clause, a reference was to be made that the disputes were to be referred to a single arbitrator. Since the parties have failed to appoint an arbitrator under the agreed procedure, it is necessary for this Court to appoint an arbitrator. In exercise of powers u/s 11(4) and (6) of the Act, read with Paragraph 2 of the Appointment of Arbitrator by the Chief Justice of India Scheme, 1996, the Sole Arbitrator is appointed to adjudicate the disputes that have arisen between the parties, on such terms and conditions as the Sole Arbitrator deems fit and proper. [para 34-35] [385-D-H; 386-A]

Case Law Reference:

2007 (11) SCR 117	**relied on**	**para 15**
2008 (14) SCR 1221	**relied on**	**para 15**
2008 (16) SCR 701	**relied on**	**para 16**
2008 (13) SCR 638	**relied on**	**para 16**
2005 (4) Suppl. SCR 688	**relied on**	**para 16**
2010 (4) SCR 942	**relied on**	**para 18**
2010 (13) SCR 803	**relied on**	**para 18**
2007 (11) SCR 117	**referred to**	**para 28**

CIVIL ORIGINAL JURISDICTION : Arbitration Petition No. 18 of 2010.

Under Sections 11 (4) and 6 of the Arbitration and Conciliation Act, 1996.

P.S. Narasimha, Vyapak Desai, P.V. Dinesh, Cherrie Alexander for the Petitioner.

Tasneem Ahamadi, Sudhir Kumar Gupta, Manish Gupta for the Respondent.

The Order of the Court was delivered by

O R D E R

SURINDER SINGH NIJJAR, J. 1. The petitioner has filed the present application under Sections 11(4) and (6) of the Arbitration and Conciliation Act, 1996 read with paragraph 2 of the Appointment of the Arbitrators by the Chief Justice of India Scheme, 1996. It is stated that the parties had entered into a legally valid and enforceable Memorandum of Understanding ('MOU') dated 25th September, 2007, providing, *inter alia,* for the respective obligation of both the parties in connection with the marketing of the cars of the petitioner. Though the term of the MOU was till December,

2007, it was extended by the acts of the parties in terms of Clause 2 of the MOU.

2. The petitioner makes a reference to various requests made by the respondent for supply of cars in terms of MOU on 22nd April, 2008; 24th August, 2008; and 1st April, 2009. The petitioner further claims that some time in September 2009, disputes arose between the parties. Numerous e-mails were exchanged between the parties, apart from the personal discussions between their representatives, touching and covering the disputes. It is the petitioner's claim that during the term of MOU, merely 15 cars of the petitioner had been sold in the Belgium Region. The petitioner, therefore, claimed that the respondent did not have in place the necessary resources to build the brand of the petitioner. Consequently, through e-mail dated 25th September, 2009 the petitioner requested the respondent to immediately cease sales and marketing activities on its behalf and take necessary steps of providing after sales and service to existing car owners, till such time the petitioner appointed its new distributor. The petitioner claims that the aforesaid e-mail duly constituted the termination of the contractual relationship between the parties as covered under the MOU.

3. As a consequence of the aforesaid termination, the parties have exchanged various e-mails raising claims and counter claims on 6th /7th /8th October, 2009.

4. The petitioner further claims to have received a Writ of Summons dated 14th January, 2010 of legal proceedings initiated by the respondent in Belgium before the First Divisional Court, Room A of the Commercial Court in Brussels. According to the petitioner, the claims made by the respondent before the Commercial Court, Brussels disclose that the respondent instituted the legal proceedings *inter alia* claiming damages from the petitioner on account of termination of the MOU dated 25th September, 2007. On 15th March, 2010, the counsel for the respondent sent an e-mail communication that

the respondent was willing to negotiate a global settlement with the petitioner and that the respondent through its counsel would be available to discuss any such proposal. According to the petitioner, the aforesaid communication also acknowledges the fact that the rights and obligation of both the parties were covered by the distributorship agreement, i.e. the MOU, which stood duly terminated.

5. The petitioner thereafter issued a notice dated 24th March, 2010 through its counsel in terms of Clause 11 of the MOU invoking arbitration under the MOU and referring all disputes between the parties to arbitration. The petitioner in fact nominated Mr. Justice Jayasimha Babu (Retired) as the Sole Arbitrator, and failing confirmation by the respondent, as the arbitrator of the petitioner on the three member Arbitral Tribunal to be constituted in terms of Clause 11.

6. The respondent through its counsel sent a reply to the notice dated 7th April, 2010 denying existence of any contractual relationship between the parties on the date of termination of MOU on 25th September, 2009.

7. The petitioner, therefore, filed Arbitration Application No.576 of 2010 under Section 9 of the Arbitration and Conciliation Act, 1996 before the Court of the Principal City Civil & Sessions Judge at Bangalore praying for an order of injunction restraining the respondent from proceeding with the legal proceedings initiated before the First Divisional Court, Room A of Commercial Court of Brussels, Belgium.

8. The petitioner had also moved I.A.No.1 in the aforesaid suit dated 19th April, 2010 seeking an order of temporary injunction which was granted by the Principal City Civil & Sessions Judge at Bangalore on 21st April, 2010. Thereafter the petitioner has moved the present application for appointment of the Arbitrator in terms of Clause 11 of the MOU which reads as under:-

"11. **Governing Law and Jurisdiction**

i. This MOU shall be construed and enforced in accordance with the laws of India.

ii. In the event of any dispute or difference arising at any time between the parties hereto as to the construction, meaning or effect of this Agreement or thing contained herein or the rights, duties, liabilities and obligations of the parties hereto in relation to this Agreement, the same shall be referred to a single arbitrator, in case the parties can agree upon one (1) within a period of thirty days upon being called by a party to do so and failing such agreement to three (3) arbitrators one (1) each to be appointed by GREENMOBIL and RECC and the third to be appointed by the two arbitrators so appointed. The award passed by such arbitrator(s) shall be final and binding on both the parties.

All such arbitration proceedings shall be held in Bangalore as per the Arbitration and Conciliation Act, 1996 as amended from time to time."

9. In reply to the aforesaid petition, the respondent claimed that the MOU dated 25th September, 2007 expired on 31st December, 2007. The petition does not clearly set out the claim or the period of the claim but the documents and implication of the contents of the present petition seem to indicate that the claim of the petitioner is in respect of the commercial distribution of the cars which commenced from 1st January, 2008 i.e. after the expiry of Memorandum of understanding. It is also the plea of the respondent that the MOU relate to a test and trial period which came to an end on 31st December, 2007, after which the parties decided to enter into a distribution agreement which was sent by the petitioner to the respondent on 15th November, 2007, i.e., 15 days prior to the expiry of the MOU. Therefore, the arbitration clause relied upon by the petitioner does not cover any disputes/claims that relate to any

period beyond 31st December, 2007. It is further claimed that the petition is only a counterblast to the proceedings filed by the respondent before the Commercial Court at Brussels. This, according to the respondent, is evident from the fact that the respondent had instituted the proceedings in the Commercial Court at Brussels on 14th January, 2010; the petitioner was intimated about the said proceedings vide e-mail dated 15th March, 2010; and the notice invoking the arbitration clause in the MOU is dated 24th March, 2010. It is, therefore, clear that the arbitration clause is invoked only to avoid proceedings before the Commercial Court at Brussels. It is emphasised that the proceedings before the Commercial Court at Brussels related to the period beyond the MOU when the parties had commenced work of distributorship or dealership after the test trial period under the MOU had come to an end.

10. I have heard the learned counsel for the parties.

11. Mr. Narasimha, learned senior counsel appearing for the petitioner submits that the averments made by the respondent in reply to the petition make it abundantly clear that the disputes pertained to the MOU dated 25th September, 2007. According to the learned counsel, there was no fresh agreement entered into between the parties. Cars were being supplied to the respondent in terms of Clause 2 of the MOU. Making a reference to Clause 2, learned counsel submits that the aforesaid clause makes it clear that the MOU was effective for a period of three to six months, from the date of arrival of the cars in Belgium. This term was to be considered as the trial period. On completion of the trial period but not later than 3rd December, 2007, the parties were to mutually decide to continue the marketing, sales, and service of the work hours by the respondent. They were also to enter into a fresh long term agreement on mutually agreed terms and conditions. He submits that till the date of the termination of the MOU, no fresh agreement had been entered into between the parties. Relying on the last sentence of the Clause 2, Mr. Narasimha submits

that it was the sole discretion of the petitioner to extend the MOU in case the petitioner believed that the additional time is required to complete the trial period. The aforesaid portion of Clause 2 is as under :-

> "RECC, at its sole discretion, may decide to extend the MOU if RECC believes that additional time is required to complete the trial period."

12. He further submits that although the cars were being supplied to the respondent but the petitioner was not satisfied with the progress made in the number of cars sold by the respondent. Therefore, the respondent was constrained to terminate the MOU, after a period of two years from the commencement.

13. According to Mr. Narasimha, respondent has initiated the proceedings in the Brussels Court only to pre-empt the initiation of legal proceedings by the petitioner. He points out that the pleadings in the Writ of Summons, clearly show: that the respondent was only concerned with the effect of the termination and not the period of the MOU. Respondent has admitted that the contractual relationship started in 2007. The respondent has admitted that there is no other subsequent agreement. In Paragraph 18 of the Writ of Summons, the respondent admits that the contractual relationship was subsisting till September, 2009. In Paragraph 30, it is admitted by the respondent that "the party summoned below terminated the contract in an untimely and brutal manner on 25th September, 2009".

14. He points out that the disputes have arisen in relation to the termination of the MOU and the consequences thereof. Such disputes are clearly covered by the arbitration clause which clearly provides for resolution of disputes through arbitration. The clause provides that in the event of any dispute or difference *arising at any time* between the parties *in relation to* the agreement shall be referred to a Sole Arbitrator. The

clause, according to the learned senior counsel, is not limited to the disputes relating only to the initial period of the MOU till 31st December 2007.

15. He submits irrespective of whether the MOU is now in existence or not, the Arbitration clause would survive. He relies on the decisions of this Court in the cases of *Bharat Petroleum Corporation Ltd. Vs. Great Eastern Shipping Company Ltd.*[1] *and Everest Holding Limited Vs. Shyam Kumar Shrivastava & Ors.*[2] He further submits that this Court is required to refer the disputes between the parties to the Sole Arbitrator, without any in-depth examination of the disputes. The Court is merely to be satisfied that the disputes fall within the ambit of the Arbitration Clause. In support of this submission, he relies on the judgment of this Court in *Brigadier Man Mohan Sharma, FRGS (Retd.) Vs. Lieutenant General Depinder Singh.*[3] He also relies on the judgment in the case of *National Insurance Company Limited Vs. Boghara Polyfab Private Limited*[4], in support of the submission all disputes are such which need to be decided by the Sole Arbitrator on merits, and can not be decided by this Court in a petition under Section 11(4) and 6 of the Arbitration and Conciliation Act, 1996. Learned counsel further submits that in accordance with the aforesaid clause the petitioner had already nominated the Sole Arbitrator. The respondent has, however, not accepted the aforesaid arbitrator. At the same time, it had expressed its willingness to negotiate the global settlement with the petitioner.

16. On the other hand, Ms. Tasneem Ahamadi, has submitted that the MOU having come to an end by efflux of time, there was no question of any termination as claimed by the petitioner. She further submits that the notice invoking arbitration was sent only as a counterblast to the summons

1. 2008 (1) SCC 503.
2. 2008 (16) SCC 774.
3. 2009 (2) SCC 600.
4. 2009 (1) SCC 267.

received by the petitioner from the Brussels Commercial Court. Learned counsel further submitted that the disputes which form the basis of the claim in the Brussels Commercial Court pertained to a period subsequent to the period covered by the MOU. The arbitration clause in the MOU relates only to disputes which relate to the test and trial period. Hence, an arbitrator can not be appointed for settlement of disputes which occurs / relate to a period after 31st December, 2007. The disputes raised before the Commercial Court at Brussels are not covered by the arbitration clause in the MOU. She had made a detailed reference to numerous e-mails exchanged between the parties to submit that the parties had in fact entered into a long term contract. This was only to be reduced to a formal document. Since the disputes are not covered by the arbitration clause, there can be no reference. In support of the aforesaid submission, learned counsel relies on a judgment of this Court in the case of *SBP & Co. Vs. Patel Engineering Ltd. & Anr.*[5]. In view of the law laid down in the aforesaid judgment, according to the learned counsel, the arbitration petition deserves to be dismissed.

17. I have considered the submissions made by the learned counsel for the parties. It appears that the submissions made by Ms. Ahamadi that the question with regard to the existence of a valid arbitration agreement would have to be decided by this Court, is not without merit. This Court has on a number of occasions examined the scope and ambit of the jurisdiction of the Chief Justice or his designate under Section 11 of the Arbitration and Conciliation Act, 1996. A reference in this connection can be made to the judgment of this Court in *SBP & Co.* **(**supra) wherein a Constitution Bench of this Court has clearly held as under :

> **"39.** It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide

5. 2005 (8) SCC 618.

his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the petitioner has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal."

In the case of *National Insurance Co. Ltd.* (supra), this Court again examined the question with regard to the scope of the jurisdiction under Section 11(6). In doing so, this Court explained the ratio of the Constitution Bench in *SBP & Co.* (supra). In Para 21 of the Judgment, the power of the Arbitral Tribunal in cases where the disputes are referred to arbitration without the intervention of the court has been distinguished from the power in matters where the intervention of the court is sought

for appointment of an Arbitral Tribunal. In case where the matters are sought to be referred to arbitration *without the intervention of the court* it has been held that the Arbitral Tribunal can decide the following questions affecting its jurisdiction: (a) whether there is an arbitration agreement; (b) whether the arbitration agreement is valid; (c) whether the contract in which the arbitration clause is found is null and void, and if so, whether the invalidity extends to the arbitration clause also.

18. In matters, where the intervention of the Chief Justice of India has been sought for appointment of a sole arbitrator under Section 11(4), (5) and (6) of the Arbitration Act, 1996, the Chief Justice or his designate will have to decide certain preliminary issues. It would be apposite to notice here the relevant observations made in Para 22, which are as follows :-

"22. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (*i*) issues which the Chief Justice or his designate is bound to decide; (*ii*) issues which he can also decide, that is, issues which he may choose to decide; and (*iii*) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/ his designate will have to decide are:

(*a*) Whether the party making the application has approached the appropriate High Court.

(*b*) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(*a*) Whether the claim is a dead (long-barred) claim

or a live claim.

(*b*) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/ his designate should leave exclusively to the Arbitral Tribunal are:

(*i*) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(*ii*) Merits or any claim involved in the arbitration."

These observations were further reiterated by this Court in the case of *A.P. Tourism Development Corporation Ltd. Vs. Pampa Hotels Ltd.*[6]. The aforesaid ratio of law has been reiterated by this Court in *Alva Aluminium Limited, Bangkok Vs. Gabriel India Limited*[7]. Upon consideration of the entire case law, it has been observed as follows :-

"18. It is in the light of above pronouncements, unnecessary to delve any further on this issue. It is clear that once the existence of the arbitration agreement itself is questioned by any party to the proceeding initiated under Section 11 of the Act, the same will have to be decided by the Chief Justice/designate as the case may be. That is because existence of an arbitration agreement is a jurisdictional fact which will have to be addressed while making an order on a petition under Section 11 of the Act."

19. In view of the aforesaid authoritative dicta, the

6. [2010 (5) SCC 425.].
7. [2011 (1) SCC 167.

submission of Ms. Ahamadi has to be accepted that in a petition under Sections 11(4)(5)(6) and (9) of the Arbitration Act, 1996, it is for the Chief Justice of India/his designate to decide about the existence of a valid arbitration agreement. Now let me examine the facts in the present case keeping in view the aforesaid well settled principles.

20. There is no dispute that the parties had entered into a legally valid and enforceable MOU dated 25th September, 2007. There is also no dispute that Clause 11 provides that disputes arising between the parties, at any time, in relation to the MOU, shall be referred to arbitration. Clause (2) of the MOU, undoubtedly, fixes the trial period upto 31st December, 2007. However, the clause also provides that the petitioner may unilaterally decide to extend the MOU, if it considers necessary. The correspondence between the parties would show that the petitioner had proposed a draft distribution agreement to the respondent for discussion. Thereafter, a series of e-mails were exchanged between the parties, but making it apparent that no final consensus was reached. It would, therefore, appear that the MOU was duly extended till it was terminated as averred by the petitioner.

21. The petitioner has categorically pleaded that the MOU was terminated on 25th September, 2009. The petitioner has placed on record the e-mail dated 25th September, 2009 in which it is clearly stated that MOU was entered into on 25th September, 2007 for a test period of six months from the date of arrival of the trial cars. It is further stated that this period was extended on an informal and voluntary basis by the petitioner for a period extending to two years from the date of signing of the MOU. During this two years period, a total of 15 REVA cars have been sold. It is pointed out that inspite of the best efforts of the respondent and the efforts of the petitioner to support the respondent, following a review of the European operations it is believed that the respondents do not have in place the resources to build the REVA brand, invest in the appropriate

infrastructure, obtain necessary fiscal and/or subsidy and infrastructure support and are not adequately prepared to launch the M1 vehicles introduced by REVA at the Frankfurt IAA. Thereafter it requests the respondents to immediately cease all sales and marking activities on behalf of REVA brand. This termination of the agreement has been acknowledged by the respondents in its e-mail dated 7th October, 2009. A perusal of this e-mail would also demonstrate that the disputes had clearly arisen between the parties at that time. The e-mail makes a grievance that the respondents had not been notified of the termination of its dealership activities a few weeks ago when it had informed the petitioner of its negotiations with potential Dutch partners. The respondents also repeated its disappointment that the win-win soft-landing solution it proposed on 25th September, 2009 was rejected by the petitioner. Rest of the correspondence between the parties continues in the same tenor. Clearly, therefore, the MOU has been extended till its termination on 25th September, 2009. It is also evident that the parties had failed to reach any fresh agreement with regard to sale of REVA cars in Europe by the respondents. In my opinion, the pleadings and the material on record has clearly established that there was a valid arbitration agreement incorporated in Clause 11 of the MOU.

22. This takes me to the second submission of Ms.Ahamadi that, in any event, the disputes cannot be referred to arbitration as it pertained to a period subsequent to the term of the MOU. Mr.Narasimha has, however, pointed out that according to the case pleaded by the respondents in the Brussels Court which is evident from the writ of summons, all the disputes pertained to the period prior to the termination of the agreement by the petitioner. The writ of summons clearly mentions as follows :

> "Whereas the first cars of the make REVA were marketed in India from June 2001 onwards, then in the UK in 2003 and worldwide from 2007.

> That the party summoned below had however promised the arrival of more performing Lithium batteries that would be installed in their vehicles from the middle of 2008, as well as a new or more competitive and more attractive car model by the end of 2008, the REVA 'NXR'.
>
> Whereas the contractual relationships between the petitioner and the party summoned below started in 2007.
>
> Whereas the distribution of the REVA cars by the petitioner took place in two stage.
>
> That during an initial period the petitioner ran a pilot project for the party summoned below to assess the marketing possibilities of the REVA on the Belgian market.
>
> That after a certain period of time the petitioner became an exclusive distributor of REVA cars for the BENULEX."

23. The writ of summons further mentions that the petitioner had to run a pilot project of three to six months to test the marketing possibilities of the REVA cars on the Belgium market. It is further pleaded that at the end of the test period and at the latest on 31st December, 2007, the parties had to decide jointly whether the petitioner would continue to provide the promotion, sales and service of REVA Cars in Belgium within the framework of a long-term distribution contract. The respondents further pleaded that :-

> "Whereas, in spite of the absence of the signing of a written contract between the parties, the petitioner de facto became the exclusive distributor of REVA vehicles in the BENELUX starting the month of January, 2008."

24. Thereafter the respondents gave details of the efforts made by it for marketing of the REVA Cars from January, 2008 onwards. In paragraph 19 of the writ of summons, it is clearly admitted as follows :-

"Whereas on the 25th of September, 2009, as soon as the first REVA cars fitted with Lithium batteries and of the new REVA NXR model arrive in Belgium the petitioner is going to be ejected all of a sudden by the party summoned below.

That during a telephone conversation on 25th September, 2009, confirmed in an email of the same date the party summoned below suddenly announced its decision to terminate the concession granted to the petitioner for the Belelux, with immediate effect;

That the party summoned below asked the petitioner to immediately stop the sale and promotion of the REVA cars as well as the use of the REVA mark."

25. The claims made by the respondents clearly pertained to the contract which was terminated on 25th September, 2009. In paragraph 30 of the writ of summons, it is pleaded as under :-

"That the parties summoned below terminated the contract in any untimely and brutal manner on 25th September, 2009."

26. On the aforesaid basis, the respondents claim compensation and damages amounting to Euro 454,000.

27. The aforesaid averments and the material on record would clearly demonstrate that the disputes that have arisen between the parties clearly relate to the MOU dated 25th September, 2007. It would be for the Arbitral Tribunal to decide as to whether claims made are within the arbitration clause. The Arbitral Tribunal would also have to decide the merits of the claim put forward by the respective parties. In view of the material placed on record, it would not be possible to accept the submissions of Ms. Ahamadi that the disputes were beyond the purview of the arbitration clause.

28. A similar matter was examined by this Court in the case of *Bharat Petroleum Corporation Ltd. Vs. Great Eastern Shipping Co. Ltd.*[8] In the aforesaid case, an agreement called time charter party was entered into between the appellant and the respondent on 6th May, 1997 for letting on hire vessels for a period of two years from 22nd September, 1996 to 30th June, 1997 and from 1st July, 1997 to 30th June, 1998. It appears that certain disputes arose between the parties. Thereafter, on the basis of the correspondence exchanged between the parties with regard to the disputes, claims and counter claims were filed before the Arbitral Tribunal. Issues were duly framed of which the following three issues may be of some relevance in the present context viz.

"Issue 1.—Whether the Hon'ble Arbitral Tribunal has no jurisdiction to adjudicate upon the dispute between the claimant and the respondent for the period September 1998 to August 1999 in respect of the vessel *Jag Praja* for the reasons stated in Para 1 of the written statement?

Issue 2.—Whether there is any common practice that if the vessel is not redelivered at the end of the period mentioned in the time charter the vessel would be governed by the charter party under which originally it was chartered?

* * *

Issue 5.—Whether the time charter party dated 6-5-1997 came to an end by efflux of time on 30-8-1998? "

29. The Arbitral Tribunal by its order dated 12th May, 2003 came to the conclusion that the appellant having invoked the arbitration clause contained in the charter party agreement dated 6th May, 1997, which was valid upto 31st December, 1998 and as the dispute between the parties related to the period subsequent to 31st August, 1998, they had no jurisdiction to decide the reference. The tribunal held that the

8. [2008] (1) SCC 503].

charter party agreement dated 6th May, 1997 was superseded by a fresh agreement. Therefore, original charter party dated 6th May, 1997 got extinguished. The respondents challenged the said award before the High Court. Learned Single Judge set aside the award and held that the Arbitral Tribunal has the jurisdiction to adjudicate the disputes between the parties as the vessel continued to be hired by the appellant for the period subsequent to 31st August, 1998 on the same terms and conditions, as were contained in charter party agreement dated 6th May, 1997. It was held that the charter party dated 6th May, 1997 did not come to an end by efflux of time and it was extended by the party on the same terms and conditions. Correctness of this order was challenged in this Court. On examination of the entire fact situation, it was held as follows :-

> **"19.** It is, no doubt, true that the general rule is that an offer is not accepted by mere silence on the part of the offeree, yet it does not mean that an acceptance always has to be given in so many words. Under certain circumstances, offeree's silence, coupled with his conduct, which takes the form of a positive act, may constitute an acceptance—an agreement *sub silentio*. Therefore, the terms of a contract between the parties can be proved not only by their words but also by their conduct."

30. Examining the fact situation in the present case, I am of the opinion that the conclusion is inescapable that notwithstanding the initial period under the MOU expiring by 31st December, 2007, the same was extended by the petitioner in exercise of its discretion under Clause (2) of the MOU. The extended MOU was terminated only on 25th September, 2009. Therefore, it is not possible to accept the submission of Ms. Ahamadi that the disputes arising between the parties cannot be referred to the Arbitral Tribunal. In my opinion, Mr. Narasimha has rightly submitted that the disputes have arisen in relation to the termination of the MOU and the consequences thereof. Such disputes would be clearly covered under the

Arbitration clause which provides that in the event of any dispute or difference *arising at any time* between the parties *in relation to the agreement* shall be referred to a Sole Arbitrator. The clause is clearly not limited to the disputes relating only to the initial period of the MOU till 31st December, 2007.

31. I also find merit in the submission of Mr. Narasimha that irrespective of whether the MOU is now in existence or not, the arbitration clause would survive. The observations made by this Court in the case of *Everest Holding Ltd.* (supra) would clearly support the submission made by the learned senior counsel. In the aforesaid case, the parties had entered into a Joint Venture Agreement (for short 'JVA') dated 25th September, 2003 for the purpose of mining, processing and export of Iron Ore. On 26th March, 2004, another JVA was executed between the parties, particularly to iron out certain controversy in respect of JVA dated 25th September, 2003. Article 14.3 of the said JVA contained an arbitration clause providing that if the parties failed to resolve the matter through mutual agreement, the dispute shall be referred to an Arbitrator appointed by mutual agreement of the two parties. The stand of the petitioner in the aforesaid case was that on 20th September, 2004, it was shocked and surprised to receive unwarranted notices for cancellation of JVA. The aforesaid notice was replied on 6th October, 2004. Since the disputes between the parties were not resolved, the petitioner invoked the arbitration clause. Respondent No. 1 in reply to the notice refuted the claim of the petitioner and also refused to refer the matter to arbitration on the ground that the JVA between the petitioner and the respondent No.1 is not in existence as the same had been terminated by respondent No.2. It was stated that in view of the aforesaid position, there could be no invocation of Clause 14.3 of JVA.

32. Considering the aforesaid fact situation, this Court observed that under Clause 14.2, the parties had agreed that they would use all reasonable efforts to resolve the disputes,

controversy or claim arising out of or relating to these agreements. Since the parties have failed to resolve their differences, the same had to be referred to Arbitration under Clause 14.3. It was held that there is a valid Arbitration Agreement between the parties as contained in the JVA, which the parties are required to adhere to and are bound by the same. In other words, if there is any dispute between the parties to the agreement arising out of or in relation to the subject matter of the said JVA, all such disputes and differences have to be adjudicated upon and decided through the process of Arbitration by appointing a mutually agreed Arbitrator. This Court observed as follows:-

> "Though the JVA may have been terminated and cancelled as stated but it was a valid JVA containing a valid arbitration agreement for settlement of disputes arising out of or in relation to the subject-matter of the JVA. The argument of the respondent that the disputes cannot be referred to the arbitration as the agreement is not in existence as of today is therefore devoid of merit."

In my opinion, the aforesaid observations are squarely applicable to the facts in the present case. The disputes that have arisen between the parties clearly pertain to the subject matter of the MOU.

33. Even if, I accept the submission of Ms.Ahamadi that MOU was not extended beyond 31st of December, 2007, it would make little difference. Section 16(1)(a) of the Arbitration and Conciliation Act, 1996 provides that an arbitration clause which forms part of the contract shall be treated as an agreement independent of the other terms of the contract. The plain meaning of the aforesaid clause would tend to show that even on the termination of the agreement/contract, the arbitration agreement would still survive. It also seems to be the view taken by this Court in *Everest Holdings Ltd.* (supra). Accepting the submission of Ms.Ahamadi that the arbitration

clause came to an end as the MOU came to an end by efflux of time on 31st December, 2007 would lead to a very uncertain state of affairs, destroying the very efficacy of Section 16(1). The aforesaid section provides as under :

> **"16. Competence of arbitral tribunal to rule on its jurisdiction –** (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose –
>
> (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
>
> (b) a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause."

34. The aforesaid provision has been enacted by the legislature keeping in mind the provisions contained in Article 16 of the UNCITRAL Model Law. The aforesaid Article reads as under :-

> "Article 16 – Competence of arbitral tribunal to rule on its jurisdiction –
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
>
> (2)…….
>
> (3)……."

Under Section 16(1), the legislature makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, the arbitration clause which formed part of the contract, has to be treated as an agreement independent of the other terms of the contract. To ensure that there is no misunderstanding, Section 16(1)(b) further provides that even if the arbitral tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause. Section 16(1)(a) presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract. By virtue of Section 16(1)(b), it continues to be enforceable notwithstanding a declaration of the contract being null and void. In view of the provisions contained in Section 16(1) of the Arbitration and Conciliation Act, 1996, it would not be possible to accept the submission of Ms.Ahmadi that with the termination of the MOU on 31st December, 2007, the arbitration clause would also cease to exist. As noticed earlier, the disputes that have arisen between the parties clearly relate to the subject matter of the relationship between the parties which came into existence through the MOU. Clearly, therefore, the disputes raised by the petitioner needs to be referred to arbitration. Under the arbitration clause, a reference was to be made that the disputes were to be referred to a single arbitrator. Since the parties have failed to appoint an arbitrator under the agreed procedure, it is necessary for this Court to appoint the Arbitrator.

35. In exercise of my powers under Section 11(4) and (6) of the Arbitration and Conciliation Act, 1996 read with Paragraph 2 of the Appointment of Arbitrator by the Chief Justice of India Scheme, 1996, I hereby appoint Hon.Mr.Justice R.V. Raveendran, R/o 8/2, Krishna Road, Basavangudi, Bangalore, Former Judge of the Supreme Court of India, as the Sole Arbitrator to adjudicate the disputes that have arisen between the parties, on such terms and conditions as the

learned Sole Arbitrator deems fit and proper. Undoubtedly, the learned Sole Arbitrator shall decide all the disputes arising between the parties without being influenced by any prima facie opinion expressed in this order, with regard to the respective claims of the parties.

36. The registry is directed to communicate this order to the Sole Arbitrator to enable him to enter upon the reference and decide the matter as expeditiously as possible.

37. The Arbitration Petition is accordingly disposed of.

R.P. Arbitration Petition disposed of.

PUNJAB STATE WAREHOUSING CORPORATION
FARIDKOT
v.
M/S SH. DURGA JI TRADERS & ORS.
(Criminal Appeal No. 2226 of 2011)

NOVEMBER 28, 2011

[D. K. JAIN AND ANIL R. DAVE, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

s.482 –Petition seeking to quash the order of Chief Judicial Magistrate dismissing the criminal complaint for default – Dismissed on the ground of alternative remedy – Held: Availability of an alternative remedy of filing an appeal is not an absolute bar in entertaining a petition u/s 482 – One of the circumstances envisaged in the section for exercise of jurisdiction by High Court is to secure the ends of justice – Trial court had dismissed the complaint on a technical ground and, therefore, interest of justice required the High Court to exercise its jurisdiction to set aside such an order so that the trial court could proceed with the trial on merits – Rejection of petition u/s 482 rather resulted in miscarriage of justice – Orders of High Court and the Magistrate are set aside and the complaint is restored to the file of the Chief Judicial Magistrate – Administration of criminal justice.

Personal appearance of complainant – Exemption granted – Complaint dismissed by trial court for default – Held: Trial court erred in holding that since the complainant had been appearing in person despite the order exempting him from personal appearance the said exemption order become redundant and the complainant should have sought a fresh exemption from personal appearance – Order of exemption from personal appearance continues to be in force till it is revoked or recalled– Practice and Procedure.

SUMMONS/PROCESS – Service of summons – Held: Since the respondents refused to accept the summons, they would be deemed to have been served –- Practice and procedure.

Jeffrey J. Diermeier & Anr. Vs. State of West Bengal & Anr. **2010 (7) SCR 128 = (2010) 6 SCC 243; and** *Dinesh Dutt Joshi v. State of Rajasthan* **2001 (3) Suppl. SCR 465 = (2001) 8 SCC 570 – relied on**

Aseem Shabanli Merchant Vs. Brij Mehra & Anr. **(2005) 11 SCC 412;** Mohd*. Azeem Vs. A. Venkatesh & Anr.* **(2002) 7 SCC 726; and** *Dhariwal Tobacco Products Ltd & Ors.. Vs. State of Maharashtra & Anr.* **2008 (17) SCR 844 =(2009) 2 SCC 370 – cited.**

Case Law Reference:

(2005) 11 SCC 412	**cited**	**para 6**
(2002) 7 SCC 726	**cited**	**para 6**
2008 (17) SCR 844	**cited**	**para 6**
2010 (7) SCR 128	**relied on**	**para 8**
2001 (3) Suppl. SCR 465	**relied on**	**para 8**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2226 of 2011.

From the Judgment & Order dated 18.02.2008 of the High Court of Punjab & Haryana at Chandigarh in Crl. Misc. No. 27097-M of 2006.

Dr. Ashok Dhamija, A.P. Dhamija, Sarad Kumar SInghania for the Appellant.

The following order of the Court was delivered

O R D E R

1. Leave granted.

2. This appeal, by special leave, arises from judgment dated 18th February, 2008 rendered by a learned Single Judge of the High Court of Judicature for the States of Punjab and Haryana at Chandigarh. By the impugned judgment, the learned Single Judge has dismissed the petition preferred by the appellant under Section 482 of the Code of Criminal Procedure, 1973 (for short "the Code"), seeking quashing of orders dated 18th February 2003, by which the Criminal Complaint filed against the respondents in this appeal, for having committed offences under Sections 406 and 409 of the Indian Penal Code, 1860 (for short "IPC") had been dismissed in default by the Chief Judicial Magistrate, Muktsar; and 9th November 2005 by which the application for restoration of the said complaint was dismissed.

3. Succinctly put, the material facts giving rise to the present appeal are as follows:

The appellant, a statutory body, constituted under the Warehousing Corporation Act, 1962, filed a private criminal complaint under Sections 406 and 409 of the IPC against the respondents, alleging shortage of huge quantity of rice in respect of paddy entrusted to them as miller. Simultaneously, an application for exemption from personal appearance of the complainant therein, was also filed, whereon the following order was passed by the Trial Court on 16th April 1999.

> "In view of the application made by the complainant presence of complainant is exempted till further orders."

The trial proceeded in the normal course for six years. However, on 18th February 2003 the Chief Judicial Magistrate dismissed the case for non appearance of the complainant even though

the pleader for the appellant was present in court. The order reads thus:

> "None is present on behalf of the complainant nor any request has been received on behalf of the complainant. Both the accused are present on bail. In view of the absence of the complainant, complaint stands dismissed in default. Be consigned to Record Room.
>
> Pronounced. Sd/-
>
> Chief Judicial Magistrate
> Muktsar
>
> At this stage an application for restoration of the complaint has been filed on the ground that personal appearance of the complainant was already exempted vide order dated 16.4.99. Copy supplied to the counsel for accused. However, let the notice to the accused regarding the application be given present in the court for 24.3.03.
>
> File be also produced on the date fixed.
>
> Sd/-
> CJM 18.2.03"

The application for restoration of the complaint was ultimately dismissed on 9th November 2005, by the following order:

> "After considering the arguments of the parties at length, I am considered of the view that complaint was dismissed in default. Complainant was already exempted from the personal appearance on 16.4.99 and thereafter he appeared in the court in person. The orders have become redundant and the complainant had to seek afresh exemption from appearance. From the perusal of the record, it appears that complainant has never moved any fresh application for exemption nor the same was ever allowed and as such the order of dismissal dated 19.2.03 has become final and counsel for the accused has referred the Apex Court judgments and I have gone through the

same and find a force in the contention of the learned counsel for accused. There is no provision in Criminal Procedure Code to review the order and recall the summons. Hence, application moved by the applicant is hereby declined and accused are also discharged. File be consigned to the record room."

4. Aggrieved thereby the appellant moved the High Court with a petition under Section 482 of the Code for setting aside of the said orders and restoration of the complaint. As aforesaid, by the impugned judgment, the High Court has dismissed the petition, holding that the dismissal in default of a private complaint amounts to acquittal of the accused, and since against such an order a specific statutory remedy exists in the Code, a petition under Section 482 of the Code cannot be entertained. Hence the present appeal by the complainant.

5. As per the office report, the respondents had refused to accept summons when the same were tendered to them by the process server. Consequently, vide order dated 18th September, 2009 the respondents were deemed to have been served. We have heard the learned counsel for the appellant.

6. Learned counsel appearing for the appellant has assailed the impugned judgment mainly on the ground that the discretion vested in the High Court under Section 482 of the Code being very wide, in the instant case the High Court grossly erred in declining to exercise its jurisdiction on the ground that an alternative remedy was available to the appellant against an order of acquittal of the accused. Relying on the decision of this Court in *Aseem Shabanli Merchant Vs. Brij Mehra & Anr.*[1], learned counsel has urged that having regard to the serious nature of the charges against the respondents, the complaint should not have been dismissed in default on account of non appearance of the complainant, who had been otherwise exempted from personal appearance, and the case ought to

1. (2005) 11 SCC 412

have been tried on merits. In support of his contention that dismissal of the complaint because of a singular default in appearance on the part of the complainant, was improper, learned counsel relied upon the decision of this Court in *Mohd. Azeem Vs. A. Venkatesh & Anr.*[2]. It is also argued that having regard to the nature of the case, the High Court committed a patent error in dismissing the petition under Section 482 of the Code on the ground of availability of an alternative remedy. In support of the proposition that availability of an alternative remedy *per se* is no ground for dismissal of an application under Section 482 of the Code, learned counsel commends us to the decision of this Court in *Dhariwal Tobacco Products Ltd & Ors.. Vs. State of Maharashtra & Anr.*[3].

7. The short question that falls for consideration is whether in the fact-situation the High Court was justified in declining to exercise its jurisdiction under Section 482 of the Code?

8. It is trite law that the inherent power of the High Court ought to be exercised to prevent miscarriage of justice or to prevent the abuse of the process of the Court or to otherwise secure the ends of justice. The Court possesses wide discretionary powers under the Section to secure these ends. In this behalf it would be profitable to refer to the decision of this Court in *Jeffrey J. Diermeier & Anr. Vs. State of West Bengal & Anr.*[4], wherein one of us (D.K.Jain, J.), speaking for the bench, explained the scope and ambit of inherent powers of the High Court under Section 482 of the Code as follows:

"20…….. The Section itself envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code; (ii) to prevent abuse of the process of Court; and (iii) to otherwise secure the

2. (2002) 11 SCC 412.
3. (2009) 2 SCC370.
4. (2010) 6 SCC 243.

ends of justice. Nevertheless, it is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction of the Court. Undoubtedly, the power possessed by the High Court under the said provision is very wide but it is not unlimited. It has to be exercised sparingly, carefully and cautiously, *ex debito justitiae* to do real and substantial justice for which alone the court exists. It needs little emphasis that the inherent jurisdiction does not confer an arbitrary power on the High Court to act according to whim or caprice. The power exists to prevent abuse of authority and not to produce injustice.

……

22. In *Dinesh Dutt Joshi v. State of Rajasthan* [(2001) 8 SCC 570], while dealing with the inherent powers of the High Court, this Court has observed thus (SCC p. 573, para 6):

> "6. ...The principle embodied in the section is based upon the maxim: *quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest* i.e. when the law gives anything to anyone, it gives also all those things without which the thing itself would be unavailable. The section does not confer any new power, but only declares that the High Court possesses inherent powers for the purposes specified in the section. As lacunae are sometimes found in procedural law, the section has been embodied to cover such lacunae wherever they are discovered. The use of extraordinary powers conferred upon the High Court under this section are however required to be reserved, as far as possible, for extraordinary cases."

9. Bearing in mind the afore-stated legal position in regard to the scope and width of the power of the High Court under

Section 482 of the Code, we are of the opinion that the impugned decision is clearly indefensible. As noted above, the High Court has rejected the petition under Section 482 of the Code on the ground of availability of an alternative remedy without considering the seriousness of the nature of the offences and the fact that the Trial Court had dismissed the complaint on a hyper technical ground viz. since the complainant had been appearing in person, despite order dated 16th April 1999, exempting him from personal appearance, the said exemption order became redundant and the complainant should have sought a fresh exemption from personal appearance. We feel that such a view defies any logic. An order of exemption from personal appearance continues to be in force till it is revoked or recalled. We are convinced that in the instant case, rejection of appellant's petition under Section 482 of the Code has resulted in miscarriage of justice. Availability of an alternative remedy of filing an appeal is not an absolute bar in entertaining a petition under Section 482 of the Code. As aforesaid, one of the circumstances envisaged in the said Section, for exercise of jurisdiction by the High Court is to secure the ends of justice. Undoubtedly, the Trial Court had dismissed the complaint on a technical ground and therefore, interests of justice required the High Court to exercise its jurisdiction to set aside such an order so that the Trial Court could proceed with the trial on merits.

10. Resultantly, the appeal is allowed. The impugned judgment as also the orders of the Chief Judicial Magistrate dated 18th February 2003 and 9th November 2005 are set aside and the complaint filed by the appellant is restored to the file of the Chief Judicial Magistrate. The Chief Judicial Magistrate shall now proceed with the trial after securing the presence of the accused.

R.P. Appeal allowed.

GAJANAN SAMADHAN LANDE
v.
SANJAY SHYAMRAO DHOTRE
(Civil Appeal No. 7923 of 2010)

NOVEMBER 30, 2011

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

Representation of People Act, 1951*: ss.10, 100(1)(a) – Disqualification from contesting elections – State Government having more than 25% share in a Corporation – Returned candidate was an elected Director of the Corporation – Since returned candidate was neither managing agent nor manager nor secretary in the Corporation, s.10 of the Act is not attracted – Returned candidate is, therefore, not disqualified u/s..10 of the Act.*

Constitution of India, 1950*: Article 102 – Disqualification for membership – Held: For attracting the disqualification provided in Article 102, a person must be holder of 'office of profit' under the Government of India or the Government of any State – Returned candidate was elected Director of Corporation – He was holding an elected office and not an office by appointment – He did not hold an office of profit under the Government – One of the essential necessities in determining the question whether the office is an 'office of profit' or not is whether such office carries remuneration in the form of pay or commission – As an elected Director, the amount paid to the returned candidate was by way of allowances not 'remuneration' – It is only a sort of reimbursement of the expenses incurred by the returned candidate – Returned candidate was neither disqualified to be member of Parliament either u/Article 102 or u/s.10 of the 1951 Act – Representation of People Act, 1951.*

The respondent was elected from Akola Constituency for the 15th Lok Sabha. The appellant, a voter in the constituency challenged the election of respondent under Section 100(1)(a) of the Representation of People Act, 1951 on the ground that the returned candidate was disqualified to contest the election as he was holding the 'office of profit' under the Government company being a Director of the Maharashtra Seeds Corporation. The High Court held that the returned candidate was not disqualified to be a member of Parliament either under Article 102(1)(a) of the Constitution or under Section 10 of the 1951 Act. The instant appeal was filed challenging the order of the High Court.

Dismissing the appeal, the Court

HELD: 1.1. Section 10 of the Representation of People Act, 1951 refers to category of persons who shall be disqualified from contesting election, *inter alia*, of either House of Parliament. These persons are, managing agent, manager or secretary of any company or corporation (other than a co-operative society) in the capital of which the appropriate Government has not less than twenty-five per cent share. The Government of Maharashtra admittedly has more than 25 per cent share in the Corporation. The Corporation is, thus, covered by Section 10. However, the returned candidate is an elected Director from the Growers constituency on the Board of the Corporation. He is neither managing agent nor manager nor secretary in the Corporation. Section 10 of the 1951 Act is, therefore, not at all attracted in the instant case. [Para 10] [400-F-G; 401-A]

1.2. Article 102 of the Constitution provides for disqualifications for membership. For attracting the disqualification provided in Article 102 of the Constitution, a person must be holder of 'office of profit' under the

Government of India or the Government of any State. The returned candidate is not the holder of any office of profit under the Government of India. He is neither the holder of the office under the Government of Maharashtra, reason being in the first place that the returned candidate was holding an elected office and not an office by appointment. The test of appointment is decisive. The Government had nothing to do in the election of Director from the Growers constituency. Moreover, being an elected office, the Government has no power to remove the returned candidate from that office. On this ground alone, it must be held that the returned candidate did not hold an office much less an 'office of profit' under the Government. Secondly, one of the essential necessities in determining the question whether the office is an 'office of profit' or not is whether such office carries remuneration in the form of pay or commission. As an elected Director, the amount paid to the returned candidate by way of allowances, by no stretch of imagination, can be said to be 'remuneration' in the form of pay or commission. It is only a sort of reimbursement of the expenses incurred by the returned candidate. Essential condition that office carries remuneration in the form of pay or commission is also not satisfied. Lastly, the peculiar features of an elected office of Director in the Corporation, do not bring such office within the meaning of 'office of profit'. The view of the High Court did not suffer from any legal infirmity justifying interference. [Paras 12-16] [401-E-H; 402-A-E]

Pradyut Bordoloi v. Swapan Roy **AIR 2001 SC 296 – cited.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7923 of 2010.

From the Judgment & Order dated 30.07.2010 of the High

Court of Judicature at Bombay, Nagpur Bench in Election Petition No. 1 of 2009.

Vishal Jogdand, Suhas Kadam, Dr. Kailash Chand for the Appellant.

Saurav S. Shamshery, Shubhashis R. Soren, Ruchi Kohli for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. This is an Appeal under Section 116-A of the Representation of the People Act, 1951 (for short "the 1951 Act").

2. The respondent – Sanjay Shyamrao Dhotre – contested the election from Akola Constituency for the 15th Lok Sabha and was declared elected.

3. The appellant – a voter in the constituency – challenged the election of the respondent (hereinafter referred to as "returned candidate") in the election petition before the Bombay High Court, Nagpur Bench, Nagpur. The invalidity of the election of the returned candidate was sought under Section 100(1)(a) of the 1951 Act. The appellant avered in the election petition that the returned candidate was disqualified to contest the election as he was holding the 'office of profit' under the Government company being a Director of the Maharashtra Seeds Corporation (for short "Corporation"). Section 10 of the 1951 Act and Article 102(1)(a) of the Constitution of India were pressed into service by the election petitioner in this regard.

4. The returned candidate contested the election petition and disputed that he was holding an 'office of profit' under the Government. His case was that he was elected as a Director of the Corporation from Growers constituency and the allowances received by him as an elected Director were not in the nature of profit but were paid to him by way of

reimbursement of actual expenses. Moreover, the returned candidate was not appointed by the Government nor the Government has any right to remove or dismiss him from the elected office of Director of the Corporation. He also set up the case that the Government has no control over the performance of functions of the elected Director of the Corporation.

5. On the basis of the pleadings of the parties, the High Court framed 14 issues. The appellant examined two witnesses, including himself and tendered documentary evidence. On the other hand, the returned candidate examined himself and one more witness who was Deputy General Manager (Audit) of the Corporation. He also produced documentary evidence in support of his defence.

6. The High Court by an elaborate judgment, on consideration of the evidence on record and on hearing the counsel for the parties, held that the returned candidate was not disqualified to be a member of Parliament either under Article 102(1)(a) of the Constitution or under Section 10 of the 1951 Act.

7. Mr. Vishaal Jogdand, learned counsel for the appellant, assailed the correctness of the judgment of the High Court and submitted that the returned candidate at the time of nomination and election was holding the office of profit. In this regard, he referred to the allowances received by the returned candidate, namely, Rs. 0.75 Lakh meeting allowance calculated at the rate of Rs. 300/- per day; telephone allowance in the sum of Rs. 2,000/- per month; dearness allowance paid at the rate of Rs. 100/- for metropolitan cities and Rs. 85/- for other places and also sale of seeds at concessional price. Learned counsel further submitted that the Corporation was a Government company and Government has full control and supervision over the company as well as its directors. Learned counsel also submitted that the returned candidate as an elected Director was entitled to enter into contract with the company and make

profit from such contract. He invited our attention to Section 10 of the 1951 Act and Article 102(1)(a) of the Constitution and submitted that the facts clearly demonstrate that the returned candidate was holding the 'office of profit'.

8. On the other hand, Mr. Saurav S. Shamshery, learned counsel for the respondent, stoutly defended the findings recorded by the High Court. He also invited our attention to a decision of this Court in *Pradyut Bordoloi Vs. Swapan Roy*[1] in support of his argument that the first and foremost thing that the election petitioner, in a case as the present one, is required to show is whether the Government has appointed the returned candidate and has power to remove him from the office and if the election petitioner has not been able to show that, nothing further is required to be seen.

9. Section 10 of the 1951 Act reads as follows :-

> "10. Disqualification for office under Government company.—A person shall be disqualified if, and for so long as, he is a managing agent, manager or secretary of any company or corporation (other than a co-operative society) in the capital of which the appropriate Government has not less than twenty-five per cent share."

10. Section 10 refers to category of persons who shall be disqualified from contesting election, *inter alia*, of either House of Parliament. These persons are, managing agent, manager or secretary of any company or corporation (other than a co-operative society) in the capital of which the appropriate Government has not less than twenty-five per cent share. The Government of Maharashtra admittedly has more than 25 per cent share in the Corporation. The Corporation is, thus, covered by Section 10. However, the returned candidate is an elected Director from the Growers constituency on the Board of the Corporation. He is neither managing agent nor manager nor

1. AIR 2001 SC 296

secretary in the Corporation. Section 10 of the 1951 Act is, therefore, not at all attracted in the present case.

11. Article 102 of the Constitution provides for disqualifications for membership. Article 102(1)(a) is relevant for the present purposes and it reads as follows :-

"102. Disqualifications for membership.—

(1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament-

(a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;

(b) x x x

(c) x x x

(d) x x x

(e) x x x"

12. For attracting the disqualification provided in the above provision of the Constitution, a person must be holder of 'office of profit' under the Government of India or the Government of any State. The returned candidate is not the holder of any office of profit under the Government of India. Is he the holder of the office under the Government of Maharashtra? Our answer is in the negative for more than one reason.

13. In the first place, the returned candidate was holding an elected office and not an office by appointment. The test of appointment is decisive. The Government had nothing to do in the election of Director from the Growers constituency. Moreover, being an elected office, the Government has no power to remove the returned candidate from that office. On

this ground alone, it must be held that the returned candidate does not hold an office much less an 'office of profit' under the Government.

14. Secondly, one of the essential necessities in determining the question whether the office is an 'office of profit' or not is whether such office carries remuneration in the form of pay or commission. As an elected Director, the amount paid to the returned candidate by way of allowances, by no stretch of imagination, can be said to be 'renumeration' in the form of pay or commission. It is only a sort of reimbursement of the expenses incurred by the returned candidate. Essential condition that office carries remuneration in the form of pay or commission is also not satisfied.

15. Lastly, the peculiar features of an elected office of Director in the Corporation, do not bring such office within the meaning of 'office of profit'.

16. Thus, we are satisfied that the view of the High Court does not suffer from any legal infirmity justifying interference by us in this Appeal.

17. The Appeal is, accordingly, dismissed with no order as to costs.

D.G. Appeal dismissed.

HIGH COURT OF A.P.
v.
N. SANYASI RAO
(Civil Appeal No. 6964 of 2004)

DECEMBER 01, 2011

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

Andhra Pradesh Public Employment (Recording and Alteration of Date of Birth) Rules, 1984 – rr. 2, 2-A, 2(4) – Judicial officer – Date of birth – Correction of, in the service record – Respondent in the application for recruitment to the post of District Munsif mentioned his date of birth as July 1, 1949 on basis of his Secondary School Leaving Certificate – Meanwhile, decree passed in his favour declaring his date of birth as March 29, 1953 – Subsequently respondent was selected and at the time of joining, stated his date of birth as March 29, 1953 – In the service register two date of birth recorded, one on basis of the decree and other on basis of the School Leaving Certificate – Representation by the Judicial Officer to the Registrar, High Court for the correct recording of his date of birth – After eight years, resolution passed by the High Court on the administrative side rejecting the representation – Writ petition by the Judicial Officer, allowed by the High Court – On appeal, held: No determination of the Judicial Officer's date of birth was made as contemplated and required in r. 2 – Nothing was shown about the firm date of birth recorded in the service record of the Judicial Officer – Judicial officer had not asked for any alteration in the date of birth but his prayer had been for recording correct date of birth in the relevant service record – High Court on the administrative side, sat over the representation made by the Judicial Officer for about nine years – Resolution rejecting the representation was a non-speaking order – High Court on the administrative side to

objectively determine the Judicial Officer's date of birth in accordance with the statutory provisions after giving an opportunity to the Judicial Officer – Impugned order is modified.

Respondent moved an application for recruitment to the State Judicial Service for the post of District Munsif and mentioned his date of birth as July 1, 1949 on basis of his date of birth shown in the Secondary School Leaving Certificate. Thereafter, he was selected and the appointment letter was issued. Meanwhile the respondent obtained a decree in his favour declaring his date of birth as March 29, 1953. Therefore, at the time of joining the service on October 7, 1985, he referred to the decree and stated his date of birth as March 29, 1953. The District Judge opened his service register and his date of birth was recorded as March 29, 1953 based on the decree and also showed his date of birth as July 1, 1949 based on the Secondary School Leaving Certificate. In 1989 the alteration was made in the education certificates in compliance of the decree. Thereafter the Judicial Officer made a representation to the Registrar, High Court for the correct recording of his date of birth. After eight years, the High Court on the administrative side passed a Resolution rejecting the representation made by the Judicial Officer and communicated him the same. The Judicial Officer sought review of the decision which has not been disposed of till date. The respondent-Judicial Officer filed a writ petition challenging the Resolution. The High Court allowed the same holding that he was entitled to get March 29, 1953 entered as his date of birth in the service record. Therefore, the appellant-High Court of A.P. filed the instant appeal.

Disposing of the appeal, the Court

HELD: 1.1 Rule 2 of the Andhra Pradesh Public Employment (Recording and Alteration of Date of Birth)

Rules, 1984 requires a Government employee to make a declaration in respect of his date of birth within one month from the date of his joining duty. The Judicial Officer joined his duty as District Munsif on October 7, 1985 and made a declaration that his date of birth was March 29, 1953. As per Rule 2, on receipt of the declaration, the Head of Office or any other officer who maintains the service records in respect of such employee, after making necessary enquiry, as may be thought fit with regard to the declaration so made by the employee and after taking into consideration the relevant evidence adduced in respect of such declaration is required to make an order within four months from the date on which the employee joins service determining the date of his birth. [Para 13] [412-G-H; 413-A-B]

1.2 In the instant case, no determination of the Judicial Officer's date of birth was made as contemplated and required in Rule 2 of the 1984 Rules. The District Judge, Vishakhapatnam on opening the service register of the Judicial Officer mentioned both the dates namely; March 29, 1953 based on the decree and also July 1, 1949 based on the Secondary School Leaving Certificate. Nothing has been shown about the firm date of birth recorded in the service record of the Judicial Officer. As a matter of fact, there has been no determination of the date of birth of the Judicial Officer at all and, therefore, the Division Bench, in the impugned order rightly observed that the judicial officer had not asked for any alteration in the date of birth but his prayer had been for recording correct date of birth in the relevant service record. Curiously, the Judicial Officer placed on record two half yearly lists of the members of the Andhra Pradesh Higher Judicial Service, corrected up to July 1, 2003 and July 1, 2004. The Judicial Officer had already become member of the Higher Judicial Service by that time and in both these lists published by the High Court of Andhra

Pradesh, the Judicial Officer's date of birth was shown as March 29, 1953. In the impugned resolution rejecting the representation of the Judicial Officer, no reasons have been stated. It is a non-speaking order on its face. For about nine years, the High Court on the administrative side, sat over the representation made by the Judicial Officer. Treating the Judicial Officer's date of birth as July 1, 1949, the High Court on the administrative side issued an order on June 8, 2009 that the Judicial Officer would retire from the service on attaining the age of superannuation of 60 years on June 30, 2009 and, accordingly, the Judicial Officer was made to retire on that date. [Para 14] [413-C-H; 414-A-B]

1.3 The Resolution in respect of the Judicial Officer also suffers from infirmities. However, having regard to the peculiar facts and circumstances of the instant case, it is appropriate that the High Court must determine on the administrative side the Judicial Officer's date of birth. This has become unavoidable as nothing has been shown that there has been determination of the Judicial Officer's date of birth as contemplated and required in Rule 2(2) of the 1984 Rules. Certain materials have been placed on record by the High Court on the administrative side in the instant appeal. One of such materials is that the Judicial Officer got admitted in 6th standard in 1961-62 and it was not possible that somebody born on March 29, 1953 would be in 6th standard in 1961-62 as at that time, he would hardly be 8-9 years old. It is strongly felt that the High Court on the administrative side must objectively determine the Judicial Officer's age in accordance with the statutory provisions which is not shown to have been done at any point of time, after giving an opportunity to the Judicial Officer. [Paras 20 and 21] [415-G-H; 416-A-D]

1.4 The impugned order is modified. The High Court

on the administrative side shall determine the Judicial Officer's date of birth in accord with Rule 2 of the 1984 Rules within the stipulated; and in case the Judicial Officer's date of birth is determined as March 29, 1953, an appropriate order for his re-instatement with all consequential benefits shall be issued as early as may be possible. [Para 22 and 23] [416-D-G]

High Court of A. P. v. M. Vijaya Bhaskara Reddy **Civil Apeal No. 4993 of 2002;** G. *Krishna Mohan Rao v. Registrar, Andhra Pradesh Administrative Tribunal, Hyderabad and Ors.* **2004 (3) ALD 449 (FB) – referred to**

Case Law Reference:

2004 (3) ALD 449 (FB) Referred to. Para 9

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6964 of 2004.

From the Judgment and Order dated 06.02.2002 of the High Court of Andhra Pradesh at Hyderabad in W.P. No. 930 of 2002.

T.V. Ratnam for the Appellant.

K. Ramamoorthy and R.V. Kameshwaran for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The High Court of Andhra Pradesh, on the administrative side, through its Registrar (Administration) is in appeal, by special leave, aggrieved by the judgment and order dated February 6,2002 whereby the Division Bench of that Court allowed the Writ Petition filed by the respondent herein and held that he was entitled to get entered March 29, 1953 as his date of birth in the service record.

2. The respondent – N. Sanyasi Rao (hereinafter referred to as the " Judicial Officer") – was selected in the judicial service of the State of Andhra Pradesh and was given an order of appointment as District Munsif. In pursuance thereof, he joined the service on October 7, 1985.

3. In the application for recruitment to the Andhra Pradesh Judicial Service for the post of District Munsif made by the Judicial Officer, he mentioned his date of birth as July 1, 1949. That date of birth was given by him on the basis of the Secondary School Leaving Certificate.

4. In 1983, before the application for recruitment to the Judicial service was made by the Judicial Officer, he had filed a suit (O.S. No. 61 of 1983) seeking declaration that his date of birth is March 29, 1953 and not July 1, 1949 and for direction to the concerned authorities to make necessary alterations in the school, college and University records. After conclusion of the trial in the suit and on hearing the parties, the Principal District Munsif at Chodavaram decreed the suit and held that the Judicial Officer was entitled to the declaration of his date of birth as March 29, 1953.

5. Thus, when the Judicial Officer joined the service on October 7, 1985, he referred to the decree dated February 28, 1985 (for short "decree") and declared his date of birth as March 29, 1953. The District Judge, Visakhapatnam, after the Judicial Officer had joined the service on October 7, 1985, opened his service register on December 30, 1985 and recorded his date of birth as March 29, 1953 based on the decree and also showed his date of birth as July 1, 1949 based on the Secondary School Leaving Certificate.

6. In 1989, after the alteration was made in the education certificates in compliance of the decree, the Judicial Officer made a representation to the Registrar, High Court for the correct recording of his date of birth. The representation was sent through concerned District Judge. The representation

made by the Judicial Officer was kept pending for years together. On October 15, 1997, the High Court on the administrative side passed a Resolution (hereinafter referred to as the "Resolution) rejecting the representation made by the Judicial Officer and he was communicated of the Resolution on December 11, 1997. The Judicial Officer sought review of the decision taken by the High Court on the administrative side and that, we are informed, has never been disposed of till today. Since the decision on Judicial Officer's request for review of the Resolution was not taken within reasonable time, the Judicial Officer moved the High Court on the judicial side by filing a Writ Petition challenging the Resolution.

7. As noticed above, the Writ Petition filed by the Judicial Officer was allowed by the High Court on February 6, 2002.

8. Mr. T.V. Ratnam, learned counsel for the appellant submits that the direction given by the High Court in the impugned order is contrary to Rule 2-A of the Andhra Pradesh Public Employment (Recording and Alteration of Date of Birth) Rules, 1984 (for short "1984 Rules"). He further submits that the decree obtained by the Judicial Officer declaring his date of birth to be March 29, 1953 is of no help and cannot be taken into consideration in regard to the alteration of date of birth. With reference to Rule 2(4) of 1984 Rules, he submits that the date of birth entered in the service record of the employee is final and binding and the employee is estopped from disputing the correctness of the date of birth so recorded.

9. Mr. K. Ramamoorthy, learned senior counsel for the Judicial Officer supported the judgment of the High Court and heavily relied upon the decision of this Court in the case of *High Court of A.P. vs. M. Vijaya Bhaskara Reddy* - Civil Appeal No. 4993 of 2002 decided on July 22, 2010. He would also submit that the decision of the Full Bench in *G. Krishna Mohan Rao vs. Registrar, Andhra Pradesh Administrative Tribunal, Hyderabad and others* 2004 (3) ALD 449(FB) was not a good

law, particularly in view of the decision of this Court in M. Vijaya Bhaskara Reddy (supra).

10. The Judicial Officer has been very candid, forthright and honest in disclosing the true and correct facts about his date of birth while making the application for recruitment to the Andhra Pradesh State Judicial Service and also while making the declaration on joining the service. He mentioned his date of birth in the application as July 1, 1949; obviously based on his date of birth shown in the Secondary School Leaving Certificate. By the time, he was selected and appointment letter came to be issued, he had a decree in his favour declaring his date of birth as March 29, 1953 and, therefore, at the time of joining the service, he referred to the decree and stated his date of birth as March 29, 1953. The District Judge, Vishakhapatnama, at the time of opening the service register pertaining to the Judicial Officer recorded his date of birth as March 29, 1953 based on the decree and also entered his date of birth as July 1, 1949 as per the Secondary School Leaving Certificate. With the above endorsement, the District Judge, Vishakhapatnam forwarded the service register of the Judicial Officer to the High Court. The exact endorsement made by the District Judge, Vishakhapatnam on December 30, 1985 is follows:

> "Date of birth of Christian Era and wherever possible is sake Era (both in words and figures as determined by the competent authority)
>
> 29.3.1953 as per decree at 28.2.1985 in O.S. 61/1983 on the file of Principal District Munsif
>
> 1.7.1949 as per H.S.L.C. Registrar."

11. Learned senior counsel for the Judicial Officer and

learned counsel for the appellant are ad idem that 1984 Rules are applicable to judicial officers for recording and alteration of date of birth. The 1984 Rules became effective from April 21, 1984. Rule 2 thereof deals with the recording of the date of birth of every Government employee. It reads as follows:

> "2: 1) Every Government employee shall, within one month from the date on which he joins duty, makes a declaration as to his date of birth.
>
> 2) On receipt of the declaration made under sub rule (1), the Head of Office or any other officer who maintains the service records in respect of such Government employee shall, after making such enquiry as may be deemed fit, with regard to the declaration and after taking into consideration such evidence, if any, as may be adduced in respect of the said declaration, make an order within four months from the date on which the Government employee joins service, determining the date of his birth.
>
> Provided that in cases where the date of birth as determined under this sub-rule is different from the one declared by the Government employee concerned under sub-rule (1), he shall be given an opportunity of making a representation, before a final order is made.
>
> 3) Where a Government employee fails to make a declaration within the time specified in Sub-Rule (1), the Head of Office or the officer who maintains the service records shall, after taking into consideration such evidence as may be available and after giving an opportunity of making a representation to the Government employee concerned, determine the date of birth of the employee within six months from the date on which the Government employee joins service.
>
> 4) The date of birth determined under this rule shall be entered in the service record of the employees concerned

> duly attested by the Head of the Office or the officer who maintains the service records and date of birth so entered shall be final and binding and the Government employee shall be estopped from disputing the correctness of such date of birth.
>
> 5) The date of birth as determined and entered in the service record shall not be altered except in case of bona fide clerical error, under the orders of Government."

12. 1984 Rules were amended subsequently. By G.O. Ms. No. 383, Fin. & Plg., dated November 16, 1993, Rule 2-A was inserted with effect from April 21, 1984. By this provision, it has been provided that the decree of a Civil Court in regard to alteration of date of birth in the school or university record shall not be taken into consideration in derogation of these Rules. We reproduce Rule 2-A as it is:

> "2-A: "Civil Courts" Decree not be taken into consideration:- In any proceedings before the Government or any Court, Tribunal, or other authority for the alteration of date of birth in the service records, the decree of a Civil Court in regard to alteration of the date of birth in the School or the University records or the contents in the Judgment leading to such decree, or the effect of its implementation shall not be taken into consideration in derogation to these rules and it is hereby declared that these rules shall have effect notwithstanding any thing contained in any judgment, Decree or Order of a Civil Court in regard to the alteration of date of birth in the School or the University records whether or not the Government is a party to such Proceedings."

13. Rule 2 requires a Government employee to make a declaration in respect of his date of birth within one month from the date of his joining duty. The Judicial Officer joined his duty as District Munsif on October 7, 1985 and made a declaration

that his date of birth was March 29, 1953. As per Rule 2, on receipt of the declaration, the Head of Office or any other officer who maintains the service records in respect of such employee, after making necessary enquiry, as may be thought fit with regard to the declaration so made by the employee and after taking into consideration the relevant evidence adduced in respect of such declaration is required to make an order within four months from the date on which the employee joins service determining the date of his birth.

14. Strangely, in the present case, no determination of the Judicial Officer's date of birth was made as contemplated and required in Rule 2 of the 1984 Rules. The District Judge, Vishakhapatnam on opening the service register of the Judicial Officer mentioned both the dates namely; March 29, 1953 based on the decree and also July 1, 1949 based on the Secondary School Leaving Certificate. Nothing has been shown to us by the learned counsel for the appellant about the firm date of birth recorded in the service record of the Judicial Officer. As a matter of fact, there has been no determination of the date of birth of the Judicial Officer at all and, therefore, the Division Bench, in the impugned order observed and, in our view rightly, that the judicial officer had not asked for any alteration in the date of birth but his prayer had been for recording correct date of birth in the relevant service record. Curiously, the Judicial Officer has placed on record two half yearly lists of the members of the Andhra Pradesh Higher Judicial Service, corrected up to July 1, 2003 and July 1, 2004. The Judicial Officer had already become member of the Higher Judicial Service by that time and in both these lists published by the High Court of Andhra Pradesh, the Judicial Officer's date of birth has been shown as March 29, 1953. In the impugned resolution rejecting the representation of the Judicial Officer, no reasons have been stated. It is a non-speaking order on its face. For about nine years, the High Court on the administrative side, sat over the representation made by the Judicial Officer. Treating the Judicial Officer's date of birth as July 1, 1949, the

High Court on the administrative side issued an order on June 8, 2009 that the Judicial Officer would retire from the service on attaining the age of superannuation of 60 years on June 30, 2009 and, accordingly, the Judicial Officer has been made to retire on that date.

15. In M. Vijaya Bhaskara Reddy (supra), this Court was concerned with a case where the Judicial Officer-M. Vijaya Bhaskara Reddy was appointed as District Munsif on August 16, 1976. He made a declaration that his date of birth was June 15, 1948. M. Vijaya Bhaskara Reddy then applied for change of his date of birth to August 15, 1949. When nothing was done after giving the notice under Section 80 of the Code of Civil Procedure, 1908, he filed a suit which was decreed on March 31, 1982. He then made a representation for implementation of the decree. His representation came to be rejected which was challenged by him in a Writ Petition. The High Court by an order dated September 3,1987 directed the State Government to consider the representation made by him and when nothing was done within a reasonable time, he filed yet another Writ Petition before the High Court. That Writ Petition was allowed by the Single Judge of the High Court vide order dated April 13, 1993 and a direction was given that the decree of the Court has got to be honoured and entries in the service register of M. Vijaya Bhaskara Reddy have got to be made accordingly.

16. Against the judgment of the Order of the Single Judge, Writ Appeal was filed by the High Court on the administrative side. The Division Bench allowed the Writ Appeal and set-aside the order of the Single Judge passed on April 13, 1993. It was held that it was not competent for the State Government to take a decision in the matter and the High Court on the administrative side alone was the competent authority either to enter the date of birth or after the date of birth was recorded in the service register of the members of the Andhra Pradesh State Judicial Service, to change the same.

17. The Division Bench, accordingly, requested the High Court on the administrative side to consider and dispose of M. Vijaya Bhaskara Reddy's representation. Pursuant thereto, the High Court on the administrative side took up the representation of M. Vijaya Bhaskara Reddy along with the representations of 24 other Judicial Officers (including the representation of the present Judicial Officer) and passed the Resolution on October 15, 1997 rejecting the representations made by M.Vijaya Bhaskara Reddy and the present Judicial Officer.

18. M. Vijaya Bhaskara Reddy then filed a Writ Petition challenging the Resolution dated October 15, 1997 (same resolution which was challenged by the present respondent in the Writ Petition in which the impugned order came to be passed). The Division Bench of that Court in the Writ Petition filed by M. Vijaya Bhaskara Reddy, on hearing the parties, set-aside the Resolution giving three reasons in support thereof namely; (1) The Resolution was not in a speaking order; (2) 22 years' time was already spent in consideration of the representation and (3) nothing was stated by the High Court against the authenticity, relevancy and admissibility of the evidence produced by the Judicial Officer.

19. Dealing with the appeal arising from that order, this Court found no justification in interfering with the order of the Division Bench and the appeal preferred by the Andhra Pradesh High Court on the administrative side was dismissed by this Court on July 22, 2010.

20. In our view, the Resolution in respect of the present Judicial Officer also suffers from all the three fundamental infirmities which have been noticed by this Court in M. Vijaya Bhaskara Reddy.

21. However, having regard to the peculiar facts and circumstances of the present case, we feel it appropriate that the High Court must determine on the administrative side the

Judicial Officer's date of birth. This has become unavoidable as nothing has been shown to us that there has been determination of the Judicial Officer's date of birth as contemplated and required in Rule 2(2) of the 1984 Rules. Certain materials have been placed on record by the High Court on the administrative side in this appeal. One of such materials is that the Judicial Officer got admitted in 6th standard in 1961-62 and it was not possible that somebody born on March 29, 1953 would be in 6th standard in 1961-62 as at that time, he would hardly be 8-9 years old. We do not want to comment on such material. However, we strongly feel that the High Court on the administrative side must objectively determine the Judicial Officer's age in accordance with the statutory provisions which is not shown to have been done at any point of time, after giving an opportunity to the Judicial Officer.

22. We, accordingly, dispose of this appeal by the following order:

(a) The High Court on the administrative side shall determine the Judicial Officer's date of birth in accord with Rule 2 of the 1984 Rules.

(b) The above exercise shall be completed within four months from the date of communication of this order.

(c) In case the Judicial Officer's date of birth is determined as March 29, 1953, an appropriate order for his reinstatement with all consequential benefits shall be issued as early as may be possible and in no case later than two weeks from the date of such determination.

23. The impugned order is modified as indicated above. No order as to costs.

N.J. Appeal disposed of.

ASHISH CHADHA

v.

SMT. ASHA KUMARI & ANR.

(Criminal Appeal No. 893 of 2005)

DECEMBER 2, 2011

[SWATANTER KUMAR AND RANJANA PRAKASH DESAI, JJ.]

CONSTITUTION OF INDIA, 1950:

Article 136 – Locus to file appeal and jurisdiction of Supreme Court – Complaint alleging illegal transfer of Government land – Order of Special Judge framing charges, set aside by High and the case transferred to a different court — Original complainant died – Special leave petition filed by an Ex-Municipal Councillor with a petition for leave to file the SLP – Held: Though in express terms, Article 136 does not confer a right of appeal on a party as such, but it confers discretionary power on Supreme Court to interfere in suitable cases – In the instant case, the allegations made against respondent no.1 are serious – There is a prima facie case against her – By the impugned order not only the charge framed against her but also against all the accused has been quashed – Though the matter has been remanded, the High Court by observing that there is no prima facie case against respondent no.1, has frustrated the purpose of remand order – Besides, without there being any material on record, the High Court has transferred the case to a different court – The High Court's judgment is tainted with legal infirmities and has resulted in miscarriage of justice – Therefore, interference by Supreme Court is necessary in larger public interest – Code of Criminal Procedure, 1973 – s. 401.

CODE OF CRIMINAL PROCEDURE, 1973:

s. 401 – High Court's power of revision – Scope of – Charge framed by Special Court set aside by High Court and the case remanded and transferred to a different court – Held: The High Court has completely misdirected itself in reversing the trial court's order framing the charge – High Court in its revisional jurisdiction appraised the evidence which it could not have done – Ignoring the settled position in law, the High Court discussed the details of the facts and drew inferences – The High Court should have left the final adjudication to the trial court by not quashing the charge – Besides, the High Court unnecessarily observed that the charge is vague – Further, the High Court transferred the case to a different court, without there being any material on record for such an order – It overstepped its revisional jurisdiction – Order of the High Court has resulted in miscarriage of justice and, as such, is set aside – The order framing charge by Special Judge is confirmed and he is directed to proceed further in accordance with law – Constitution of India, 1950 – Article 136.

s. 303 – Right of person against whom proceedings are instituted to be defended – Criminal proceedings against husband and wife – Both represented by one and the same Counsel – Proceedings for framing charges conducted on 15 dates – On the date of framing the charge, the same counsel, who had argued the case on behalf of the wife, stated that he had no instructions to represent her – The wife also filed an application that she wanted to be defended by a counsel of her choice – Application rejected by trial court – Further application for transfer of the case also rejected – In revision, the High Court observing that the applicant had been denied opportunity to be defended by counsel of her choice, remanded the case, but to a different court – Held: The attempt of the applicant to change the counsel was a dilatory tactic – There is no violation of s. 303 of the Code or Article 22 (1) of the Constitution – Constitution of India, 1950 – Article 22 (1).

ADMINISTRATION OF JUSTICE:

Transfer of cases by High Court – HELD: Transfers ordered merely on the say-so of a party have a demoralizing effect on the trial courts – Unless a very strong case, based on concrete material is made out, such transfers should not be ordered – Transfer petition.

A complaint was filed against respondent no.1, who had been the Member of the State Legislative Assembly, her husband (since deceased) and others, stating that they conspired to get wrong entries made in the revenue records and to secure illegal orders regarding conferment of proprietary rights in favour of the servants of the husband of respondent no.1, who finally managed to become owner of the said land. This was stated to have been done by using forged Power of Attorneys and fictitious wills with connivance of revenue officials. The Special Judge, Chamba framed charges against respondent no. 1 for offences punishable u/ss 420, 218, 467, 468, 471 read with s. 120-B IPC. On a criminal revision filed by respondent no.1, the High Court set aside the order of the Special Judge on the ground that the accused were denied an opportunity of being heard and that the trial court's observation that there was a prima facie case against the accused was made without applying mind to the relevant record. The High Court also transferred the matter to the Court of Special Judge, Kangra at Dharmashala on the ground that the apprehension expressed by respondent no.1 that she would not get fair trial in the court at Chamba was well founded. Meanwhile, the original complainant expired and the appellant, an Ex-Municipal Councillor filed the appeal upon permission being granted by the Supreme Court in larger public interest.

Respondent no.1 besides contesting the appeal on merits, raised a preliminary objection that since the

original complainant had died the appellant had no locus to file the instant appeal.

Disposing of the appeal, the Court

HELD: 1. So far as the preliminary objection is concerned, this Court in *PSR Sadhanantham's* case*, while dealing with the scope of Article 136 of the Constitution of India, observed that in express terms it does not confer a right of appeal on a party as such, but it confers wide discretionary power on the Supreme Court to interfere in suitable cases. This Court further observed that it is true that strict vigilance over abuse of the powers of this Court should be maintained and in the criminal jurisprudence this strictness applies a fortiori, but in the absence of an independent prosecution authority easily accessible to every citizen, a wider connotation to the expression 'standing' is necessary for Article 136 to further its mission. No dogmatic proscription of leave under Article 136 to a non-party applicant can be laid down inflexibly. [Para 5-6] [426-H; 427-A-F]

****PSR Sadhanantham v. Arunachalam* (1980) 3 SCC 141 – relied on.**

1.2 In the instant case, the allegations made against respondent no. 1 are serious. There is a prima facie case against her. By the impugned order the charge framed against not only respondent no. 1 but against all the accused is quashed. It is true that the matter is remanded, but while remanding the matter the High Court has expressed that there is no prima facie case against respondent no. 1, thus, frustrating the purpose of remand order. Therefore, interference by this Court is necessary in larger public interest. [Para 7] [427-H; 428-A-C]

2.1 Though the discretionary power vested in this Court under Article 136 is apparently not subject to any

limitations, it has to be used sparingly and in exceptional cases. But there is no manner of doubt that the instant case is an exceptional one where interference under Article 136 is called for. The High Court has completely misdirected itself in reversing the trial court's order framing charge. The High Court's judgment is tainted with legal infirmities and has resulted in miscarriage of justice. [Para 12] [430-D-E]

2.2 The High Court has in its revisional jurisdiction appraised the evidence which it could not have done. Ignoring the settled position in law, the High Court discussed the details of some selected facts and drew inferences. The facts of the case are inextricably interwoven. It is significant to note that respondent no. 1 made two fraudulent sales in favour of her husband who is stated to have been deeply involved in the alleged conspiracy. In such circumstances, the High Court should have left the final adjudication to the trial court by not quashing the charge. Whether the revenue entries are genuine or not will also have to be decided by the trial court after perusing the evidence led by the parties. The High Court unnecessarily observed that the charge is vague. It overstepped its revisional jurisdiction. [Para 13-14] [430-F; 431-D-H]

Munna Devi vs. State of Rajasthan & Anr. **(2001) 9 SCC 631 – relied on.**

2.3 Besides, the tenor of High Court's order suggests that it has formed an opinion that there was no prima facie case against respondent no. 1. A prima facie opinion of the High Court in such a strongly worded language is likely to influence the trial court. By expressing opinion on merits of the case, the High Court almost decided the matter in favour of respondent no. 1, thus, frustrating the remand and virtually acquitting her. [Para 15] [432-B-C]

3.1 It cannot be said that respondent no.1 was denied her right to be defended by a lawyer of her choice. From the impugned order and from the order of the Special Judge it is clear that the Special Judge conducted the proceedings for framing charge on 15 dates from 6.12.2003 to 4.1.2005. From the Special Judge's order it is clear that 'M' was appearing as counsel both for respondent no.1 and her husband, but on 4.1.2005, he stated that he had no instructions to appear for respondent no. 1. Respondent no. 1 filed an application that she wanted to be defended by a counsel of her choice. The Special Judge rejected the prayer and framed the charges observing that 'M' had advanced arguments on behalf of respondent no. 1 and since State's reply dated 4.12.2004 did not disclose any new facts, adjournment was not necessary. The manner in which the proceedings were conducted on behalf of respondent no. 1, leads this Court to conclude that she wanted to delay the framing of charges. Her desire to change the counsel was obviously not genuine but was a dilatory tactic. The High Court wrongly came to the conclusion that respondent no.1 was not given a chance to engage a counsel of her choice. In the instant case, there is no violation of s 303 of the Code of Criminal Procedure, 1973 or Article 22 (1) of the Constitution. [para 16-17] [432-D-H; 433-A-C-E-F]

3.2 It is also significant to note that while the order was being dictated by the Special Judge, respondent no.1 moved an application for transfer of the case stating that an opportunity of being heard through an advocate of her choice was denied to her. This application was rightly rejected by the Special Judge for want of jurisdiction. Respondent no.1 then requested the High Court to transfer her case from the file of the Special Judge, Chamba to the Court of Special Judge, Kangra on the

ground that she had reasonable apprehension that she would not get a fair trial. The High Court, wrongly transferred the case, as the apprehension expressed by respondent no.1 was baseless and there was no material to substantiate it. Such transfers ordered merely on the say-so of a party have a demoralizing effect on the trial courts. Unless a very strong case based on concrete material is made out, transfers should not be ordered. [para 18] [433-G-H; 434-A-E]

4.1 It must also be noted that the High Court has quashed the charge not only against respondent no.1 but also against all the accused when no such prayer was made. It was improper for the High Court to go beyond the scope of the prayers made by respondent no.1 and quash even the charges framed against all other accused. [para 18] [434-E-G]

Bimal Chand Dhandhia vs. State **1976 Crl. L. J. 1594 – held inapplicable.**

4.2 The impugned order has resulted in miscarriage of justice, and is, therefore, set aside. The order dated 4.1.2005 framing charge by Special Judge, Chamba is confirmed and he is directed to proceed further in accordance with law. [para 19] [434-H; 435-A-B]

Sadhanantham v. Arunachalam **(1980) 3 SCC 141,** *State of Orissa v. Debendra Nath Padhi* **2004 (6) Suppl. SCR 460 = (2005) 1 SCC 568,** *Mathai alias Joby vs. George & Another* **2010 (3) SCR 533 = (2010) 4 SCC 358,** *Jamshed Harmusji Wadia vs. Port of Mumbai* **2004 (1) SCR 483 = (2004) 3 SCC 214; and** *Netraj Singh vs. State of M. P.* **2007 (4) SCR 370 =(2007) 12 SCC 520 – cited.**

Case Law Reference:

(1980) 3 SCC 141	**cited**	**para 6**

2004 (6) Suppl. SCR 460	**cited**	**para 8**
(2001) 9 SCC 631	**relied on**	**para 8 and 13**
2010 (3) SCR 533	**cited**	**para 9**
2004 (1) SCR 483	**cited**	**para 9**
2007 (4) SCR 370	**cited**	**para 11**
1976 Crl. L. J. 1594	**held inapplicable**	**para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 893 of 2005.

From the Judgment & Order dated 29.04.2005 of the High Court of Himanchal Pradesh at Shimla in Criminal Revision Petition No. 20 of 2005.

P.S. Patwalia, Meenakshi Arora, Suryanarayana Singh, Pragati Neekhra, Aman Preet Singh Rahi, Naresh K Sharma, N.K. Srivastava for the appearing parties.

The following Judgment of the Court was delivered by

(SMT.) RANJANA PRAKASH DESAI, J. 1. The first respondent was the member of the Legislative Assembly of Banikhet Constituency from the year 1984 to 1990 and 1994 to 2001. A complaint dated 6.8.1998 was filed against her by one Shri Kuldeep Singh, Ex-Municipal Councilor, Dalhousie alleging interalia that the first respondent and her husband Brijender Singh (since deceased) had in connivance with Revenue Officials manipulated the revenue records, forged documents and got the land belonging to the Government transferred in the name of Brijender Singh. The said complaint was inquired into by Vigilance Department and FIR came to be registered on 15.12.2001 against the first respondent and Brijender Singh and others under Sections 420, 218, 467, 468, 471 read with Section 120-B of the Indian Penal Code (for short, "**the IPC**"). The Special Judge, Chamba framed charges

against the first respondent and others on 4.1.2005 under Sections 420, 218, 467, 468, 471 read with Section 120-B of the IPC. The first respondent filed Criminal Revision No. 20 of 2005 before the High Court of Himachal Pradesh at Shimla challenging the order dated 4.1.2005 framing charges. By the impugned order the High Court set aside the said order on the ground that the accused were denied an opportunity of being heard and that the trial court's observation that there was prima facie case against the accused was made without applying mind to the relevant record. The High Court also transferred the matter from the court of Special Judge Chamba to the Court of Special Judge Kangra at Dharmashala on the ground that the apprehension expressed by respondent no. 1 that she would not get fair trial in the Court at Chamba was well founded. A direction was issued that the matter be proceeded with in accordance with the provisions of Sections 239 and 240 of the Code of Criminal Procedure (the "Code" for Short). It may be stated here that the original complainant Shri Kuldeep Singh expired in 2001. The appellant was the elected Municipal Councilor of Dhalhousie Municipal Committee from 1995 to 2000 and from 2000 till it was suspended in 2003. It is the case of the appellant that the State of Himachal Pradesh for political reasons was not interested in challenging the impugned judgment though in this case there is illegal grabbing of Government forest land worth crores of rupees. He has, therefore, filed the instant appeal upon permission being granted by this Court in larger public interest.

2. It is necessary to give brief background of the case.

3. One Raja Laxman Singh the original owner of 85.10 bighas of land situate at Mauza Jandrighat Bhatyat (now Chuwari) expired on 20.5.1971. His properties were inherited by one Raja Prem Singh and after coming into force of the Himachal Pradesh Ceiling on Land Holdings Act, 1972, the said land vested in the State of Himachal Pradesh. Brijender Singh got married to respondent no. 1 in 1978. Between 1977

and 1978 revenue records were tampered with in connivance with the revenue officials and the names of the domestic servants of Brijender Singh namely Piar Singh, Arjun Singh, Bemi Ram, Narvada Devi, Nand Lal and Laxmi Devi were entered in revenue records as non-occupancy tenants in respect of 67.3 bighas of land. After protracted litigation the aforesaid persons were declared non-occupancy tenants of 67.3 bighas of land and proprietary rights in respect thereof were conferred upon them vide mutations attested on 23.6.1987 and 8.12.1987. Thereafter Brijender Singh is stated to have fabricated two Wills – one of Arjun Singh and other of Piar Singh. On the basis thereof Brijender Singh is stated to have got the land of Piar Singh and Arjun Singh mutated in his favour vide mutation dated 29.7.1994. The first respondent is stated to have obtained three General Power of Attorneys on 29.1.1993 and 30.1.1993 from Narvada Devi, Nand Lal and Bemi Ram authorizing her to sell their land in favour of her husband Brijender Singh for consideration. On the basis of the said General Power of Attorneys the first respondent is stated to have made two sales in favour of her husband Brijender Singh. Thus, in short, the allegation against the first respondent and her husband Brijender Singh is that they conspired to get wrong entries made in the revenue records and to secure illegal orders regarding conferment of proprietary rights in favour of the servants of Brijender Singh who finally managed to become owner of the said land. This was done by using forged Power of Attorneys and fictitious Wills with connivance of Revenue Officials.

4. We have heard learned counsel for the parties at some length. We have also gone through the written submissions tendered by them.

5. At the outset we must refer to the preliminary objection raised by counsel for respondent no. 1. Counsel submitted that the original complainant has expired and as such the present appellant has no locus to file the instant appeal. Counsel submitted that the appellant has a personal grievance against

respondent no.1. He is the son of Smt. Chadha a member of legislative assembly. Smt. Chadha had filed election petition against respondent no.1. It was dismissed. The appellant has filed the present petition to settle Smt. Chadha's political scores. Counsel submitted that the appeal is politically motivated and deserves to be dismissed on that ground also. Ms. Arora learned counsel for the appellant has vehemently opposed this submission.

6. So far as the preliminary objection is concerned we may usefully refer to the judgment of this Court in *PSR Sadhanantham v. Arunachalam*[1]. There the State not having filed an appeal against the judgment of the High Court acquitting the accused who had allegedly committed the murder of her brother, the petitioner filed petition in this Court under Article 136 of the Constitution of India challenging the said judgment of acquittal. Objection was raised to the maintainability of the said petition. Dealing with the scope of Article 136, this Court observed that in express terms it does not confer a right of appeal on a party as such, but it confers wide discretionary power on the Supreme Court to interfere in suitable cases. This court further observed that it is true that strict vigilance over abuse of the powers of this court should be maintained and in the criminal jurisprudence this strictness applies a fortiori, but in the absence of an independent prosecution authority easily accessible to every citizen, a wider connotation to the expression 'standing' is necessary for Article 136 to further its mission. No dogmatic proscription of leave under Article 136 to a non-party applicant can be laid down inflexibly. This court rejected the objection raised to the maintainability of the petition.

7. In our view the preliminary objection raised by counsel for the first respondent is liable to be rejected in the light of the above judgment. The allegations made against the first respondent are serious. There is a prima facie case against the first respondent. By the impugned order the charge framed

1. (1980) 3 SCC 141.

against not only the first respondent but against all the accused is quashed. It is true that the matter is remanded, but while remanding the matter the High Court has expressed that there is no prima facie case against the first respondent, thus frustrating the purpose of remand order. We, therefore feel that interference by this Court is necessary. We do not think that the petition is politically motivated. But assuming there is political rivalry between the first respondent and the appellant's aunt in our opinion since the charge is about grabbing of government land in the larger public interest the appeal cannot be dismissed in limine. The preliminary objection is, therefore, rejected.

8. We shall now go to the other submissions advanced by the counsel. Ms. Arora learned counsel for the appellant submitted that the High Court has erroneously come to the conclusion that the first respondent had been denied an opportunity of being heard. In fact the first respondent was given adequate hearing. At the penultimate stage an application for change of counsel was made by her. Counsel submitted that this shows mala fides and motive to delay the proceedings. Counsel submitted that at the stage of charge, the trial court has to peruse the police report and the documents submitted with it and consider whether prima facie case is made out or not. The trial court has rightly come to the conclusion that there is prima facie case and framed the charge. The High Court however, while exercising its revisional jurisdiction wrongly went into the material, analysed the facts and made observation that there was no prima facie case. In this connection counsel relied on *State of Orissa v. Debendra Nath Padhi*[2] and *Munna Devi V. State of Rajasthan*[3]. Counsel submitted that the High Court wrongly transferred the case to the Special Judge, Kangra on the basis of baseless allegations made by respondent no.1. Counsel urged that for the aforementioned reasons the impugned judgment and order deserves to be quashed.

2. (2005) 1 SCC 568.
3. (2001) 9 SCC 631.

9. Mr. P.S. Patawalia, learned senior counsel for respondent no.1 submitted that the allegations made against the first respondent and her husband Brijender Singh have already been adjudicated by various courts in Himachal Pradesh. The State of Himachal Pradesh through its officer denied the contention that the names of servants of Brijender Singh were recorded as non-occupancy tenants in connivance with Revenue Officials. The High Court therefore, dismissed that writ petition. Counsel submitted that thereafter a civil suit was filed in the court of Civil Judge, Dalhousie by a MLA making the same allegations. Again the State of Himachal Pradesh denied the allegations. The suit therefore came to be dismissed. Counsel submitted that Shri Kuldeep Singh gave written complaint on 6.8.1998. The FIR came to be lodged on 15.12.01. This delay casts shadow of doubt about is genuineness. Counsel submitted that by the impugned order the High Court has merely remanded the matter to the trial court. This is not a case, therefore, where this court should interfere in its jurisdiction under Article 136 of the Constitution of India. In this connection the counsel relied on *Mathai alias Joby vs. George & Another*[4] and *Jamshed Harmusji Wadia vs. Port of Mumbai*[5].

10. Counsel further submitted that respondent no.1 got married to Brijender Singh on 19.4.79. She was, therefore, not present in Himachal Pradesh when the names of the tenants were recorded in the revenue records. This important fact is not noted by the trial court. Counsel submitted that the record of the case shows that before the land vested in the Government, the non-occupant tenants were already in possession of the land and were paying annual rent. Smt. Narbada Devi in her bail application before the Sessions Court stated that she had issued General Power of Attorney in favour of respondent no. 1 without any fear or coercion. The report of the forensic expert states that signatures of the persons who

4. (2010) 4 SCC 358.

5. (2004) 3 SCC 214.

gave Power of Attorneys were not forged and none of the said three persons had made any complaint with regard to the non-receipt of sale amount.

11. Counsel submitted that the trial court did not allow respondent no.1 to engage a counsel and framed the charge in the absence of her counsel which has caused great prejudice to her. In this connection counsel relied on *Netraj Singh vs. State of M.P.*[6] Counsel submitted that the High Court has rightly invoked the revisional jurisdiction, because respondent no.1 was deprived of her legitimate right under Section 303 of the Code to engage a counsel of her choice. Council submitted that in the circumstances no interference is necessary with the impugned order.

12. Counsel for respondent no. 1 is right in submitting that though the discretionary power vested in this Court under Article 136 is apparently not subject to any limitations, it has to be used sparingly and in exceptional cases. But we have no manner of doubt that this indeed is an exceptional case where interference under Article 136 is called for. In our opinion, the High Court has completely misdirected itself in reversing the trial court's order framing charge. The High Court's judgment is tainted with legal infirmities and has resulted in miscarriage of justice. Following are the reasons for this conclusion of ours.

13. The High Court has in its revisional jurisdiction appraised the evidence which it could not have done. It is the trial court which has to decide whether evidence on record is sufficient to make out a prima facie case against the accused so as to frame charge against him. Pertinently, even the trial court cannot conduct roving and fishing inquiry into the evidence. It has only to consider whether evidence collected by the prosecution discloses prima facie case against the accused or not. In this connection, we may usefully refer to the observations of this court in *Munna Devi vs. State of Rajasthan & Anr.*[7]

6. (2007) 12 SCC 520.

7. (2004) 3 SCC 214.

"We find substance in the submission made on behalf of the appellant. The revision power under the Code of Criminal Procedure cannot be exercised in a routine and casual manner. While exercising such powers the High Court has no authority to appreciate the evidence in the manner as the trial and the appellate courts are required to do. Revisional powers could be exercised only when it is shown that there is a legal bar against the continuance of the criminal proceedings or the framing of charge or the facts as stated in the first information report even if they are taken at the face value and accepted in their entirety do not constitute the offence for which the accused has been charged."

14. Ignoring the above settled position in law, the High Court has noticed that fake entries were made in the revenue records during the years 1973-1974; that respondent no. 1 was married to Brijender Singh in 1978 and that there is no evidence that before her marriage, respondent no. 1 was not residing in her parent's house in Madhya Pradesh as is her case but was residing in Chamba with her prospective in-laws. The High Court has then concluded that it cannot be held, prima facie, that respondent no. 1 was a conspirator in bringing about the fake entries in the revenue records in the years 1973-1974. It cannot be forgotten that it is also the prosecution case that respondent no. 1 obtained three Power of Attorneys from three of the tenants in January, 1993 and, on the basis thereof, she made two fraudulent sales in favour of her husband, Brijender Singh. Two Wills are stated to have been fabricated by her husband Brijender Singh to get Government land transferred in his name. The facts are inextricably interwoven. Brijender Singh, the husband of respondent no. 1 is stated to be deeply involved in the alleged conspiracy. In such circumstances, the High Court should have left the final adjudication to the trial court by not quashing the charge. The High Court unnecessarily observed that the charge is vague. It overstepped its revisional jurisdiction. It is contended that the State of Himachal Pradesh

had taken a stand that concerned revenue entries are genuine. In our opinion, whether concerned revenue entries are genuine or not will also have to be decided by the trial court after perusing the evidence led by the parties.

15. Besides, the tenor of High Court's order suggests that the High Court has formed an opinion that there was no prima facie case against respondent no. 1. A prima facie opinion of the High Court in such a strongly worded language is likely to influence the trial court. If the High Court wanted to remand the matter on the ground that respondent no. 1 was denied opportunity to engage a counsel it should have stopped at that. By expressing opinion on merits of the case, the High Court almost decided the matter in favour of respondent no. 1 thus frustrating the remand and virtually acquitting respondent no. 1.

16. We are also not impressed by the submission that respondent no.1 was denied her right to be defended by a lawyer of her choice. From the impugned order and from the order of learned Special Judge it is clear that the Special Judge conducted the proceedings for framing charge on 6.12.2003, 12.12.03, 3.1.2004, 14.1.2004, 7.2.2004, 15.3.2004, 5.4.2004, 26.4.2004, 10.5.2004, 4.6.2004, 12.7.2004, 6.12.2004, 8.12.2004, 10.12.2004 and 4.1.2005. From the Special Judge's order it is clear that Mr. Malhotra was appearing for respondent no.1 and also for her husband Brijender Singh. It is pertinent to note that during the course of the hearing the State filed its reply on 4.12.2004. The case was posted for consideration of charge on 8.12.2004. On 8.12.2004 co-accused Brijender Singh raised an objection that copy of the reply dated 7.2.2004 was not supplied to him. He was permitted to inspect the record. Shri Malhotra submitted that he was not in a position to argue the case on charge. The request for adjournment was disallowed. Shri Malhotra then submitted that he was ready to argue the case even on behalf of respondent no. 1. In fact, he advanced arguments. He, however, stated that he would make further submissions on 10.12.2004 after inspection of the record. The case was then

adjourned to 10.12.2004. On that day neither the counsel for the first respondent was present nor the first respondent was present. Respondent no. 1 made a telegraphic request for adjournment on the ground that her mother was ill. That application was rejected. On 4.1.2005, Shri Malhotra who had been appearing for respondent no. 1 stated that he had no instructions to appear for respondent no. 1. Respondent no. 1 filed an application that she wanted to be defended by a counsel of her choice. Learned Special Judge rejected the prayer and framed the charge observing that Shri Malhotra had advanced arguments on behalf of respondent no. 1 and since State's reply dated 4.12.2004 did not disclose any new facts adjournment was not necessary. Learned Special Judge rejected the contention of respondent no. 1 that Shri Malhotra was not her counsel because order sheet of 8.12.2004 made it clear that Shri Malhotra had moved application for exemption from personal appearance on behalf of respondent no. 1.

17. The manner in which the proceedings were conducted on behalf of respondent no. 1 leads us to conclude that respondent no. 1 wanted to delay the framing of charges. Shri Malhotra had appeared for respondent no. 1 and also for her husband Brijender Singh. He had made exemption application on behalf of respondent no. 1. Respondent no. 1's desire to change the horse in the midstream was obviously not genuine but was a dilatory tactic. The High Court wrongly came to the conclusion that respondent no.1 was not given a chance to engage a counsel of her choice. We have no hesitation in observing that, in this case, there is no violation of Section 303 of the Code or Article 22 (1) of the Constitution of India.

18. It is also significant to note that while the order was being dictated by learned Special Judge, respondent no.1 moved an application for transfer of the case since allegedly an opportunity of being heard through an advocate of her choice was denied to her. This application was rightly rejected by Special Judge for want of jurisdiction. Learned Special Judge then framed charges against respondent no.1 and other

accused. Respondent no.1 then requested the High Court to transfer her case from the file of learned Special Judge Chamba to the Court of Special Judge, Kangra on the ground that she had reasonable apprehension that she will not get a fair trial. The High Court, in our opinion, wrongly transferred the case as desired by respondent no.1. Apprehension expressed by respondent no.1 that she would not get a fair trial was baseless. We have already noted the number of dates on which learned Special Judge adjourned the proceedings. It is only when he was satisfied that respondent no.1 was purposely seeking adjournment and that Mr. Malhotra, counsel appearing for respondent no.1 had argued her case that learned Special Judge refused to grant further adjournment. We do not find any material to substantiate the fear expressed by respondent no.1 that she would not get a fair trial. The High Court, therefore, should not have transferred the case to the Special Judge, Kangra. Needless to say that such transfers ordered merely on the say-so of a party have a demoralizing effect on the trial courts. Unless a very strong case based on concrete material is made out, such transfers should not be ordered. We must also note that the High Court has quashed the charge not only against respondent no.1 but also against all the accused when no such prayer was made. Reliance placed by the High Court on the judgment of learned Single Judge of Calcutta High Court in *Bimal Chand Dhandhia vs. State*[8] is totally misplaced. In that case, learned Single Judge of the Calcutta High Court has observed that learned Magistrate had failed to proceed in accordance with the procedure established by law in framing the charges against the accused. No such case is made out here. It was improper for the High Court to go beyond the scope of the prayers made by respondent no.1 and quash even the charges framed against all other accused.

19. In view of the above, we are of the opinion that the impugned order has resulted in miscarriage of justice. It will have to be, therefore, set aside and is, accordingly, set aside.

8. 1976 CRI.L.J. 1594.

We confirm the order framing charge dated 4.1.2005 passed by learned Special Judge, Chamba and direct him to proceed further in accordance with law. We make it clear that if any observations made by us touch the merits of the case, they should be treated as prima facie observations. Learned Special Judge shall deal with the case independently and in accordance with law.

20. The appeal is disposed of in the aforestated terms.

R.P. Appeal disposed of.

NARINDER SINGH ARORA

v.

STATE (GOVT. OF NCT OF DELHI) AND ORS.

(Criminal Appeal No.2184 of 2011)

DECEMBER 5, 2011

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

Judgment – Requirement of a Judge to act fairly as also to act above suspicion of unfairness and bias – Test of "real likelihood of bias"– Appellant lodged complaint whereafter charges were framed against the respondents u/ss.498-A, 304-B r/w s.34 and s.302 of IPC by 'PR', Additional District & Sessions Judge – Thereafter, the case was listed before 'SND', Additional Sessions Judge for trial, however, the Judge recused from hearing the matter for personal reasons – Accordingly, the case was withdrawn from the Court of 'SND' and transferred to the Court of 'SMC', Additional Sessions Judge – Eventually accused respondents were tried and acquitted vide judgment passed by 'MG', Additional Sessions Judge – Appellant preferred revision petition before the High Court – The same was dismissed vide impugned final Judgment passed by Judge, 'SND' – Held: Apparently the fact of earlier recusal of the case at the trial by 'SND' himself, was not brought to his notice in the revision petition before the High Court by either of the parties to the case – Therefore, 'SND' owing to inadvertence regarding his earlier recusal, dismissed the revision petition by the impugned Judgment – The impugned Judgment, passed by 'SND' subsequent to his recusal at trial stage for personal reasons, is against the principle of natural justice and fair trial – A person who tries a cause should be able to deal with the matter placed before him objectively, fairly and impartially – No one can act in a judicial capacity if his previous conduct gives ground for believing that he cannot act with an open mind or impartially

– A person, trying a cause, must not only act fairly but must be able to act above suspicion of unfairness and bias – In view of the aforesaid facts and reasons, the impugned Judgment of the High Court in Criminal Revision is set aside and the matter is remanded to the High Court for fresh disposal of the revision petition filed by the appellant.

Manak Lal v. Dr. Prem Chand Singhvi **AIR 1957 SC 425: 1957 SCR 575;** *A.K. Kraipak v. Union of India* **(1969) 2 SCC 262: 1970 (1) SCR 457;** *S. Parthasarathi v. State of A.P.* **(1974) 3 SCC 459: 1974 (1) SCR 697;** *G. Sarana (Dr.) v. University of Lucknow* **(1976) 3 SCC 585: 1977 (1) SCR 64;** *Ranjit Thakur v. Union of India* **(1987) 4 SCC 611: 1988 (1) SCR 512;** *Secy. to Govt., Transport Deptt.* v. *Munuswamy Mudaliar* **(1988) Supp. SCC 651 – relied on.**

R. v. Camborne JJ, ex p Pearce **(1955) 1 QB 41 and** *R. v. Gough* **(1993) 2 All ER 724 (HL) – referred to.**

Case Law Reference:

1957 SCR 575	**relied on**	**Para 5**
1970 (1) SCR 457	**relied on**	**Para 6**
1974 (1) SCR 697	**relied on**	**Para 7**
1977 (1) SCR 64	**relied on**	**Para 8**
1988 (1) SCR 512	**relied on**	**Para 9**
(1988) Supp. SCC 651	**relied on**	**Para 10**
(1955) 1 QB 41	**referred to**	**Para 11**
(1993) 2 All ER 724 (HL)	**referred to**	**Para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2184 of 2011.

From the Judgment & Order dated 01.09.2010 of the High Court of Delhi in Criminal Revision No. 555 of 2003.

Kamini Jaiswal for the Appellant.

P.P. Malhotra, ASG, Sadhna Sandhu (for Anil Katiyar), Dhuruv Tamta (for Binu Tamta) for the Respondents.

The Order of the Court was delivered by

O R D E R

H.L. DATTU, J.

Leave granted.

1. The present appeal, by way of special leave, is directed against the Judgement and Order dated 01.09.2010 of the High Court of Delhi in Criminal Revision No. 555 of 2003 whereby the High Court has dismissed the revision petition preferred by the appellant against the Judgment and Order dated 22.03.2003 passed by Learned Additional Sessions Judge in Sessions Case No. 104 of 2001.

2. Since we intend to remand the matter to the High Court for fresh disposal, it is not necessary to go into the factual matrix. Suffice to state that the appellant had filed a complaint against the respondents dated 24.11.1988 which was registered as FIR No. 393 of 1988 at P.S.- Srinivaspuri, New Delhi. Subsequently, the charges were framed against the respondents under Sections 498-A, 304-B read with Section-34 and Section 302 of the IPC by Shri. Prithvi Raj, learned Additional District & Sessions Judge dated 15.05.1995. Thereafter, the case was listed before Shri. S.N. Dhingra, Additional Sessions Judge for the trial, however, the learned Judge had recused from hearing the matter for personal reasons vide Order dated 25.09.2000. The said Order is extracted below:

"*25-09-2000*

Present:- Spl. P.P. for the State

All the accused on bail.

For personal reason I do not want to try this case. The case be sent to Ld. Sessions Judge, Delhi for marking it to some other court. Put up on 11-10-2000 to find out to which court case has been allocated.

A.S.J. New Delhi
25-09-2000"

3. Accordingly, the case was withdrawn from the Court of Shri. S.N. Dhingra, Additional Sessions Judge and transferred to the Court of Shri. S.M. Chopra, Additional Sessions Judge *vide* the Order dated 29.09.2000 of the Sessions Judge. Eventually the accused respondents were tried and acquitted vide Judgment and Order dated 22.03.2003 passed by Ms. Manju Goel, Additional Sessions Judge. Being aggrieved by the Judgment and Order, the appellant preferred a revision petition before the High Court. The same was dismissed *vide* impugned final Judgment and Order dated 01.09.2010 passed by learned Judge, Shri. Justice S.N. Dhingra.

4. It is apparent that the fact of earlier recusal of the case at the trial by learned Shri Justice S.N. Dhingra himself, was not brought to his notice in the revision petition before the High Court by either of the parties to the case. Therefore, Shri Justice S.N. Dhingra, owing to inadvertence regarding his earlier recusal, has dismissed the revision petition by the impugned Judgment. In our opinion, the impugned Judgment, passed by Shri Justice S.N. Dhigra subsequent to his recusal at trial stage for personal reasons, is against the principle of natural justice and fair trial.

5. It is well settled law that a person who tries a cause should be able to deal with the matter placed before him objectively, fairly and impartially. No one can act in a judicial

capacity if his previous conduct gives ground for believing that he cannot act with an open mind or impartially. The broad principle evolved by this Court is that a person, trying a cause, must not only act fairly but must be able to act above suspicion of unfairness and bias. In the case of *Manak Lal* v. *Dr. Prem Chand Singhvi,* AIR 1957 SC 425, it was observed:

> "5. … every member of a tribunal that [sits to] try issues in judicial or quasi-judicial proceedings must be able to act judicially; and it is of the essence of judicial decisions and judicial administration that Judges should be able to act impartially, objectively and without any bias. In such cases the test is not whether in fact a bias has affected the judgment; the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. It is in this sense that it is often said that justice must not only be done but must also appear to be done."

6. In the case of *A.K. Kraipak* v. *Union of India, (1969) 2 SCC 262,* this Court, while discussing the rule of bias, has observed:

> "15. ... At every stage of his participation in the deliberations of the Selection Board there was a conflict between his interest and duty. Under those circumstances it is difficult to believe that he could have been impartial. The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore what we have to see is whether there is reasonable ground for believing that he was likely to have been biased. … In deciding the question of bias we have to take into consideration human probabilities and ordinary course of human conduct."

7. In the case of *S. Parthasarathi* v. *State of A.P., (1974) 3 SCC 459,* this Court has applied the "real likelihood" test and

restored the decree of the trial court which invalidated compulsory retirement of the appellant by way of punishment. This Court observed:

> "16. … We think that the reviewing authority must make a determination on the basis of the whole evidence before it, whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The court must look at the impression which other people have. This follows from the principle that justice must not only be done but seen to be done. If right-minded persons would think that there is real likelihood of bias on the part of an inquiring officer, he must not conduct the enquiry; nevertheless, there must be a real likelihood of bias. Surmise or conjecture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced against the delinquent. The court will not inquire whether hewas really prejudiced. If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision…."

8. In the case of *G. Sarana (Dr.)* v. *University of Lucknow,* (1976) 3 SCC 585*,* this Court had referred to the judgments of *A.K. Kraipak* v. *Union of India (Supra) and S. Parthasarathi* v. *State of A.P. (Supra)* and observed:

> "11. … the real question is not whether a member of an administrative board while exercising quasi-judicial powers or discharging quasi-judicial functions was biased, for it is difficult to prove the mind of a person. What has to be seen is whether there is a reasonable ground for believing that he was likely to have been biased. In deciding the question of bias, human probabilities and ordinary course of human conduct have to be taken into consideration."

9. In *the case of Ranjit Thakur v. Union of India,* (1987)

4 SCC 611, this Court has held:

> "15. … The test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely and whether Respondent 4 was likely to be disposed to decide the matter only in a particular way.
>
> 16. It is the essence of a judgment that it is made after due observance of the judicial process; that the court or tribunal passing it observes, at least the minimal requirements of natural justice; is composed of impartial persons acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial 'coram non judice'.
>
> 17. As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the Judge is not to look at his own mind and ask himself, however, honestly, 'Am I biased?'; but to look at the mind of the party before him."

10. In the case of *Secy. to Govt., Transport Deptt. v. Munuswamy Mudaliar,* (1988) Supp. SCC 651, this Court considered the question as to whether a party to the arbitration agreement could seek change of an agreed arbitrator on the ground that being an employee of the State Government, the arbitrator will not be able to decide the dispute without bias. While reversing the judgment of the High Court, which had confirmed the order of the learned Judge, City Civil Court directing the appointment of another person as an arbitrator, this Court observed:

> "12. Reasonable apprehension of bias in the mind of a reasonable man can be a ground for removal of the arbitrator. A predisposition to decide for or against one party, without proper regard to the true merits of the dispute

is bias. There must be reasonable apprehension of that predisposition. The reasonable apprehension must be based on cogent materials. See the observations of Mustill and Boyd, Commercial Arbitration, 1982 Edn., p. 214. Halsbury's Laws of England, 4th Edn., Vol. 2, para 551, p.282 describe that the test for bias is whether a reasonable intelligent man, fully apprised of all the circumstances, would feel a serious apprehension of bias."(emphasis supplied)

11. In the case of *R. v. Camborne JJ, ex p Pearce, (1955) 1 QB 41,* the Divisional Court of the Queen's Bench Division, after reviewing a large number of authorities including *R. v. Sussex JJ, ex p McCarthy (Supra)* held: "In the judgment of this Court the right test is that prescribed by Blackburn, J., namely, that to disqualify a person from acting in a judicial or quasi-judicial capacity upon the ground of interest (other than pecuniary or proprietary) in the subject-matter of the proceeding, a real likelihood of bias must be shown. This Court is further of opinion that a real likelihood of bias must be made to appear not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries.

12. In the case of *R. v. Gough,* (1993) 2 All ER 724 (HL), the House of Lords while applying the "real likelihood" test, by using the expression "real danger", has observed thus:

"… In my opinion, if, in the circumstances of the case (as ascertained by the court), it appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand. I am by no means persuaded that, in its original form, the real likelihood test required that any more rigorous criterion should be applied. Furthermore the test as so stated gives sufficient effect, in cases of apparent bias, to

the principle that justice must manifestly be seen to be done, and it is unnecessary, in my opinion, to have recourse to a test based on mere suspicion, or even reasonable suspicion, for that purpose."

13. In view of the aforesaid facts and reasons, we set aside the impugned Judgment and Order dated 01.09.2010 of the High Court in Criminal Revision No.555 of 2003 and remand the matter to the High Court for fresh disposal of the revision petition filed by the appellant in accordance with law. We clarify that we have not expressed any opinion on the merits of the case. Ordered accordingly.

B.B.B. Appeal disposed of.

M/S. INDUSTRIAL PROMOTION AND INVESTMENT CORPORATION OF ORISSA LIMITED

v.

M/S. TUOBRO FURGUSON STEELS PRIVATE LIMITED & OTHERS

(Civil Appeal No.1850 of 2007)

DECEMBER 5, 2011

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

State Financial Corporation Act, 1951: s.29 – Contract of sale –Corporation took over a Foundry Unit after its original promoters defaulted in payment of its dues – Publication of advertisement for sale of Unit – Sale of Unit to respondent on down payment of Rs. 8 lacs – Balance amount of Rs.32 lacs was to be paid on installments – However, after taking possession of the Unit, respondent did not take steps to complete the documentation as required in the sale letter – Notice issued u/s.29 to respondent and assets of the Unit taken over by the Corporation – Writ petition by respondent – High Court directed the Corporation to refund to the respondent Rs.8 lacs along with interest – On appeal, held: High Court did not even refer to the sale advertisement, stipulations made in the sale letter and correspondences between the parties and completely overlooked that the parties, with their eyes widely open, had entered into the contract for sale of the Unit which was subject to the terms and conditions clearly spelled out in the advertisement and in the sale letter; that in furtherance of the contract, payment was made and possession of the Unit changed hands – Both sides had acted on the basis of the contract, changing their respective positions and assuming rights and obligations against each other – The contract having been acted upon, it could not be unilaterally abrogated on the sweet will of any of the two sides – In terms of the contract, the respondents

were obliged to pay the balance consideration amount of Rs.32 lacs along with interest as provided in the sale letter – In default of payment, it was the statutory right of the Corporation to take possession of the Unit u/s. 29 of the Act – Corporation had not only the right to retain Rs.8 lacs paid to it as part consideration but also to realise the balance amount of consideration, in accordance with law – Order of the High Court not sustainable.

The appellant-Corporation took over a Foundry Unit situated along with land, building, plant and machineries under Section 29 of the State Financial Corporation Act, 1951, as its original promoters defaulted in payment of its dues. The taken-over Unit was put to sale by publishing advertisement in newspapers inviting offers for purchase of the Unit. In the advertisement, it was stipulated that the sale would be on 'AS IS WHERE IS' basis. The intending purchasers were allowed inspection of the Unit-on-sale.

In response to the advertisement, the respondents made an offer to purchase the Unit for a total consideration of Rs.40,00,000/- with down payment of Rs.8,00,000/-. The offer made by the respondents was accepted and the Corporation issued the sale letter. It was stated in the sale letter that possession of the Unit would be handed over to the respondents on payment of Rs.8,00,000/- and the balance amount of Rs.32,00,000/- would be treated as fresh loan to respondent no.1 to be repaid within a period of 6 years in quarterly instalments after a moratorium of 18 months with interest at the rate of 18 per cent per annum from the date of handing over the physical possession of the Unit. The sale formalities were required to be completed within 30 days from the date of issue of the letter. It was further stipulated in the letter that the sale would lapse and the earnest money forfeited if the documents were not executed within the prescribed time.

In furtherance of the sale, respondents made payment of Rs.8,00,000/- to the appellant and following the payment, possession of the Unit was made over to respondents. Before the delivery of possession, the Director and other technical persons of the respondent company verified/compared the assets with the inventory of assets item-wise and thereafter, took over possession of the assets in presence of officers of the Corporation, OSFC and SBI and the security personnel.

After taking possession of the Unit, the respondents did not take any step to complete the documentation with IPICOL and OSFC as required in clause 7 of the sale letter. The appellant then wrote number of letters asking the respondents to execute the documents/loan agreement with the Corporation and with the OSFC. The respondents, however, went on temporising in the matter. Instead of executing the necessary documents, the respondents wrote to the appellant complaining about the high rate of interest and requesting to lower it down. The respondents also made the complaint that the machineries were in very bad shape and were required to be replaced and unless the issue of the rate of interest was resolved, it was not possible to start the operation of the factory. The respondents also complained about the difficulty in getting loans from the bank or other financial institutions and asked the appellant whether it would give its consent to creation of *pari passu* or second charge as security for the loan amount advanced by the financial institutions. It also complained about the electricity dues and sought the intervention of the appellant to resolve the difficulties being faced by it.

The appellant-Corporation once again wrote to respondents asking them to pay the over due interest of Rs.3,51,445/- as on March 31, 2000 and to execute the necessary documents. The respondents did not make

any payment nor did they take any step to complete the documentation. Instead, by letter dated July 20, 2001, they asked the appellant to take back the Unit stating that from July 31, 2001, they would withdraw the security personnel engaged by them in the factory premises which was till that date under their control. The appellant issued notice under Section 29 of the State Financial Corporation Act, 1951 to respondents and took over the assets of the Unit. The respondents filed a writ petition before the High Court challenging the taking over of the assets by the appellant. The High Court allowed the writ petition and directed the Corporation to refund to the respondents Rs.8,00,000/ along with interest at the prevailing bank rate that was received by it as part of the sale consideration. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1. The case of the respondents, as noted by the High Court was untenable on its face. Even according to the respondents it was only *after having taken possession* of the Unit that they found that some vital parts of the machineries were missing and there were huge arrears of electricity dues and that the recommendation for the industrial policy resolution was not forthcoming. In those circumstances, the respondents realised that the Unit was not worth Rs.40,00,000/-. The respondents went to the High Court seeking refund of the part consideration money Rs.8,00,000/- paid by them as if the antecedent acts of the parties, namely, the issuance of the advertisement, the offer made by the respondents followed by negotiations between the parties and the issuance of the sale letter by the Corporation, the payment of Rs.8,00,000/- by the respondents in pursuance of the sale letter followed by their taking over the possession of the Unit meant

nothing and did not create any rights or obligations in the parties. Strangely, the High Court did not even refer to the sale advertisement, the stipulations made in the sale letter and the correspondences between the parties. The High Court completely overlooked that the parties, with their eyes widely open, had entered into the contract for sale of the Unit which was subject to the terms and conditions clearly spelled out in the advertisement and in the sale letter; that in furtherance of the contract, payment was made and possession of the Unit changed hands. In other words, both sides had acted on the basis of the contract, changing their respective positions and assuming rights and obligations against each other. The contract having been acted upon, it could not be unilaterally abrogated on the sweet will of any of the two sides. In terms of the contract, the respondents were obliged to pay the balance consideration amount of Rs.32,00,000/- along with interest as provided in the sale letter. In default of payment it was the statutory right of the appellant-corporation to take possession of the Unit under Section 29 of the Financial Corporation Act. In the aforesaid facts and circumstances, there was no ground for the High Court, to interfere in favour of the respondents, much less to direct for refund of the part consideration money paid by the respondents to the appellant. [Paras 11-13] [456-A-H; 457-A-B]

2. The question of forfeiture of the earnest money would arise in case the parties had not acted upon in furtherance of the sale letter but the matter in this case went much beyond that stage. The parties agreed for the sale of Unit for an amount of Rs.40,00,000/- out of which the respondents were required to make a down payment of Rs.8,00,000/-, which they did. On payment of the part consideration money, the possession of the Unit was made over to them. The respondents were, thus, under the legal obligation to pay the balance consideration of

Rs.32,00,000/- in instalments and along with interest, as stipulated in the letter. The Corporation had, therefore, not only the right to retain Rs.8,00,000/- paid to it as part consideration but also to realise the balance amount of consideration, in accordance with law. The order of the High Court is completely unsustainable. [Paras 14, 17] [457-D-G; 458-E]

Isha Marbles vs. Bihar State Electricity Board & Anr., **(1995) 2 SCC 648 – relied on.**

Haryana Financial Corporation v. Rajesh Gupta **(2010)1 SCC 655;** *V.K.Ashokan v. Assistant Excise Commissioner* **(2009) 14 SCC 85 – held inapplicable.**

Case Law Reference:

(1995) 2 SCC 648	**relied on**	**Para 15**
(2010)1 SCC 655	**held inapplicable**	**Para 17**
(2009) 14 SCC 85	**held inapplicable**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1850 of 2007.

From the Judgment and Order dated 29.06.2006 of the High Court of Orissa at Cuttack in Writ Petition (Civil) No. 1556 of 2003.

Raj Kumar Mehta, Antaryami Upadhyay and David A. for the Appellant.

Shrish Kumar Mishra and Ajay Kr. Singh for the Respondents.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. This appeal, at the instance of M/s Industrial Promotion and Investment Corporation of Orissa Limited ("Corporation" for the sake of brevity), is directed

against the judgment and order dated June 29, 2006 passed by a Division Bench of the Orissa High Court. By the impugned judgment, the High Court allowed the Writ Petition [W.P.(Civil) No.1556/2003] filed by respondent Nos.1 & 2 (M/s Tuobro Furguson Steels Private Limited and its Director) and undoing a contract of sale of an Industrial Unit entered into between the parties, directed the appellant to refund Rs.8,00,000/- (Rupees Eight Lacs), that was paid by the respondents to the appellant as part of the sale consideration, together with simple interest at prevailing rates of interest of the State Bank of India on deposits made by customers during the relevant period.

2. The facts relevant to appreciate the rival contentions of the parties are brief and may be stated thus. A Foundry Unit situated at Ganeswarpur Industrial Estate, Balasore, by the side of NH-5, along with land, building, plant and machineries was taken over by the Corporation under Section 29 of the State Financial Corporation Act, 1951, as its original promoters namely, M/s Josna Casting Centre, defaulted in payment of its dues. The taken-over Unit was put to sale *vide* advertisement dated February 8, 1999 issued in Oriya and English newspapers inviting offers for purchase of the Unit. A copy of the sale advertisement is at Annexure P1 which gives a complete description of the Industrial Unit along with all the relevant details. It is significant to note that in the advertisement it was stipulated that the sale would be on 'AS IS WHERE IS' basis. Further, the intending purchasers were allowed inspection of the Unit-on-sale from February 16 to 27, 1999.

3. In response to the advertisement the respondents made an offer (revised by letters dated April 12, 1999 and August 5, 1999) to purchase the Unit for a total consideration of Rs.40,00,000/- (Rupees Forty Lacs) with down payment of Rs.8,00,000/- (Rupees Eight Lacs). The offer made by the respondents was considered by the Advisory and Disposal Committee of the Corporation, and in acceptance of the offer, the Corporation issued the sale letter dated September 10,

1999. A copy of the sale letter is at Annexure P2. In the sale letter it was stated that possession of the Unit would be handed over to the respondents on payment of Rs.8,00,000/- (Rupees Eight Lacs) and the balance amount of Rs.32,00,000/- (Rupees Thirty Two Lacs) would be treated as fresh loan to respondent no.1 to be repaid within a period of 6 years in quarterly instalments after a moratorium of 18 months with interest at the rate of 18 per cent per annum from the date of handing over the physical possession of the Unit. The sale formalities were required to be completed within 30 days from the date of issue of the letter. It was further stipulated in the letter that the sale would lapse and the earnest money forfeited if the documents were not executed within the prescribed time. In clause 2 of the letter it was once again repeated that the sale was on "AS IS WHERE IS" basis and no further claim in that respect would be entertained by the Corporation. In clause 5 it was stated that the sale of fixed assets was free from liabilities other than the deferred payment of loan of Rs.32,00,000/- (Rupees Thirty Two Lacs) with interest as stated in the earlier paragraph of the letter. Clause 8 made it clear that the sale did not pre-suppose sanction of any additional loan in favour of the purchaser for operation of the Unit. In clause 9 of the letter it was stated that though the Corporation would recommend to all concerned to assist and help the buyer of the Unit (the respondents) but would not be in any manner responsible if any of the benefits were not granted to the Unit or if there was delay in grant of any of the benefits. It was expressly made clear that the denial of any benefits to the Unit by any financial organisation or any other body or delay in grant of any concession or benefit shall not be a ground for non-payment of the Corporation's dues.

4. In furtherance of the sale, respondents made payment of Rs.8,00,000/- (Rupees Eight Lacs) to the appellant and following the payment, possession of the Unit was made over to respondents on September 15, 1999. Before the delivery of possession, the Director and other technical persons of the respondent company verified/compared the assets with the

inventory of assets item-wise and thereafter, took over possession of the assets on September 15, 1999 in presence of officers of the Corporation, OSFC and SBI and the security personnel. The handing over of possession of the Unit was witnessed by a 'Memo of Delivery of Possession of Assets' executed both on behalf of the appellant and the respondent company. A copy of "the Memo of Delivery of Possession of Assets" is annexed as Annexure P-3 to the appeal memo.

5. After taking possession of the Unit, the respondents did not take any step to complete the documentation with IPICOL and Orissa State Financial Corporation as required in clause 7 of the sale letter. The appellant then wrote a number of letters (on October 12, 1999, January 4, 2000 and February 28, 2000) asking the respondents to execute the documents/loan agreement with the Corporation and with the Orissa State Financial Corporation. The respondents, however, went on temporising in the matter. Instead of executing the necessary documents, the respondents wrote to the appellant complaining about the high rate of interest and requesting to lower it down. The respondents also made the complaint that the machineries were in very bad shape and required to be replaced and unless the issue of the rate of interest was resolved, it would not be possible to start the operation of the factory. The respondents also complained about the difficulty in getting loans from the bank or other financial institutions and asked the appellant whether it would give its consent to creation of *pari passu* or second charge as security for the loan amount advanced by the financial institutions. It also complained about the electricity dues and sought the intervention of the appellant to resolve the difficulties being faced by it.

6. On March 24, 2000, the appellant – Corporation once again wrote to respondents asking them to pay the over due interest of Rs.3,51,445/- as on March 31, 2000 and to execute the necessary documents.

7. The respondents did not make any payment nor did they

take any step to complete the documentation. Instead, by letter dated July 20, 2001, they asked the appellant to take back the Unit stating that from July 31, 2001, they would withdraw the security personnel engaged by them in the factory premises which was till that date under their control. On October 12, 2001, respondents informed the appellant that a theft had taken place in the factory premises which was at that time under their possession. On April 29, 2002, respondents once again wrote to the appellant that they would withdraw the security personnel if the assets were not taken over by the appellant within 15 days. Faced with the recalcitrant attitude of respondents, the appellant issued notice under Section 29 of the State Financial Corporation Act, 1951 to respondents and took over the assets of the Unit.

8. On February 17, 2003, the respondents went to the High Court challenging the taking over of the assets by the appellant.

9. On June 17, 2004, the appellant decided to sell the Unit along with its assets to Sun Agro Foods & Exports for a consideration of Rs.17,00,000/- (Rupees Seventeen Lacs) but could not hand over possession to the new buyer in view of the interim order passed by the High Court in the Writ Petition filed by the respondents. Finally, by the impugned order dated June 29, 2006, the High Court allowed the Writ Petition filed by the respondents and directed the Corporation to refund to the respondents Rs.8,00,000/ (Rupees Eight Lacs) along with interest at the prevailing bank rate that was received by it as part of the sale consideration.

10. The order of the High Court is brief and does not even advert to all the relevant facts as stated above.

11. It took note of the case of the respondents-writ petitioners in the following manner:-

"According to the petitioner, *after* taking possession of the said Unit, it found that because of missing of some

vital parts of the machines and machineries, huge arrear electric dues and lack of grant of recommendation for I.P.R. the Unit does not worth Rs.40,00,000/- (Forty Lakhs) and, therefore, petitioner made correspondences with opposite party No.1 seeking reliefs on those accounts besides requesting to reduce the rate of interest on the differential amount to be paid in instalments and that when opposite party No.1 turned a deaf ear to all such approaches and representations, *petitioner opted to withdraw from the Industrial Unit* and surrender the same in favour of opposite party No.1. With such assertion, petitioner has filed the present writ petition with the prayer to issue a writ of mandamus directing opposite party No.1 to give the rehabilitation package (as mentioned in the prayer portion of the writ petition) or alternative to direct opposite party No.1 to return the amount of Rs.8,00,000/- (eight lakhs) which was paid by it in September, 1999 with interest at the prevailing Bank rate."

The High Court then noted the stand of the Corporation that it was not possible to give the rehabilitation package, as requested by the respondents because they had failed to adhere to the terms of the sale letter. Having noted the stand of the Corporation, the High Court disposed of the Writ Petition and passed the operative order in the following terms:-

"Regard being had to the aforesaid facts and submission, we find that when opposite party no.1 is not intending to give rehabilitation assistance package as prayed for by the petitioner, therefore, it is appropriate that opposite party No.1 should refund the amount of Rs.8,00,000/- (eight lakhs) together with simple interest at prevailing rates of interest of the State Bank of India on deposits made by customers during the relevant period. The amount be worked out accordingly and be paid to the petitioner within a period of four months, failing which the entire sum shall carry compound interest therefrom."

We are unable to appreciate the order of the High Court and we see no basis on which such an order could have been passed. The case of the respondents, as noted by the High Court was untenable on its face. Even according to the respondents it was only *after having taken possession* of the Unit that they found that some vital parts of the machineries were missing and there were huge arrears of electricity dues and that the recommendation for the industrial policy resolution was not forthcoming. In those circumstances, the respondents realised that the Unit was not worth Rs.40,00,000/- (Rupees Forty Lacs).

12. The respondents went to the High Court seeking refund of the part consideration money Rs.8,00,000/- (Rupees Eight Lacs) paid by them as if the antecedent acts of the parties, namely, the issuance of the advertisement, the offer made by the respondents followed by negotiations between the parties and the issuance of the sale letter by the Corporation, the payment of Rs.8,00,000/- (Rupees Eight Lakhs) by the respondents in pursuance of the sale letter followed by their taking over the possession of the Unit meant nothing and did not create any rights or obligations in the parties. Strangely, the High Court did not even refer to the sale advertisement, the stipulations made in the sale letter and the correspondences between the parties. The High Court completely overlooked that the parties, with their eyes widely open, had entered into the contract for sale of the Unit which was subject to the terms and conditions clearly spelled out in the advertisement and in the sale letter; that in furtherance of the contract, payment was made and possession of the Unit changed hands. In other words, both sides had acted on the basis of the contract, changing their respective positions and assuming rights and obligations against each other. The contract having been acted upon, it could not be unilaterally abrogated on the sweet will of any of the two sides. In terms of the contract the respondents were obliged to pay the balance consideration amount of Rs.32,00,000/- (Rupees Thirty Two Lacs) along with interest as

provided in the sale letter. In default of payment it was the statutory right of the appellant-corporation to take possession of the Unit under Section 29 of the Financial Corporation Act.

13. In the aforesaid facts and circumstances, there was no ground for the High Court, to interfere in favour of the respondents, much less to direct for refund of the part consideration money paid by the respondents to the appellant.

14. Before concluding, however, we must take note of the submissions made by Mr. Shrish Kumar Misra, learned counsel for the respondents, who tried to defend the order of the High Court. Mr. Misra submitted that the Corporation had no right to forfeit the amount of Rs.8,00,000/- (Rupees Eight Lacs) paid by the respondents as part consideration for the sale of the Unit and at best they could forfeit the earnest money of Rs.50,000/- (Rupees Fifty Thousand) paid by the respondents while making the offer to purchase the Unit. There is no substance at all in the submission. The question of forfeiture of the earnest money would have arisen in case the parties had not acted upon in furtherance of the sale letter but the matter in this case went much beyond that stage. The parties agreed for the sale of Unit for an amount of Rs.40,00,000/- (Rupees Forty Lacs) out of which the respondents were required to make a down payment of Rs.8,00,000/- (Rupees Eight Lacs), which they did. On payment of the part consideration money, the possession of the Unit was made over to them. The respondents were, thus, under the legal obligation to pay the balance consideration of Rs.32,00,000/- (Rupees Thirty Two Lacs) in instalments and along with interest, as stipulated in the letter. The Corporation had, therefore, not only the right to retain Rs.8,00,000/- (Rupees Eight Lacs) paid to it as part consideration but also to realise the balance amount of consideration, in accordance with law.

15. Mr. Misra next submitted that according to clause 5 of the sale letter the fixed assets of the Unit were free from liabilities other than the deferred payment of loan of

Rs.32,00,000/- (Rupees Thirty Two Lacs) but in reality there were many dues, including dues of electricity, against the Unit. We find no substance in this submission either. According to us, there was no misrepresentation of facts in clause 5 or in any other clauses of the sale letter. As to the electricity dues, it may be noted that the decision of this Court in *Isha Marbles vs. Bihar State Electricity Board & Anr*.,(1995) 2 SCC 648 had already come by the time the respondents took over the Unit and it was for them to take benefit of the decision of this Court.

16. Mr.Misra also tried to seek support from two decisions of this Court (1) in *Haryana Financial Corporation Vs. Rajesh Gupta* (2010) 1 SCC 655, paragraphs 20 and 22 and (2) in *V.K.Ashokan vs. Assistant Excise Commissioner* (2009) 14 SCC 85, paragraph 69. These two decisions have no application to the facts of the case and do not even slightly advance the case of the respondents.

17. On hearing counsel for the parties and on going through the materials on record, we find, for the reasons stated above, that the order of the High Court is completely unsustainable. We, accordingly, set aside the impugned order and dismiss the writ petition filed by the respondents.

18. In the result, the appeal is allowed with costs, quantified at Rs.10,000/- (Rupees Ten Thousand).

D.G. Appeal allowed.

AKRAM KHAN

v.

STATE OF WEST BENGAL

(Criminal Appeal No. 2248 of 2011)

DECEMBER, 05, 2011

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

PENAL CODE, 1860:

ss. 364-A and 120-B – Kidnapping of a minor boy for ransom – Conviction and sentence of imprisonment for life awarded by trial court, affirmed by High Court – Out of three convicts, one filing the appeal – Held: From the evidence of the witnesses, it is clearly established that the accused persons, particularly, the appellant, kidnapped the minor boy of the complainant, demanded ransom from him for release of the child and also threatened that if the demand was not met his son would be killed –The High Court was right in maintaining the conviction and the sentence and its judgment does not suffer from any infirmity– Sentence/Sentencing.

SENTENCE/SENTENCING:

Sentence u/s 364A IPC – Object of – Held: The statement of objects and reasons introducing s.364A in the IPC makes it clear that cases relating to kidnapping for ransom is a crime which called for a deterrent punishment, irrespective of the fact that kidnapping had not resulted in death of the victim – Considering the alarming rise in kidnapping of young children for ransom, the legislature in its wisdom provided for stringent sentence – Therefore, in such cases no leniency is to be shown in awarding sentence, on the other hand, it must be dealt with in the harshest possible manner and an obligation rests on the courts as well – Penal Code, 1860 – s. 364A.

The appellant along with 7 others was prosecuted for kidnapping a minor boy (PW 2) for ransom. The prosecution case was that on 17.3.2000, PW 2 was found missing from his house in the city of Calcutta. His father (PW 3) reported the matter to the police the same day. Later on, PW 3 received telephone calls from unknown persons demanding a ransom. The callers went on demanding the ransom from different places. In the night of 13.4.2000, a raid was conducted by the Calcutta Police along with the help of the Bihar Police and they arrested five accused including the appellant from Bhagalpur in Bihar and PW 2 was rescued from the house of one of the accused. Subsequently, one accused, who was an ex-employee of PW 3, was arrested in Calcutta. Two more persons were arrested thereafter. The trial court convicted seven accused u/ss 364A and 120-B IPC and sentenced them, *inter alia*, to imprisonment for life under each of the two counts, but the sentences were made to run concurrently. On appeal, the High Court confirmed the conviction and sentence of four accused including the appellant and acquitted the remaining three on benefit of doubt. Aggrieved, the appellant alone filed the appeal.

Dismissing the appeal, the Court

HELD: 1.1 The specific charge against the appellant accused is for offences punishable u/ss. 364-A and 120-B IPC. If it is established that the offender after kidnapping a person keeps the said person in detention or threatens to cause death or hurt to such person in order to compel any other person to pay a ransom, undoubtedly, s. 364A is attracted. [Para 8] [466-E-G]

Malleshi v. State of Karnataka, **2004 (4) Suppl. SCR 441 = (2004) 8 SCC 95*;* and *Vinod vs. State of Haryana,* **2008 (1) SCR 1141 = AIR 2008 SC 1142 – relied on**

1.2 The prosecution case relates to kidnapping of a minor boy, from his lawful guardian (PW-3), and then keeping him in detention. Thereafter, the appellant and other accused persons, started giving threat calls in order to extort huge amount of money from the father of the kidnapped boy and also threatened him that in the event of his failure to respond to such ransom calls, the boy in custody would be murdered. The victim himself was examined as PW-2. He was a student of Class IV at the relevant time. He being a child witness, the trial Judge, after satisfying his capacity to depose, accepted his evidence to the extent that he was kidnapped and detained in a house and the appellant made telephone calls demanding ransom and also threatened PW-2 on various occasions. [Para 11] [467-F-H; 468-F-G]

1.3 The other witness is PW-3, the father of the victim boy. He not only disclosed how his minor son was taken by the accused persons including the appellant and kept in a far away place in order to get ransom, but also explained the threat received from the accused and failing compliance of their demand they threatened that his son would be killed. Inasmuch as PW-3 was subjected to extensive cross-examination and he withstood his stand, the trial Judge as well as the High Court accepted his testimony in *toto*. [Para 12] [468-H; 470-H; 471-A-B]

1.4 The other main witnesses are PWs 6 and 7. PW-6 is a newspaper vendor. It was he who accompanied PW-3 in search of PW-2 pursuant to the threat call from the accused. He corroborated the statement of PW-3 in all aspects. PW-7, a resident of Bhagalpur, Bihar, was working as an employee of public telephone booth. He deposed that the appellant and another accused visited the booth on several occasions, and on 2-3 occasions with a child, to make telephone calls. The evidence of PW-7 corroborates with the evidence of PW-3, who stated

that that he had received 8 or 9 calls from the accused persons demanding ransom for release of his son. [Para 13, 14 and 17] [471-B-F; 472-D]

1.5 From the evidence of PWs-3, 6 and 7, it is clear that the accused persons, particularly, the appellant, demanded ransom from PW-3 for the release of his child and he also threatened that if his demand was not met, he would kill his son. There is no reason to disbelieve the version of PWs-3, 6 and 7. [Para 15] [471-G]

2. Section 364A was introduced in the IPC by virtue of Amendment Act 42 of 1993. The statement of objects and reasons makes it clear that kidnapping for ransom is a crime which calls for a deterrent punishment, irrespective of the fact that kidnapping had not resulted in death of the victim. Considering the alarming rise in kidnapping of young children for ransom, the legislature in its wisdom provided for stringent sentence. Therefore, the Court is of the view that in such cases, no leniency be shown in awarding sentence; on the other hand, it must be dealt with in the harshest possible manner and an obligation rests on the courts as well. In the case on hand, the High Court was right in maintaining the order of conviction and sentence of the appellant and the impugned judgment of the High Court does not suffer from any infirmity to warrant interference. [Para 22] [473-D-G-H; 474-A-B]

Mulla and Another vs. State of Uttar Pradesh **(2010) 3 SCC 508 – relied on.**

Case Law Reference:

2004 (4) Suppl. SCR 441	**relied on**	**para 16**
2008 (1) SCR 1141	**relied on**	**para 18**
(2010) 3 SCC 508	**relied on**	**para 21**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2248 of 2011.

From the Judgment & Order dated 29.06.2010 of the High Court at Calcutta in C.R.A. No. 198 of 2006.

Pranab Kumar Mullick, Vishavranjan, Soma Mullick for the Appellant.

Chanchal Kr. Ganguli, Abhijit Sengupta, Tara Chandra Sharma for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the final judgment and order dated 29.06.2010 passed by the High Court at Calcutta in C.R.A. No. 198 of 2006 whereby the High Court acquitted three out of seven accused persons giving them the benefit of doubt and affirmed the conviction and sentence of the appellant herein and other three accused persons awarded by the Additional Sessions Judge, 6th Fast Track Court, Calcutta by order dated 17.02.2006 in S.C. No. 80 of 2000 and S.T. No. 4(3) of 2001.

3. **Brief facts:**

(a) The prosecution case, in short, is that in the afternoon of 17.03.2000, which was a Bakrid day, a minor boy named Vicky Prasad Rajak (PW-2) was found missing. Mahendra Prasad Rajak (PW-3)-father of the boy (the Complainant) reported the matter in the Park Street Police Station which was recorded vide GD Entry No. 1504 dated 17.03.2000. Later on, the boy's father received telephone calls from unknown persons demanding ransom of Rs.10 lakhs and Park Street P.S. Case No. 117 dated 20.03.2000 under Section 363A of the Indian Penal Code, 1860 (in short "IPC") was amended to Section

364A IPC and a case was registered against unknown persons.

(b) On 21.03.2000, again the complainant received a call where the caller told him that he had the money because of the sale of the shop, however, the ransom demanded was reduced to Rs. 7 lakhs. The caller also threatened him that if the ransom is not paid, his son would not remain alive. There were further telephone calls on other dates and, ultimately, on 01.04.2000, the ransom was reduced by the caller to Rs. 3 lakhs.

(c) Again on 04.04.2000, the Complainant received a telephonic message asking him to go to Jamalpur Railway Station with Rs.3 lakhs wearing a black coloured shirt. He informed the same to the Lalbazar Police Station. He along with his relative and the police in civil dress, went to Jamalpur Railway Station but none approached. On enquiry from his wife, he learnt that another call had been received whereby the caller asked him to go to Sahebgunj Station by Danapur Express. Then they proceeded to Sahebgunj Station by that train and during the journey one Afsal @ Fazo asked the Complainant to get down at the next station i.e. Ghoga, where he would have to hand over the ransom but he refused to get down and went to Sahebgunj but none approached, they came back. Again on 13.04.2000, the complainant received a message from the caller to come at Ghoga Railway Station. When they went there, none came. At night, a raid was conducted by the Calcutta Police along with the help of Bihar Police and they arrested five accused persons, namely, Md. Kalim @ Kalu, Akram Khan, Afsal Khan @ Fazo, Md. Javed and Md. Mehtab from different places in Bhagalpur and the kidnapped boy was rescued from the house of Mehatab. Later, one of the associates of the accused persons, namely, Md. Zakir Khan was arrested in Calcutta. It was revealed that Zakir Khan was an ex-employee of the father of the kidnapped boy in his tailoring shop which he had sold. Two more associates, Nazamul Khan and Md.

Dilshad, who took part in the commission of offence, were also arrested.

(d) The police filed charge sheet against all the eight accused persons for the offence punishable under Sections 364A/120B read with 34 IPC. On 13.11.2000, the case was committed by the Metropolitan Magistrate, 9th Court, Calcutta to the Court of Sessions. Vide judgment dated 17.02.2006, the Additional Sessions Judge sentenced seven accused persons to undergo imprisonment for life and to pay a fine of Rs.5,000/- each, in default, to suffer rigorous imprisonment for one year each for commission of offence under Section 364A IPC and further imprisonment for life and to pay a fine of Rs.3,000/- each, in default, to suffer rigorous imprisonment for one year each for commission of offence under Section 120B IPC and both sentences were to run concurrently. However, Md. Nazamul Khan, one of the accused was acquitted as not found guilty.

(e) Against the said judgment, all the seven accused persons including the appellant herein filed an appeal being C.R.A. No. 198 of 2006 before the High Court at Calcutta. By the impugned judgment dated 29.06.2010, the High Court acquitted Md. Javed, Md. Dilshad and Md. Mehtab giving them the benefit of doubt and affirmed the conviction and sentence imposed on Akram Khan-appellant herein, Afzal Khan @ Fazo, Md. Zakir Khan and Md. Kalim @ Kalu.

(f) Being aggrieved by the said judgment, Akram Khan-appellant herein alone has filed this appeal by way of special leave before this Court.

4. Heard Mr. Pranab Kumar Mullick, learned counsel for the appellant-accused and Mr. Chanchal Kr. Ganguli, learned counsel for the respondent-State.

5. Learned counsel for the appellant, after taking us through the evidence led in by the prosecution and the defence, decision of the trial Court and the impugned order of the High

Court, submitted that the prosecution has not established its case for offence punishable under Section 364A IPC and, in any event, at the most, it is punishable under Section 363 IPC for kidnapping alone. He further contended that the maximum punishment provided for kidnapping under Section 363 IPC is seven years and inasmuch as the appellant has served 11 years 7 months, the period already undergone would satisfy the prosecution case and he may be ordered to be released forthwith.

6. On the other hand, learned counsel for the respondent-State contended that in the light of the categorical evidence of Naresh Kr. Rajak-PW-6 (close relative of PW-3) and Prantosh Kumar Gupta-(PW-7) (an employee of a Public Telephone Booth), which corroborated with the evidence of PWs 2 and 3, and in view of the fact that the prosecution has established its charge, namely, kidnapping for ransom (Section 364A IPC), the punishment of life sentence imposed by the trial Court as affirmed by the High Court is appropriate and no interference is called for by this Court.

7. We have carefully perused all the relevant materials and considered the rival contentions.

8. It is true that if it is a simple case of kidnapping in terms of Section 363 IPC, the offender shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine. Here, the specific charge against the appellant-accused is under Sections 364A and 120B IPC. If it is established that the offender after kidnapping a person keeps the said person in detention or threatens to cause death or hurt in order to pay ransom, undoubtedly, Section 364A attracts. The said provision reads as under:

> "**364A. Kidnapping for ransom, etc.** – Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause

death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organization or any other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine."

9. Now let us consider whether the prosecution has established its case for the offence punishable under Section 364A IPC beyond reasonable doubt?

10. The appellant herein was one of the seven accused who were found guilty under Sections 364A and 120B IPC and they were convicted and sentenced to imprisonment for life and to pay a fine of Rs.5,000/- each for commission of offence under Section 364A IPC. They were also sentenced to suffer imprisonment for life and to pay a fine of Rs.3000/- for commission of the offence under Section 120B IPC and sentences were to run concurrently. No doubt, three accused persons, namely, Md. Javed, Md. Dilshad and Md. Mehtab were acquitted of all the charges by the High Court. The appellant herein is one among the other accused convicted by the High Court. The other accused persons have not challenged the conviction before this Court except the appellant herein.

11. The prosecution case, as stated earlier, relates to kidnapping of a minor boy, Vicky Prasad Rajak from his lawful guardian - Mahendra Prasad Rajak (PW-3) and then keeping him in detention. Thereafter, the appellant and other accused persons, started giving threat calls in order to extort huge amount of money from the father of the kidnapped boy and also threatened him that in the event of his failure to respond to such ransom calls, the boy in custody would be murdered. The victim himself was examined as PW-2. The victim boy was a student of Class IV at the relevant time. He being a child witness, the Court has to satisfy that he is capable of understanding the

events. In his evidence, the victim boy - PW-2 has stated that on 17.03.2000 which was Bakrid Day and the school was closed. According to him, when he along with his friend, Kaso, was offering leaves to the goats, a man came there and asked him to accompany him so that he could purchase some chocolates for him. He along with Kaso went with him. At first, they went to the shop of one Mintu in front of their house. The man was having 10 rupees note but the shopkeeper Mintu did not have change. Kaso went back and thereafter they went to the other shop which was closed. They went a bit further and got into a taxi and he was taken to a house in Kalabagan. They stayed there for sometime. Thereafter, he was taken in a bus, route No. 71 to Tikiapara, Howrah and from there he was taken to a room of another person. That person was not in his house at that time but when he came back, he was offered some food. Thereafter, he was taken to Sealdah Station where Zakir was present. Zakir used to work at the tailoring shop of his father. Thereafter, they boarded a train and next morning they got down at a station named Ghoga. From there, they took a cycle rickshaw and went to a house. He further deposed that in that house two men were present inside the room and they were Akram, the appellant herein and Afzal Khan @ Fazo. PW-2 identified them in the Court along with the first person - Md. Kalim @ Kalu. He also deposed that two women were also present there. He was kept there for 5 to 6 days and the accused Md. Kalim @ Kalo was with him in the said house. He also explained that several times he was taken to the STD telephone booth. He also deposed that at the time of making telephone calls, the appellant-accused threatened him. The trial Judge, after satisfying his capacity to depose, accepted his evidence to the extent that he was kidnapped and detained in a house and another person-the present appellant, made telephone calls demanding ransom and also threatened PW-2 on various occasions.

12. The other witness heavily relied on by the prosecution is Mahendra Prasad Rajak (PW-3), the father of the victim boy

(PW-2). In his evidence, he stated that he along with his family members including PW-2 were residing at Premises No. 108A, Elliot Road, Calcutta. Apart from the victim (PW-2), he has two minor sons younger to him. He was engaged as a salesman at A.C. Market at the relevant time and was also owning a shop bearing No. B-3 in A.C. market. Besides this, he had a tailoring shop at 45 Gardner Lane, Calcutta, near Ripon Lane. The said tailoring shop had been sold away in February, 2000. He had two employees in the said tailoring shop by name Ashok Mondal and Zakir Khan. He informed further that three years prior to sale, Ashok Mondal had been relieved from his employment and Zakir Khan had been continuing as an employee. After the sale of the tailoring shop, he paid Zakir Khan cash of Rs. 20,000/-, a sewing machine and a bicycle. On 17.03.2000, which was a Bakrid day, when he went to his shop at 10:00 a.m., at around 01:00 p.m., he received a telephone from his wife stating that their son was missing for the last one hour. After making search, he made a complaint to the police. Even after announcement in the locality, he could not get his son back. While so, on the evening of 19.03.2000, he received a telephone call demanding a ransom of Rs. 10 lakhs for his missing child Vicky Prasad Razak (PW-2). He was informed that his missing son was with him but he had not stated his name or place where his son was stationed. After half an hour, the very same person asked over telephone not to give information to local police about the same. PW-3 further explained that on 20.03.2000, he informed the local police about the two telephonic messages received on the previous day. The same was recorded by the police officer. On 21.03.2000, he received another telephonic message wherein the person on the other side had stated that he had money because of the sale of tailoring shop, however, reduced the quantum of ransom to Rs. 7 lakhs to be paid to him otherwise his missing son would not remain alive. After his threat, the unknown person also arranged to make a call by his son to speak to him (PW-3) over telephone in order to act quickly. On 25.03.2000, he received another telephonic message enquiring

whether he had arranged ransom. On 26.03.2000, he received another telephonic message stating that the ransom was reduced to Rs. 5 lakhs and asked him to have a talk with his son Vicky who stated to take him back quickly. On 01.04.2000, he received another telephonic message by which the quantum of ransom was further reduced to Rs. 3 lakhs. PW-3 agreed to pay the said amount but the person on the other side informed that the place of exchange of ransom would be made known to him later. On 02.04.2000, when he was coming back from the temple after offering puja, he found that his inmates were crying on hearing that his missing son had been killed and they had received such information over phone. Again on 04.04.2000, he received a telephonic message from the same person stating that his son was alive and had not been killed. The caller asked him to come to Jamalpur Railway Station with Rs. 3 lakhs wearing a black coloured shirt and accompanying one of his relatives. On 13.04.2000, he received another telephonic message from the miscreants asking him to go to Ghoga Railway Station on 15.04.2000 with Rs. 3 lakhs and a relative wearing a black coloured shirt. He informed all the details to the police and started for Ghoga but when they reached there, none approached. At night, a raid was conducted by the Calcutta Police along with Bihar Police and the accused were arrested and the boy was rescued from the house of one Mehtab. During search, the police also recovered one pistol and two cartridges under the bed of one Afzal Khan @ Fazo. In the evidence, he further informed the Court that he received telephonic messages 8 or 9 times from the miscreants and every time they threatened him that unless the money is brought in, his son would be killed. In his cross-examination, PW-3 explained the statement made before the police officer on various dates i.e. on 17.03.2000, 20.03.2000, 04.04.2000, 11.04.2000 and 18.04.2000, when he got back his son. In his evidence, PW-3 not only disclosed how his minor son was taken by the accused persons including the appellant herein and kept in a far away place in order to get ransom. PW-3 also explained the threat received from the accused and failing

compliance of their demand they threatened that his son would be killed. Inasmuch as PW-3 was subjected to extensive cross-examination and he withstood his stand, the trial Judge as well as the High Court accepted his testimony in toto.

13. Apart from the evidence of PW-3, the prosecution heavily relied on the evidence of PWs 6 and 7. PW-6 is a newspaper vendor. In his evidence, he accepted that PW-3 is his close relative. It was he who accompanied PW-3 in search of PW-2 pursuant to the threat call from the accused. He corroborated the statement of PW-3 in all aspects.

14. The next witness relied on by the prosecution is PW-7, a resident of Ekchari Bazar, Kahelgaon, Bhagalpur, Bihar. He was working as an employee of public telephone booth owned by one Vikas Singh. He deposed that he came to know of Akram-appellant herein from one Javed, who is a resident of the house situated contiguous to their telephone booth. He further deposed that Javed told him that Akram was his maternal uncle and he was a resident of Ghoga. PW-7 further informed the Court that the said Akram visited their booth on 8/10 occasions. On 2 or 3 occasions, he came to his booth along with one child. The other person Javed also visited the booth on 2/4 occasions with a view to make telephone calls. PW-7 also informed the Court that the child accompanied Akram also used to talk over phone as directed by him.

15. From the evidence of PWs-3, 6 and 7, it is clear that the accused persons, particularly, the appellant herein demanded ransom from PW-3 for the release of his child and he also threatened that unless his demand is met, he would kill his son. There is no reason to disbelieve the version of PWs-3, 6 and 7.

16. In *Malleshi vs. State of Karnataka, (2004) 8 SCC 95, while considering the ingredients of Section 364A IPC, this Court held as under:*

> ***"12.*** *To attract the provisions of Section 364-A what is required to be proved is: (*1*) that the accused kidnapped or abducted the person; (*2*) kept him under detention after such kidnapping and abduction; and (*3*) that the kidnapping or abduction was for ransom....."*

To pay a ransom, as stated in the above referred Section, in the ordinary sense means to pay the price or demand for ransom. This would show that the demand has to be communicated.

17. We have already pointed out the evidence of PW-3 that he had received 8 or 9 calls from the accused persons demanding ransom for release of his son and the evidence of PW-7, an employee of a public telephone booth, also corroborates with the evidence of PW-3 who deposed that the calls were made on several occasions by the appellant from the telephone booth and on 2 or 3 occasions along with the child.

18. In *Vinod vs. State of Haryana, AIR 2008 SC 1142, while reiterating the principles enunciated in Malleshi* (supra), *this Court accepted the case of the prosecution and confirmed the conviction and sentence of life imprisonment imposed under Section 364A IPC.*

19. Though learned counsel for the appellant submitted that the case falls only under Section 363, namely, mere kidnapping and not under Section 364A i.e., Kidnapping for ransom, in the light of the acceptable evidence led in by the prosecution, relied on and accepted by the trial Court and the High Court, we reject the said contention.

20. Now, we have to see whether the sentence imposed by the trial Court and confirmed by the High Court is appropriate or not? We have already extracted Section 364A in the earlier paras which stipulates that if the prosecution establishes beyond doubt that the kidnapping was for ransom,

the sentence provided in this Section is death or imprisonment for life and also be liable to fine.

21. In *Mulla and Another vs. State of Uttar Pradesh (2010) 3 SCC 508, after considering various earlier decisions, this Court held as under:-*

> **"67.** It is settled legal position that the punishment must fit the crime. It is the duty of the court to impose proper punishment depending upon the degree of criminality and desirability to impose such punishment. As a measure of social necessity and also as a means of deterring other potential offenders, the sentence should be appropriate befitting the crime."

We fully endorse the above view once again.

22. It is relevant to point out that Section 364A had been introduced in the IPC by virtue of Amendment Act 42 of 1993. The statement of objects and reasons are as follows:-

> "Statement of Objects and Reasons.—*Kidnappings by terrorists for ransom, for creating panic amongst the people and for securing release of arrested associates and cadres have assumed serious dimensions. The existing provisions of law have proved to be inadequate as deterrence. The Law Commission in its 42nd Report has also recommended a specific provision to deal with this menace. It [was] necessary to amend the Indian Penal Code to provide for deterrent punishment to persons committing such acts and to make consequential amendments to the Code of Criminal Procedure, 1973."*

It is clear from the above the concern of Parliament in dealing with cases relating to kidnapping for ransom, a crime which called for a deterrent punishment, irrespective of the fact that kidnapping had not resulted in death of the victim. Considering the alarming rise in kidnapping young children for ransom, the

legislature in its wisdom provided for stringent sentence. Therefore, we are of the view that in those cases whoever kidnaps or abducts young children for ransom, no leniency be shown in awarding sentence, on the other hand, it must be dealt with in the harshest possible manner and an obligation rests on the courts as well. In the case on hand, we are satisfied that the High Court was right in maintaining the order of conviction and sentence of the appellant herein and we are satisfied that the impugned judgment of the High Court does not suffer from any infirmity to warrant interference.

23. Consequently, the appeal fails and is accordingly dismissed.

R.P. Appeal dismissed.

DATTU S/O NAMDEV THAKUR

v.

STATE OF MAHARASHTRA AND ORS.

(Special Leave Petition (C) 3314 of 2010)

DECEMBER 07, 2011

[ALTAMAS KABIR, SURINDER SINGH NIJJAR AND J. CHELAMESWAR, JJ.]

Social status certificate: Scheduled tribe certificate issued to petitioner-father and petitioners-son and daughter – Cancellation of, by the Caste Scrutiny Committee – High Court upheld the decision of Committee – On appeal, held: The decision of Caste Scrutiny Committee and High Court is not disturbed – However, whatever advantage the petitioners had derived on the basis of their 'Caste Certificates', may not be disturbed and the cancellation of their respective 'Caste Certificates' would not deprive them of the benefits which they have already enjoyed – However, none of the petitioners would be entitled to take any further advantage of reservation in future, either for studies or for employment – If the petitioners have obtained any concession by way of reduction in fees, as a reserved candidate, they would have to make good the same by paying the difference in fees that is being paid by general candidates – The results of the petitioners would be published.

The case of the petitioners was that the Caste Certificates granted to them on 7th June, 2001 by the competent authorities were invalidated by the Caste Scrutiny Committee mainly on the ground that they were unable to satisfy the Committee that they belonged to the 'Thakur' tribe recorded as a Scheduled Tribe at Serial no.44 of the Maharashtra Scheduled Tribes list and that the petitioners were also unable to prove by way of affinity test that they belonged to the Thakur Scheduled

Tribe. The petitioners filed the writ petitions challenging the cancellation of the 'Caste Certificates'. The High Court dismissed the writ petitions. The Special Leave Petitions were filed challenging the order of the High Court.

Dismissing the Special Leave Petitions, the Court

HELD: 1. The findings of the Caste Scrutiny Committee, as also that of the High Court is accepted. However, the fact is that reference was made to the Caste Scrutiny Committee in 2009, i.e. nine years after the certificates had been issued, and there is no proper explanation for such delay. The petitioner in the first writ petition was allowed by the respondents to continue in service and also by virtue of orders passed by the High Court. Similarly, the petitioners in the other two writ petitions have continued their studies after having obtained certain benefits from their 'Caste Certificates'. The petitioner in the second Special Leave Petition who is the son of the petitioner in the main Special Leave Petition, has in the meantime, appeared for the B.Pharmacy examination but his results have not been declared. Similarly, daughter of the petitioner in the main Special Leave Petition, who is the petitioner in the other Special Leave Petition, has appeared for the B.Ed.examination and her result is also to be declared. Whatever advantage the three petitioners in the three Special Leave Petitions, might have derived on the basis of their 'Caste Certificates', would not be disturbed and the cancellation of their respective 'Caste Certificates' would not deprive them of the benefits which they have already enjoyed. However, none of the three petitioners in the three respective Special Leave Petitions, would be entitled to take any further advantage of reservation in future, either for studies or for employment. However, if the petitioners in the 2nd and 3rd Special Leave Petition, have obtained any concession by way of reduction in fees, as a reserved candidate, they will have to make good

the same by paying the difference in fees that is being paid by general candidates. Such payment has to be made within a period of six months and in default of such payment, this order will cease to have any effect. The results of the 2nd and 3rd petitioners shall, therefore, be published in view of this judgment. [Para 9, 10] [479-F-H; 480-A-C]

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 3314 of 2010.

From the Judgment & Order dated 14.12.2009 of the Hgih Court of Judicature of Bombay Bench at Aurangabad in Writ Petition No. 7813 of 2009.

WITH

SLP (C) Nos. 3370 & 3365 of 2010.

Anandbhushan Kanade, Shashibhushan P. Adgaonkar, Anjani Kumar Jha for the Petitioner.

Shankar Chillarge, Adv., Asha Gopalan Nair, Irshad Ahmad for the Respondents.

The following Judgment of the Court was delivered

ALTAMAS KABIR, J. 1. Special Leave Petition(C)Nos. 3314, 3365 and 3370, all of 2010, which are on board today, all arise out of the judgment and final order dated 14th December, 2009, passed by the Aurangabad Bench of the Bombay High Court in Writ Petition Nos.7813 of 2009, 8048 of 2009 and 7289 of 2009.

2. The petitioner in SLP(C)No.3314 of 2010, is the father of the petitioners in the other two Special Leave Petitions, one being the son and the other being the daughter of the petitioner, Dattu Thakur, son of Namdev Thakur. In all these cases, the grievance is common since the 'Caste Certificates' granted to them on 7th June, 2001, by the competent authorities were invalidated by the Caste Scrutiny Committee by its orders dated 4th September, 2009 and 24th September, 2009.

3. The Caste Certificates issued to the petitioners were invalidated mainly on the ground that they were unable to satisfy the Caste Scrutiny Committee that they belong to the 'Thakur' tribe, which is recorded as a Scheduled Tribe at Serial No.44 of the Maharashtra Scheduled Tribes List. The Caste Scrutiny Committee also came to the finding that the School Leaving Certificate of the father of the petitioner in SLP(C)No.3314 of 2010, did not really support the case of the petitioners who, in any event, had also failed in the affinity test. It was submitted that the documents tendered by them did not conform to their claim. Furthermore, the petitioners were also unable to prove by way of affinity test that they belong to the Thakur Scheduled Tribe.

4. Cancellation of the 'Caste Certificates' issued to the petitioners on the basis of the report of the Caste Scrutiny Committee, was challenged by the petitioners in the aforesaid writ petitions, in which the High Court upheld the findings of the Caste Scrutiny Committee.

5. As indicated hereinabove, the Special Leave Petitions have been filed against the said order of the High Court.

6. Having heard learned counsel for the petitioner(s), as well as the State of Maharashtra, we are of the view that even if we are to accept the findings of the Caste Scrutiny Committee, as also that of the High Court, we cannot ignore the various circumstances that have intervened between the issuance of the 'Caste Certificates' and the cancellation thereof. In fact, reference was made to the Caste Scrutiny Committee in 2009, i.e. nine years after the certificates had been issued, and there is no proper explanation for such delay. On the other hand, the petitioner in the first writ petition has been allowed by the respondents to continue in service and also by virtue of orders passed by the High Court. Similarly, the petitioners in the other two writ petitions have continued their studies after having obtained certain benefits from their 'Caste Certificates'.

We are now informed by Mr. Kanade, learned senior advocate, appearing for the petitioner(s), that the petitioner in the second Special Leave Petition, Amol, who is the son of Dattu Thakur, who is the petitioner in the main Special Leave Petition, has in the meantime, appeared for the B.Pharmacy examination but his results have not been declared. Similarly, Pratibha, daughter of Dattu Thakur, who is the petitioner in the other Special Leave Petition, has appeared for the B.Ed.examination and her result is also to be declared.

7. In support of the case of the petitioner(s), an order passed by another Bench of this Court in C.A.No.7411 of 2010 (*Swati Vs. State of Maharashtra & Ors.*), on 6th September, 2010, was brought to our notice, wherein in similar circumstances, the Court while dismissing the civil appeal, directed that the benefits that had already been enjoyed by the candidate, and the degree obtained by her in the BDS course, which she had completed, would continue. The Court further directed that she would not be entitled to any further benefits under the 'Caste Certificates' issued to her and that whatever advantage she may have obtained by way of payment of fees at a reduced rate, were to be made up by her by paying the difference.

8. We are of the view that this being a case of a similar nature, the decision of the said Bench may also be applied to the facts of this case.

9. Accordingly, while dismissing all the three Special Leave Petitions, we direct that whatever advantage the three petitioners in the three Special Leave Petitions, may have derived on the basis of their 'Caste Certificates', shall not be disturbed and the cancellation of their respective 'Caste Certificates' will not deprive them of the benefits which they have already enjoyed. However, we also make it clear that none of the three petitioners in the three respective Special Leave Petitions, will be entitled to take any further advantage of

reservation in future, either for studies or for employment. Following the judgment in Swati's case, we also direct that if the petitioners in the 2nd and 3rd Special Leave Petition, have obtained any concession by way of reduction in fees, as a reserved candidate, they will have to make good the same by paying the difference in fees that is being paid by general candidates. Such payment has to be made within a period of six months and in default of such payment, this order will cease to have any effect.

10. The results of the 2nd and 3rd petitioners shall, therefore, be published in view of this judgment.

11. There will be no orders as to costs.

D.G. Special Leave Petitions dismissed.

M/S. NAGPUR GOLDEN TRANSPORT COMPANY (REGD.)

v.

M/S. NATH TRADERS & ORS.

(Civil Appeal No. 3546 of 2006)

DECEMBER, 07, 2011

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

CONSUMER PROTECTION ACT, 1986:

Restitution – Complaint against the carrier company for the goods damaged in transit – District forum holding the carrier company liable to the consignees for negligence – Held: If the amount determined by District Forum covered the price of damaged goods and the carrier had returned the said goods to the consigner and the latter having received the price of said consignment from the consignees, also retained the consignment or disposed it of but has not paid the realized amount to the carrier, the consigner would stand unjustly enriched – Matter remitted to District Forum to order the consigner to return the damaged goods or its value to the carrier – Unjust enrichment.

Respondent No.3 booked a consignment of monoblock pumps with the appellant for transportation from Coimbatore to respondents No.1 and 2 at Gwalior. The truck transporting the consignment met with an accident and the monoblock pumps were damaged. Respondents No.1 and 2, therefore, did not take delivery of 198 damaged monoblock pumps. The appellant returned the said articles to respondent No.3. Respondents No.1 and 2 filed a complaint before the District Consumer Disputes Redressal Forum, stating that they had paid the price of the consignment to respondent No.3 and were entitled to the same, along with damages.

The District Forum, held that the appellant as a common carrier was the insurer of the goods in transit and as the goods were damaged, the appellant was liable to respondents No.1 and 2 for negligence. It awarded a sum of Rs.3,60,131/- along with interest @ 18% per annum from 01.04.1997 till the date of payment. On appeal, the State Commission, maintained the award but reduced the interest to 12%, payable from the date of filing of the complaint (2.3.1998) till the date of payment. The revision filed by the appellant was dismissed by the National Commission.

Partly allowing the appeal, the Court

HELD: 1.1 If the amount directed by the District Forum to be paid by the appellant to respondents No.1 and 2 covered the price of the monoblock pumps and this price of the monoblock pumps had also been received by respondent No.3 from respondents No.1 and 2, the appellant was entitled to the return of the damaged 198 monoblock pumps from respondent No.3, and in case the latter has disposed of the articles in the meanwhile, the appellant was entitled to the value thereof realized by respondent No.3; otherwise, respondent No.3 would stand unjustly enriched. [Para 8] [486-B-D]

Fibrosa Spolka Akcyjna v. *Fairbairn Lawson Combe Barbour Ltd.* **(1942) 2 ALL ER 122 (HL) – referred to**

1.2 Respondent No.3 was not entitled to any charges towards watch and ward etc. as it should not have retained the damaged monoblock pumps having received the full price thereof. [para 8] [486-G]

1.3 The matter is, therefore, remanded to the District Forum, with the direction to issue notice to the parties and after taking evidence, if necessary, order the return of the 198 damaged monoblock pumps by respondent No.3 to

the appellant and if the said goods are not available with respondent No.3, to find out its value and direct respondent No.3 to pay the same to the appellant. [Para 9] [486-H; 487-A-B]

Case Law Reference:

(1942) 2 ALL ER 122 (HL) referred to Para 8

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3546 of 2006.

From the Judgment and Order dated 18.02.2003 of the National Consumer Disputes Redressal Commission, New Delhi in Revision Petition No. 371 of 2000 and 10.4.2003 in Misc. Petition No. 98 of 2003.

Sudarsh Menon for the Appellant.

Dharam Bir Raj Vohra, P.K. Bajaj, Brahm Singh and Prem Sunder Jha for the Respondent.

The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. This is an appeal by way of special leave under Article 136 of the Constitution against the order dated 18.02.2003 of the National Consumers Disputes Redressal Commission in Revision Petition No.371 of 2000.

2. The facts very briefly are that the respondent No.3 booked a consignment of monoblock pumps with the appellant for transportation from Coimbatore to respondents No.1 and 2 at Gwalior in March, 1997. While the appellant was transporting the consignment in a truck, there was an accident and the monoblock pumps were damaged. The respondents No.1 and 2, therefore, did not take delivery of the 198 damaged monoblock pumps at Gwalior. In the circumstances, the appellant returned the 198 damaged monoblock pumps to the respondent No.3.

3. The respondents No.1 and 2 then filed Complaint No.101 of 1998 before the Consumer Disputes Redressal Forum, Gwalior, and their case in the complaint was that they had paid the price of the consignment to respondent No.3 and were entitled to Rs.3,61,131/- towards the price of the monoblock pumps and damages of Rs.70,000/-, loss of profit Rs.14,000/- as well as cost of Rs.5,000/- and interest @ 18% per annum on the amount claimed by them. The appellant resisted the claim contending that the claim was not maintainable under the Consumer Protection Act, 1986 (for short 'the Act'). The District Consumer Disputes Redressal Forum, in its order dated 27.01.1999, held that the appellant as a common carrier was the insurer of the goods in transit and if the goods have been damaged, the appellant was liable to respondents No.1 and 2 for negligence. The District Consumer Disputes Forum, therefore, awarded a sum of Rs.3,60,131/- along with interest @ 18% per annum from 01.04.1997 till the date of payment and Rs.500/- as counsel fee and further sum of Rs.500/- as cost of the case.

4. Aggrieved, the appellant filed appeal No.202 of 1999 before the Madhya Pradesh State Consumer Disputes Redressal Commission, Bhopal, and the State Consumer Disputes Redressal Commission in its order dated 07.10.1999 held that there was no legal infirmity in the order of the District Consumer Disputes Redressal Forum, Gwalior, awarding the sum of Rs.3,60,131/- but took the view that levy of interest @ 18% per annum was penal and instead directed the appellant to pay interest @ 12% per annum on the amount of Rs.3,60,131/- from the date of filing of the complaint (02.03.1998) till the date of payment. The appellant filed a revision but by the impugned order dated 18.02.2003 the National Consumer Disputes Redressal Commission dismissed the revision.

5. On 10.07.2003, this Court took note of the fact that the amount awarded in favour of the respondents No.1 and 2 by

the District Consumer Disputes Redresal Forum had been deposited and the counsel for the appellant had no objection to the amount to be paid to respondents No.1 and 2. This Court in its order dated 10.07.2003 issued notice limited to the question of law raised before the Court. In the order dated 10.07.2003, however, this Court appears to have recorded a different question of law and hence the appellant has filed an application I.A. No.2 of 2003 for clarification of the aforesaid order dated 10.07.2003. On reading the application I.A. No.2 of 2003, we find that the question of law raised was whether the appellant was entitled to receive 198 monoblock pumps from respondent No.3 when he is held to be liable to pay the price of the monoblock pumps to respondents No.1 and 2. We, accordingly, correct the order dated 10.07.2003 as prayed by the appellant in the application for clarification in I.A. No.2 of 2003.

6. At the hearing of the appeal, learned counsel for the appellant submitted that the District Consumer Disputes Redressal Forum should have directed the respondent No.3 to return the 198 monoblock pumps to the appellant when the appellant has been held liable for the price of the monoblock pumps to the respondents No.1 and 2, who had paid for the same to respondent No.3. He submitted that the appellant cannot be held liable to pay the price of the monoblock pumps to respondents No.1 and 2 and at the same time not entitled to the return of the 198 monoblock pumps from respondent No.3.

7. Learned counsel for respondent No.3 relied on the counter affidavit filed on behalf of the respondent No.3 in this Court in which it is stated that the 198 damaged monoblock pumps had no value and the same have been kept in the godown of the respondent No.3 under the watch and ward of extra staff engaged by the respondent No.3 and that due to delay the monoblock pumps have become useless and have no value at all.

8. We have considered the submissions of learned counsel for the appellant and the respondent No.3 and we are of the considered opinion that if the District Consumer Disputes Redressal Forum directed the appellant to pay Rs.3,60,131/- to respondents No.1 and 2 and this sum of Rs. Rs.3,60,131/- covered the price of the monoblock pumps and this price of the monoblock pumps had also received by respondent No.3 from the respondents No.1 and 2, the appellant was entitled to the return of the damaged 198 monoblock pumps from respondent No.1. We are also of the view that in case the respondent No.3 has disposed of the 198 monoblock pumps in the meanwhile, the appellant was entitled to the value of the 198 damaged monoblock pumps realized by the respondent No.3. If the damaged monoblock pumps are not returned by respondent No.3 to the appellant or if the value of the damaged monoblock pumps realized by respondent No.3 are not paid to the appellant, respondent No.3 would stand unjustly enriched. To quote Lord Wright in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* [(1942) 2 ALL ER 122 (HL)]:

> "……Any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."

We are also of the considered opinion that the respondent No.3 was not entitled to any charges towards watch and ward etc. as respondent No.3 should not have retained the damaged monoblock pumps having received the full price of the pumps.

9. We, therefore, remand the matter to the District Consumer Disputes Redressal Forum, Gwalior, with the direction to issue notice to the parties and after taking evidence,

if necessary, order the return of the 198 damaged monoblock pumps by respondent No.3 to the appellant and if the 198 damaged monoblock pumps are not available with respondent No.3, to find out the value of the 198 damaged monoblock pumps realized by the respondent No.3 and direct the respondent No.3 to pay the said value to the appellant. The appeal is allowed to the extent indicated above. No costs.

R.P. Appeal partly allowed.

UNIVERSITY OF KERALA

v.

COUNCIL, PRINCIPALS',COLLEGES,KERALA & ORS.

(I.A. Nos. 22, 23 & 24 IN Civil appeal No(s). 887 of 2009)

DECEMBER 08, 2011

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

Election laws – Election to students' bodies – Judicial intervention – Election in Jawaharlal Nehru University (JNU) – Complaints that elections not taking place in accordance with Lyngdoh Committee recommendations accepted by Supreme Court – Issuance of notice of contempt to the Vice Chancellor and the Registrar of the Jawaharlal Nehru University by Supreme Court – JNU elections to students' bodies scheduled to be held, stayed as they were not being held in accordance with the Lyngdoh Committee recommendations – Interlocutory applications by JNU Students' Union – Held: As regards the time period of holding elections, no variation in Lyngdoh Committee recommendation is called for – Suggestion that for research students, the maximum age limit which can be fixed for them to legitimately contest the election could be enhanced to 30 years, is accepted – Since in JNU, for research students no attendance is taken, the stipulation given in the Lyngdoh Committee recommendation about 75% attendance is not applicable to election by research students of JNU – As regards the repeat criteria and in cases of criminal record of candidates, the elections to be held in accordance with the Lyngdoh Committee recommendations – Suggestions that photostat copies of pamphlets and manifestos may be permitted within the limit of Rs. 5000/- as recommended by the Lyngdoh Committee, is accepted – No change is called for in the grievance mechanism – Thus, since the

recommendations of the Lyngdoh Committee are very salutary in nature, no major changes allowed except those which are absolutely necessary – Interlocutory applications disposed of with the aforesaid directions.

Union of India Vs. Association of Democratic Reforms & Anr. **(2002) 5 SCC 294 – referred to.**

Case Law Reference:

(2002) 5 SCC 294 Referred to. Para 15

CIVIL APPELLATE JURISDICTION : I.A. Nos. 22, 23 & 24.

IN

Civil Appeal No. 887 of 2009.

Gopal Subramanium, A. Mariarputham, Gen. V.G. Pragasam, S.J. Aristotle, Praburamasubramaniam, K. Nobin Singh, S.B. Meitei, Amitesh Kumar, Ravi Kant, Gopal Singh, Priti Kumari, A. Subhashini, Aruna Mathur, Yusuf Khan (for Arputham Aruna & Co.), G.N. Reddy, C. Kannan, Ravi Shankar, Anil K. Jha, Chhya Kumari, M.L. Lahoty, Paban K. Sharma, Sukumar Agarwal, B. Burali, Himanshu Shekhar, K.N. Madhusoodhanan, R. Sathish, Sanjay Parekh, Mamta Saxena, A.N. Singh, Pranav Raina, E.M.S. Anam, K.R. Sasiprabhu, H.K. Puri, Priya Puri, A.C. Dhanda, S.K. Puri, Shail Kumar Dwivedi, Lakshmi Raman Singh, D. Bharathi Reddy, Shivaji M. Jadhav, Himinder Lal, T. Anamika, Radha Shyam Jena, Himanshu Shekhar, T. Mahipal, P.V. Dinesh, Ansar Ahmad Chaudhary, T.V. George, R.C. Kohli, Liz Mathew, Sana A.R. Khan, Shrish Kr. Misra and Ajay Kr. Singh for the appearing parties.

The following Order of the Court was delivered by

ORDER

Heard Mr. Gopal Subramanium, learned amicus curiae, Mr. Sanjay Parikh, learned counsel appearing for the Jawaharlal

Nehru University Students' Union, Mr. A.C. Dhanda, learned counsel for Jawaharlal Nehru University (JNU) authorities and also Mr. M.L. Lahoty, learned counsel appearing for the Youth for Equality Students.

The instant matter comes up before us by way of Interlocutory Applications No. 22-23 and 24 filed by the JNU Students' Union and the learned Amicus Curiae respectively.

It appears that by way of judicial intervention, this Court wanted to introduce fairness and transparency in the holding of elections to the Students' Unions in various Universities across the country. The main thrust behind such intervention is because of the fact that the general election scenario in this country is murky and suffering from mob-muscle methods which have deleterious effects on various elections including conduct of free and fair elections to the students' unions. Elections to students' bodies has been badly affected throughout the country. It goes without saying that the students are the future representatives in various democratic bodies like State Legislative Assemblies as well as Parliament in our democratic set up. This Court, therefore, thought that a value based mechanism should be inculcated at a very early stage in the elections of students' bodies so that the same ultimately transforms and improves the quality of general elections to strengthen the democratic governance of the country. This Court, therefore, on the basis of important public law principles, intervened in the judgment rendered by Kerala High Court where the main controversy in a students' body election was whether the form of elections should be Parliamentary or Presidential.

By an order dated 12th December, 2005, a Division Bench of this Court took note of certain valid suggestions given by Mr. Gopal Subramanium, the then Additional Solicitor General (presently appearing as amicus curiae before us) in order to ensure free and fair elections to the students' bodies across the country. The learned amicus suggested that there

are three areas of serious concern which need immediate attention of this Court. They are:

(a) Criminalization in Students' Union elections.

(b) Financial transparency and limits of expenditure.

(c) Criterion for being eligible to contest elections.

This Court, after hearing Mr. Gopal Subramanium, the then Additional Solicitor General and the counsel for Principals of the Colleges and the students' bodies, found that the suggestions given by learned amicus are prima facie worth considering and therefore, appointed a Committee consisting of the following persons:

1. Mr. J.S. Lyngdoh, Retd. Chief Election Commissioner
2. Dr. Zoya Hasan
3. Professor Pratap Bhanu Mehta
4. Dr. Dayanand Dongaonkar (Secretary General of the Association of Indian Universities)

The said order dated 12th December, 2005 also directs nomination of two other members by the Ministry of Human Resources and Development and one of the members should preferably be a Chartered Accountant to consider the financial angles of such elections.

Pursuant to the aforesaid order of this Court, a Committee was constituted by the Central Government and the said Committee ultimately consisted of the following persons:

Shri J.M. Lyngdoh Chairman
Former Chief Election Commissioner — Chairman

Prof. Zoya Hasan Member Professor
Centre for Political Studies — Member

Dr. Pratap Bhanu Mehta Member
President & Chief Executive Centre for
Policy Research New Delhi — Member

Prof. Ved Prakash Member Director
National Institute of Educational Planning
and Administration (NIEPA) New Delhi — Member

Shri I.P. Singh Member Retired Deputy
Comptroller and Auditor General — Member

Prof. Dayanand Dongaonkar Convener
Secretary General Association of Indian
Universities New Delhi — Convener

The aforesaid Committee upon a very seirous exercise gave detailed recommendations. This Court vide its order dated 22nd September, 2006 accepted those recommendations and directed that those recommendations should thereafter be followed scrupulously in holding elections to the students' bodies in all Universities across the country.

We are happy to note that after those recommendations are given, the standard of fairness in the matter of holding elections to students' bodies across the country has substantially improved.

Afterwards, notice of this Court was drawn to certain complaints to the effect that elections were taking place not in accordance with those recommendations. This Court vide an order dated 24th October, 2008, issued notice of contempt to the Vice Chancellor and the Registrar of the Jawaharlal Nehru University and also stayed the JNU elections which were scheduled to be held on 3rd November, 2008 as they are not being held in accordance with the Lyngdoh Committee recommendations which were accepted by this Court.

Pursuant to such notice of contempt, the University authorities appeared before this Court and made it clear that

the elections in JNU are held under the Jawaharlal Nehru University Act and the student bodies are holding such elections as autonomous bodies and the JNU authorities do not have much control in those matters.

Since the elections to the student bodies of JNU were stayed pursuant to the aforesaid order of this Court dated 24th October, 2008, interlocutory applications were filed by the student bodies seeking leave of this Court for the holding of elections in accordance with the Lyngdoh Committee recommendations and if necessary by seeking certain suitable modifications to the existing norms so that elections are held in a manner which is substantially in tune with the recommendations of the Lyngdoh Committee.

It may also be noticed that prayers were also made for vacation of the order of the stay issued by this Court on 24th October, 2008.

We have heard learned counsel for the parties and the amicus in connection with the aforesaid prayers and after hearing parties, we pass the following order.

This Court is confronted with two competing claimsof public interest: On the one hand, the Court has to ensure purity in the election process and on the other hand, is the right to exercise the vitally important liberty of the students to choose their representative through election. This Court has held that this right to choose one's representative through an election is virtually an extension of one's fundamental right to freedom of expression (*See Union of India Vs. Association of Democratic Reforms & Anr.* (2002) 5 SCC 294). Thus, it partakes of the character of a fundamental right.

We thought that such a right cannot be possibly stifled by a Court order. Thus, we are trying to strike a balance and in doing so, we have followed the concept of reasonable restrictions, which is a part of our Constitutional doctrine.

We have been told by the learned counsel appearing for the University that JNU is primarily a research oriented University. There are some students in the language courses but JNU is basically a post-graduate University. JNU being primarily a research oriented university, it has certain unique and distinct features of its own.

We have heard learned Amicus Curiae on the areas of relaxation which have been sought by the students' union and also considered the suggestions given by learned amicus.

One of the issues is for the time period of holding of elections. After considering the suggestions given by the learned amicus and learned counsel for the parties, we do not think that any variation in Lyngdoh Committee recommendation in that aspect is called for.

The next suggestion is coming up on the question of age restriction of candidates. After considering the suggestions given by learned amicus and also after hearing learned counsel appearing for the students' bodies, we accept the suggestion given by learned amicus that for research students, the maximum age limit which can be fixed for them to legitimately contest the election could be enhanced to 30 years.

Insofar as attendance criteria is concerned, we have been told by the learned counsel appearing for the University authorities that in JNU, for research students no attendance is taken. Therefore, the stipulation given in the Lyngdoh Committee recommendation about 75% attendance is not applicableinsofar as election by research students of JNU is concerned.

So far as the repeat criteria is concerned, we do not think that any change is required. We reiterate that the elections should be held in accordance with the Lyngdoh Committee recommendations. Similarly, in cases of criminal record of candidates, the recommendation of Lyngdoh Committee should

be followed.

Insofar as the use of printed material and pamphlets is concerned, we accept the suggestions given by the learned amicus that photostat copies of pamphlets and manifestos may be permitted within the limit of Rs. 5000/- as recommended by the Lyngdoh Committee.

Insofar as grievance mechanism is concerned, we think no change is called for.

Since we are of the view that the recommendations of the Lyngdoh Committee are very salutary in nature, we have not allowed any major changes except those which are absolutely necessary.

We hope that elections may be satisfactorily held in view of the relaxations permitted by this order.

With the above directions, the interlocutory applications stand disposed of.

Before parting with the matter, this Court records its profound appreciation for the very competent assistance rendered by the learned amicus in resolving these issues, which are of vital importance.

N.J. Interlocutory applications disposed of.

M/S. DISHA CONSTRUCTIONS AND ORS.

v.

STATE OF GOA AND ANR.

(Civil Appeal No. 10763 of 2011)

DECEMBER 9, 2011

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

Limitation Act, 1963: s.15(2) – Period of limitation under – Computation of – Notice u/s.80, CPC given before expiry of limitation – Held: In computing the period of limitation, the period of notice would be mandatorily excluded since the notice was given within the limitation period – Code of Civil Procedure, 1908 – s.80.

The appellants-plaintiffs entered into an agreement with respondent no.1 for construction of a school. On competition of work on 30th September, 2006, defendant no.2 issued a certificate of completion dated 3rd October, 2006. According to the appellant, the entire payment due to the appellant was alleged to have not been made and the balance amount remained unpaid from 30th September, 2006. A recovery suit was filed on 24th October, 2009. The trial court dismissed the suit holding that the plaint could not be registered as it was barred by limitation as also in view of the fact that there was no compliance with Section 80, CPC. On appeal, the High Court held that the suit was barred by limitation but held that notice was duly served on respondent no.1 on 27th February, 2009 and two months from date of receipt expired on 27th April, 2009. It held that the period of limitation expired on 30th September, 2009, and, therefore, the suit which was filed on 24th October, 2009 was barred by limitation. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1.1. In the facts and circumstances of this case, the notice under Section 80 was admittedly given on 19th February, 2009 which was within the period of limitation and the same was received on 27th February, 2009 and two months from the date of receipt expired on 27th April, 2009. The High Court has held, erroneously, that since the suit was filed on 24th October, 2009, which was beyond 30th September, 2009, the plaintiffs/ appellants were not entitled to the benefit of exclusion statutorily provided under Section 15(2) of the Limitation Act, 1963 and the suit is barred by limitation. The said interpretation of the High Court was erroneous in view of the fact that if the notice under Section 80 had been given, say, on 29th September, 2009, in that case the appellants according to High Court's interpretation, would have been given the benefit of exclusion of time after 30th September, 2009. Just because the appellants gave the notice before the expiry of the period of limitation, the benefit which is given under Section 15(2) of the Act cannot be taken away. The said period of two months must be computed and benefit of exclusion of the said two months must be given to the appellants even if they had given the said notice within the period of limitation. If the appellants had given the notice after the expiry of period of limitation, say, after 30th September, 2009, then possibly they could not have been given the benefit. [Paras 12-14] [502-D-H; 503-A]

Union of India & Ors. v. West Coast Paper Mills Ltd. & Anr. **(2004)3 SCC 458: 2004 (2) SCR 642 – relied on.**

1.2. Under Section 2(j) of the Act, the "period of limitation" means the period prescribed for any suit, or other proceeding by the Schedule and the "prescribed period" means the period of limitation computed in accordance with the provisions of the Act. Following the

said principles, the erroneous interpretation which has been given by the High Court will have the effect of denying the appellants the benefit of Section 15(2) which is not permissible in the eye of law. Proper interpretation of Section 15(2) of the Act would be that in computing the period of limitation, the period of notice, provided notice is given within the limitation period, would be mandatorily excluded. That would mean a suit, for which period of limitation is three years, would be within limitation even if it is filed within two months after three years, provided notice has been given within the limitation period. In such a case, the period of notice cannot be counted concurrently with the period of limitation. If it is done, then period of notice is not excluded. Any other interpretation would be contrary to the express mandate of Section 15(2) of the Act. [Paras 15, 16] [503-D-H; 504-A]

3. The order of the High Court is set aside and the suit is held to be within the period of limitation. Since, on the question of notice, the finding of the trial Court was overruled by the High Court and the High Court held that the notice was served on defendant No. 1 and against such finding there was no cross objection, the notice in this case was served. [Para 17] [504-B]

Case Law Reference:

2004 (2) SCR 642	**relied on**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10763 of 2011.

From the Judgment and Order dated 17.09.2010 of the High Court of Bombay at Panaji in FA No. 13 of 2010.

Arun R. Padnekar and V.N. Raghupathy for the Appellants.

Siddharth Bhatnagar, Pawan Kr. Bansal and T. Mahipal for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Heard learned counsel for the parties.

2. Leave granted.

3. A suit was filed by the appellants praying for payment of money which according to the appellants was due to them for undertaking the construction work on behalf of the defendants. The suit was dismissed by a judgment and order dated 12th November, 2009 by the District Judge, North Goa, Panaji, inter alia, holding that the plaint cannot be registered as it was barred by limitation as also in view of the fact that there was no compliance with Section 80 of the Civil Procedure Code insofar as notice on defendant No. 2 is concerned.

4. On an appeal before the High Court, the High Court was pleased to hold that the suit is barred by limitation but on the question of notice, the High Court came to a different finding and came to the conclusion that notice was served. The material facts of the case are as follows:

5. The appellants-plaintiffs entered into an agreement with respondent No. 1 for construction of a school auditorium for Fr. Agnelo High School under M.P. L.A.D. scheme. On completion of the work on 30th September, 2006 defendant No. 2 issued a certificate of completion dated 3rd October, 2006. Out of the total amount of Rs.24,26,000/- the appellants plaintiffs were paid only Rs.18,12,000/- and therefore, there was a balance amount to be paid. The appellants plaintiffs prayed for the payment of the balance amount but it was denied and the same remained unpaid from 30th September, 2006 and a suit was filed on 24th October, 2009 for recovery of a sum of Rs.9,15,550/- with interest at 18%.

6. The first question, which was examined by the High Court, was whether notice under Section 80, CPC was required to be given to defendant No. 2? The High Court came to the

conclusion that such notice was necessary. The High Court observed as follows:

> "Since the suit was filed by the plaintiffs against defendant No. 2 in his official capacity, in my opinion, the defendant No. 2 was certainly required to be given a notice, as required under Section 80 of the Civil Procedure Code and in absence of the same, the suit filed against him had to be necessarily considered as bad in law for want of notice. However, that cannot be said to be fatal to the entire case of the plaintiff because the plaintiff's suit was essentially for recovery of money and as could be seen from the prayer clause (a) it was filed against defendant No.1. A similar view was held by the Apex Court in *Ram Kumar Vs. State of Rajasthan*, AIR 2008 (10) SCC 73."

7. It is a common ground that High Court correctly noted the relevant facts, which are as under:

> "...according to the plaintiff, the cause of action had arisen, as pleaded by the plaintiff, on 30/09/2006 and being so, the suit against defendant No. 1 had to be filed before 30/9/2009 that is to say before the expiry of three years, that being the period prescribed, for filing a suit for recovery of money. There is no dispute that the suit was in fact filed on 24/10/2009. There is also no dispute that the plaintiff had sent notice to defendant No. 1 on 19/02/2009 which was received by defendant No. 1 on 27/02/2009. If two months are computed from 27/02/2009, the plaitiffs were required to file the suit on 27/04/2009."

8. Upon setting out the aforesaid fact, the High Court has noted that the notice under Section 80 was served on Defendant No. 1 on 27th February, 2009 and the period of two months had expired on 27th April, 2009. According to the High Court, the period of limitation expired on 30th September, 2009 and therefore, the suit which was filed on 24th October, 2009, was barred by limitation.

9. Assailing the aforesaid finding, learned counsel for the appellants has drawn our notice to the provision of Section 15(2) of the Limitation Act which is contained under Part III of the Limitation Act, 1963 (hereinafter referred to as 'the Act'). Part III is under the heading "Computation of period of limitation" and Section 15 deals with "Exclusion of time in certain other cases". Sections 12, 13 and 14 also deal with exclusion of time in different situations such as "Exclusion of time in legal proceedings", "Exclusion of time in cases where leave to sue or appeal as a pauper is applied for" and "Exclusion of time of proceeding bona fide in Court without jurisdiction" respectively.

10. Section 15(2) which is relevant for our consideration deals with exclusion of time which is required to be given for a notice and there is also an explanation which is appended to Section 15. The said Section 15(2) reads as follows:

> 15. Exclusion of time in certain other cases.—
>
> (1) ...
>
> (2) In computign the period of limitation for any suit of which notice has been given, or for which the previous consent or sanction of the Government or any other authority is required, in accordance with the requirements of any law for the time being in force, the period of such notice or, as the case may be, the time required for obtaining such consent or sanction shall be excluded.
>
> *Explanation.*—In excluding the time required for obtaining the consent or sanction of the Government or any other authority, the date on which the application was made for obtaining the consent or sanction and the date of receipt of the order of the Government or other authority shall both be counted.

11. It may be noted that the present Section 15(2) is a little

more comprehensive than the previous Section 15(2) of the Limitation Act, 1908 which reads as follows:

> 15.Exclusion of time during which proceedings are suspended.-
>
> (1) ...
>
> (2) In computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of such notice shall be excluded.

12. We are of the view that in the facts and circumstances of this case, the notice under Section 80 was admittedly given on 19th February, 2009 which is within the period of limitation and the same was received on 27th February, 2009 and two months from the date of receipt expired on 27th April, 2009.

13. The High Court has held, in our view erroneously, that since the suit was filed on 24th October, 2009, which is beyond 30th September, 2009, the plaintiffs appellants are not entitled to the benefit of exclusion statutorily provided under Section 15(2) of the Act and the suit is barred by limitation.

14. The said interpretation of the High Court is erroneous in view of the fact that if the notice under Section 80 had been given, say, on 29th September, 2009, in that case the appellants according to High Court's interpretation, would have been given the benefit of exclusion of time after 30th September, 2009. Just because the appellants gave the notice before the expiry of the period of limitation, the benefit which is given under Section 15(2) of the Act cannot be taken away. We are of the view that the said period of two months must be computed and benefit of exclusion of the said two months must be given to the appellants even if they had given the said notice within the period of limitation. If the appellants had given the notice after the expiry of period of limitation, say, after 30th

September, 2009, then possibly they could not have been given the benefit. In this connection, we may refer to the decision of this Court in *Union of India & Ors. Vs. West Coast Paper Mills Ltd. & Anr.* (2004) 3 SCC 458, where in a somewhat similar situation, this Court has held as follows:

> "Any circumstance, legal or factual, which inhibits entertainment or consideration by the Court of the dispute on the merits comes within the scope of the Section and a liberal touch must inform the interpretation of the Limitation Act which deprives the remedy of one who has a right".

15. We are in respectful agreement with the aforesaid principles laid down by this Court though in the context of considering Section 14 of the Limitation Act. We are of the view that the same principles should be applied while considering the provision of Section 15(2) of the Limitation Act. The statutory provision in this connection is very clear and in the definition clause also it has been made clear in Section 2(j) of the Act. Under Section 2(j) of the Act, the "period of limitation" means the period prescribed for any suit, or other proceeding by the Schedule and the "prescribed period" means the period of limitation computed in accordance with the provisions of the Act. If we follow the aforesaid principles, as we must, we find that the erroneous interpretation which has been given by the High Court will have the effect of denying the appellants the benefit of Section 15(2) which is not permissible in the eye of law.

16. In our view, proper interpretation of Section 15(2) of the Act would be that in computing the period of limitation, the period of notice, provided notice is given within the limitation period, would be mandatorily excluded. That would mean a suit, for which period of limitation is three years, would be within limitation even if it is filed within two months after three years, provided notice has been given within the limitation period. In such a case, the period of notice cannot be counted

concurrently with the period of limitation. If it is done, then period of notice is not excluded. Any other interpretation would be contrary to the express mandate of Section 15(2) of the Act.

17. We, therefore, set aside the order of the High Court and we hold that the suit is within the period of limitation. Since, on the question of notice, the finding of the trial Court has been overruled by the High Court and the High Court has held that the notice has been served on defendant No. 1 and against such finding there is no cross objection, we are of the view that the notice in this case has been served.

18. Therefore, we direct that the suit may be heard out now on merits by the trial Court as early as possible. We, however, do not make any observation on the merits of the controversy between the parties.

19. The appeal is accordingly allowed. No costs.

D.G. Appeal allowed.

CHIEF INFORMATION COMMR. AND ANOTHER
v
STATE OF MANIPUR AND ANOTHER
(Civil Appeal Nos.10787-10788 of 2011)

DECEMBER 12, 2011

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

RIGHT TO INFORMATION ACT, 2005:

ss. 7, 18(1) and 19(1) – No response to application seeking information u/s 6 – Remedy – Applicant filing complaint u/s 18 – Chief Information Commissioner directing the State Information Officer to furnish the required information – Held: The applicant after having applied for information u/s 6 and then not having received any reply thereto, it must be deemed that he has been refused the information – The situation is covered by s. 7 and the remedy is provided by way appeal u/s 19 – Applicant directed to file appeals u/s 19 in respect of the requests made in his applications – Appeal – Interpretation of Statutes - Limitation.

ss. 18 and 19 – Scope of and difference between the two procedures – Explained.

s. 24(4) – Act not to apply to certain organizations – Notification dated 15.10.2005,issued by State Government notifying the exemption of certain Government organizations from the purview of the Act – Held: s. 24 does not have any retrospective operation – Therefore, no notification issued in exercise of the power u/s 24 can be given retrospective effect – Even otherwise, the exemption does not cover allegations of corruption and human right violations – Government of Manipur Notification dated 15.10.2005 – Retrospective operation.

***Object of the Act** – Held: The Act has been enacted to promote transparency and accountability in the working of every public authority in order to strengthen the core constitutional values of a democratic republic and to curb corruption – The Act is meant to harmonise the conflicting interests of Government to preserve the confidentiality of sensitive information with the right of citizens to know the functioning of the governmental process in such a way as to preserve the paramountcy of the democratic ideal – The Act is based on the concept of an open society – Declaration of European Convention for the Protection of Human Rights (1950); and Universal Declaration of 1948.*

CONSTITUTION OF INDIA, 1950:

Article 19 (1) (a)—Right to information – Held: Right to information which is basically founded on the right to know, is an intrinsic part of the fundamental right to free speech and expression guaranteed under Article 19 (1) (a) — Right to information is definitely a fundamental right of free speech — Right to Information Act, 2005.

INTERPRETATION OF STATUTES;

Harmonious construction – HELD: No statute should be interpreted in such a manner as to render a part of it redundant or surplusage – When a procedure is laid down statutorily and there is no challenge to the said statutory procedure the court should not, in the name of interpretation, lay down a procedure which is contrary to the express statutory provision – Thus, a construction which leads to redundancy of a portion of the statute cannot be accepted in the absence of compelling reasons.

Appellant no. 2 filed two applications dated 9.2.2007 and 19.5.2007 u/s 6 of the Right to Information Act, 2005 seeking information regarding magisterial inquiries

initiated by the State Government during certain periods. As there was no response by the State Public Information Officer, the appellant filed two complaints u/s 18 of the Act. The State Chief Information Commissioner, by orders dated 3.5.2009 and 14.8.2007, directed respondent No.2 to furnish the required information within 15 days of the respective orders. The State challenged both the orders by filing writ petitions, which were dismissed by the Single Judge of the High Court, inter-alia, upholding the orders of the Chief Information Commissioner. However, in the writ appeals, the Division Bench of the High Court held that the Chief Information Commissioner acted beyond his jurisdiction, as u/s 18 of the Act, he was not empowered to pass a direction to the State Public Information Officer for furnishing the information sought for by the complainant, and such a power was conferred u/s 19(8) of the Act on the basis of an exercise u/s 19 only. Aggrieved, the Chief Information Commissioner filed the appeals.

Disposing of the appeals, the Court

HELD: 1.1 The powers u/s 18 of the Right to Information Act, 2005 have been categorized under clauses (a) to (f) of s.18(1) whereunder the Central Information Commission or the State Information Commission, as the case may be, may receive and inquire into the complaint of any person who has been refused access to any information requested under the Act [s.18(1)(b)], or has been given incomplete, misleading or false information [s.18(1)(e)], or has not been given a response to a request for information or access to information within time limits specified under the Act [s.18(1)(c)]. [Para 29] [521-B-D]

1.2 In the facts of the instant case, the appellant after having applied for information u/s 6 and then not having received any reply thereto, it must be deemed that he has

been refused the information. The said situation is covered by s.7 of the Act and the remedy to such a person who has been refused the information is provided by way of appeal u/s 19 of the Act. A second appeal is also provided under sub-s.(3) of s.19. [Para 32-33] [522-C-D-H]

1.3 The procedures contemplated u/s 18 and s.19 of the Act are substantially different. The nature of the power u/s 18 is supervisory in character whereas the procedure u/s 19 is an appellate procedure and a person who is aggrieved by refusal in receiving the information which he has sought for can only seek redress in the manner provided in the statute, namely, by following the procedure u/s 19. [Para 35] [524-E]

Deep Chand v. State of Rajasthan **AIR 1961 SC 1527;** State *of U.P. v. Singhara Singh* **AIR 1964 SC 358 – relied on.**

Taylor v. Taylor **(1876) 1 Ch. D. 426;** *Nazir Ahmad v. Emperor* **AIR 1936 PC 253(1) – referred to.**

1.4 This Court is, therefore, of the opinion that s.7 read with s.19 provides a complete statutory mechanism to a person who is aggrieved by refusal to receive information. Such person has to get the information by following the statutory provisions. Any other construction would render the provision of s.19(8) of the Act totally redundant. It is one of the well known canons of interpretation that no statute should be interpreted in such a manner as to render a part of it redundant or surplusage. It is well known when a procedure is laid down statutorily and there is no challenge to the said statutory procedure the court should not, in the name of interpretation, lay down a procedure which is contrary to the express statutory provision.Thus, a construction which leads to redundancy of a portion of the statute

cannot be accepted in the absence of compelling reasons. [Para 35 & 41] [524-G-H-A; 526-F]

Aswini Kumar Ghose and another v. Arabinda Bose and another **AIR 1952 SC 369;** *Rao Shiv Bahadur Singh and another v. State of U.P.* **1953 SCR 1 = AIR 1953 SC 394; and** *J.K. Cotton Spinning & Weaving Mills Co. Ltd. v. State of Uttar Pradesh and others* **AIR 1961 SC 1170 – relied on.**

1.5 Besides, the procedure u/s 19 of the Act, when compared to s. 18, has several safeguards for protecting the interest of the person who has been refused the information he has sought, and out of the two procedures, the one u/s 19 is more beneficial to a person who has been denied access to information. [Para 42] [526-G; 527-A]

1.6 Further, the procedure u/s 19 is an appellate procedure. A right of appeal is a creature of statute and is a right of entering a superior forum for invoking its aid and interposition to correct the errors of the inferior forum. It is a very valuable right. Therefore, when the statute confers such a right of appeal that must be exercised by a person who is aggrieved by reason of refusal to be furnished with the information. This Court does not find any error in the impugned judgment of the Division Bench of the High court whereby it has been held that the Commissioner while entertaining a complaint u/s 18 of the Act has no jurisdiction to pass an order providing for access to the information. [Para 43 and 31] [527-B-C; 522-B]

1.7 The appellant is directed to file appeals u/s 19 of the Act in respect of two requests by him for obtaining information as sought in the applications dated 9.2.2007 and 19.5.2007 within a period of four weeks. If such an appeal is filed following the statutory procedure by the

appellants, the same should be considered on merits by the appellate authority without insisting on the period of limitation. [Para 44] [527-E]

2.1 By virtue of the notification dated 15.10.2005 issued u/s 24 of the Act, the State Government has notified the exemption of certain Government organizations from the purview of the Act. This Court makes it clear that those notifications cannot apply retrospectively. The right of the respondents to get the information in question must be decided on the basis of the law as it stood on the date when the request was made. Such right cannot be defeated on the basis of a notification if issued subsequently to time when the controversy about the right to get information is pending before the court. Section 24 of the Act does not have any retrospective operation. Therefore, no notification issued in exercise of the power u/s 24 can be given retrospective effect and especially so in view of the object and purpose of the Act which has an inherent human right content. Even otherwise, the exemption does not cover allegations of corruption and human right violations. [Para 45] [527-G-H; 528-A]

2.2 Right to Information Act, 2005, as its preamble shows, was enacted to promote transparency and accountability in the working of every public authority in order to strengthen the core constitutional values of a democratic republic. Transparency of information is vital in curbing corruption and making the Government and its instrumentalities accountable. The Act is meant to harmonise the conflicting interests of Government to preserve the confidentiality of sensitive information with the right of citizens to know the functioning of the governmental process in such a way as to preserve the paramountcy of the democratic ideal. The Act is based

on the concept of an open society and was enacted to consolidate the fundamental right of free speech. [para 7,8 and 11] [514-B-D; 515-F]

The State of Uttar Pradesh v. Raj Narain & others **1975 (3) SCR 333 = AIR 1975 SC 865;** *S.P.Gupta & Ors. v. President of India and Ors.* **1982 SCR 365 = AIR 1982 SC 149 – relied on.**

2.3 It is clear from the ratio in the Constitution Bench decisions of this Court that the right to information, which is basically founded on the right to know, is an intrinsic part of the fundamental right to free speech and expression guaranteed under Article 19(1)(a) of the Constitution, and definitely is a fundamental right. However, while considering the width and sweep of this right as well as its fundamental importance in a democratic republic, this Court is also conscious that such a right is subject to reasonable restrictions under Article 19(2) of the Constitution. [para 11 and 20] [515-E; 517-H; 518-A]

Secretary, Ministry of Information & Broadcasting, Govt. of India and Ors. v. Cricket Association of Bengal and Ors. **1995 (1) SCR 1036 = (1995) 2 SCC 161;** *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd. & others* **1988 (3) Suppl. SCR 212 =(1988) 4 SCC 592;** *People's Union for Civil Liberties and Anr. v. Union of India and Ors.* **2004 (1) SCR 232 = (2004) 2 SCC 476;** *Dinesh Trivedi, M.P. & Others v. Union of India & others* **1997 (3) SCR 93 = (1997) 4 SCC 306 – relied on.**

Case Law Reference:

1975 (3) SCR 333	**relied on**	**Para 9**
1982 SCR 365	**relied on**	**Para 10**

1995 (1) SCR 1036	**relied on**	**Para 12**
1988 (3) Suppl. SCR 212	**relied on**	**Para 13**
2004 (1) SCR 232	**relied on**	**Para 15**
1997 (3) SCR 93	**relied on**	**Para 21**
(1876) 1 Ch. D. 426	**referred to**	**Para 35**
1936 PC 253(1)	**referred to**	**Para 35**
AIR 1961 SC 1527	**relied on**	**Para 35**
AIR 1964 SC 358	**relied on**	**Para 35**
AIR 1952 SC 369	**relied on**	**Para 38**
1953 SCR 1	**relied on**	**Para 39**
AIR 1961 SC 1170	**relied on**	**Para 40**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 10787-10788 of 2011.

From the Judgment & Order dated 29.07.2010 of the High Court of Gauhati at Imphal in Writ Appeal No. 11 & 12 of 2008.

Colin Gonsalves, Divya Jyoti, Jyoti Mendiratta for the Appellants.

Jaideep Gupta, Khwairakpam Nobin Singh for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. These appeals have been filed by the Chief Information Commissioner, Manipur and one Mr. Wahangbam Joykumar impugning the judgment dated 29th July 2010 passed by the High Court in Writ Appeal Nos. 11 and 12 of 2008 in connection with two Writ Petition No.733 of 2007 and Writ Petition No. 478

of 2007. The material facts giving rise to the controversy in this case can be summarized as follows:

3. Appellant No.2 filed an application dated 9th February, 2007 under Section 6 of the Right to Information Act ("Act") for obtaining information from the State Information Officer relating to magisterial enquiries initiated by the Govt. of Manipur from 1980-2006. As the application under Section 6 received no response, appellant No. 2 filed a complaint under Section 18 of the Act before the State Chief Information Commissioner, who by an order dated 30th May, 2007 directed respondent No. 2 to furnish the information within 15 days. The said direction was challenged by the State by filing a Writ Petition.

4. The second complaint dated 19th May, 2007 was filed by the appellant No. 2 on 19th May, 2007 for obtaining similar information for the period between 1980 - March 2007. As no response was received this time also, appellant No. 2 again filed a complaint under Section 18 and the same was disposed of by an order dated 14th August, 2007 directing disclosure of the information sought for within 15 days. That order was also challenged by way of a Writ Petition by the respondents.

5. Both the Writ Petitions were heard together and were dismissed by a common order dated 16th November, 2007 by learned Single Judge of the High Court by *inter alia* upholding the order of the Commissioner. The Writ Appeal came to be filed against both the judgments and were disposed of by the impugned order dated 29th July 2010. By the impugned order, the High Court held that under Section 18 of the Act the Commissioner has no power to direct the respondent to furnish the information and further held that such a power has already been conferred under Section 19(8) of the Act on the basis of an exercise under Section 19 only. The Division Bench further came to hold that the direction to furnish information is without jurisdiction and directed the Commissioner to dispose of the complaints in accordance with law.

6. Before dealing with controversy in this case, let us consider the object and purpose of the Act and the evolving mosaic of jurisprudential thinking which virtually led to its enactment in 2005.

7. As its preamble shows the Act was enacted to promote transparency and accountability in the working of every public authority in order to strengthen the core constitutional values of a democratic republic. It is clear that the Parliament enacted the said Act keeping in mind the rights of an informed citizenry in which transparency of information is vital in curbing corruption and making the Government and its instrumentalities accountable. The Act is meant to harmonise the conflicting interests of Government to preserve the confidentiality of sensitive information with the right of citizens to know the functioning of the governmental process in such a way as to preserve the paramountcy of the democratic ideal.

8. The preamble would obviously show that the Act is based on the concept of an open society.

9. On the emerging concept of an 'open Government', about more than three decades ago, the Constitution Bench of this Court in *The State of Uttar Pradesh v. Raj Narain & others* – AIR 1975 SC 865 speaking through Justice Mathew held:

> "…The people of this country have a right to know every public act, everything, that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. *The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security.* … To cover with veil of secrecy, the common routine business, is not in the interest of the

public. Such secrecy can seldom be legitimately desired."

(para 74, page 884)

10. Another Constitution Bench in *S.P.Gupta & Ors. v. President of India and Ors.* (AIR 1982 SC 149) relying on the ratio in *Raj Narain* (supra) held:

"…The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). *Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands.* The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest…"

(para 66, page 234)

11. It is, therefore, clear from the ratio in the above decisions of the Constitution Bench of this Court that the right to information, which is basically founded on the right to know, is an intrinsic part of the fundamental right to free speech and expression guaranteed under Article 19(1)(a) of the Constitution. The said Act was, thus, enacted to consolidate the fundamental right of free speech.

12. In *Secretary, Ministry of Information & Broadcasting, Govt. of India and Ors. v. Cricket Association of Bengal and Ors.* – (1995) 2 SCC 161**,** this Court also held that right to acquire information and to disseminate it is an intrinsic component of freedom of speech and expression. (See para 43 page 213 of the report).

13. Again in *Reliance Petrochemicals Ltd. v. Proprietors*

of Indian Express Newspapers Bombay Pvt. Ltd. & others – (1988) 4 SCC 592 this Court recognised that the Right to Information is a fundamental right under Article 21 of the Constitution.

14. This Court speaking through Justice Sabyasachi Mukharji, as His Lordship then was, held:

"…We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon themselves the responsibility to inform."

(para 34, page 613 of the report)

15. In *People's Union for Civil Liberties and Anr. v. Union of India and Ors.* – (2004) 2 SCC 476 this Court reiterated, relying on the aforesaid judgments, that right to information is a facet of the right to freedom of "speech and expression" as contained in Article 19(1)(a) of the Constitution of India and also held that right to information is definitely a fundamental right. In coming to this conclusion, this Court traced the origin of the said right from the Universal Declaration of Human Rights, 1948 and also Article 19 of the International Covenant on Civil and Political Rights, which was ratified by India in 1978. This Court also found a similar enunciation of principle in the Declaration of European Convention for the Protection of Human Rights (1950) and found that the spirit of the Universal Declaration of 1948 is echoed in Article 19(1)(a) of the Constitution. (See paras 45, 46 & 47 at page 495 of the report)

16. The exercise of judicial discretion in favour of free speech is not only peculiar to our jurisprudence, the same is a

part of the jurisprudence in all the countries which are governed by rule of law with an independent judiciary. In this connection, if we may quote what Lord Acton said in one of his speeches:

> "Everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity"

17. It is, therefore, clear that a society which adopts openness as a value of overarching significance not only permits its citizens a wide range of freedom of expression, it also goes further in actually opening up the deliberative process of the Government itself to the sunlight of public scrutiny.

18. Justice Frankfurter also opined:

> "The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. "We live by symbols." The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution."

19. Actually the concept of active liberty, which is structured on free speech, means sharing of a nation's sovereign authority among its people. Sovereignty involves the legitimacy of a governmental action. And a sharing of sovereign authority suggests intimate correlation between the functioning of the Government and common man's knowledge of such functioning.

(Active Liberty by Stephen Breyer – page 15)

20. However, while considering the width and sweep of this right as well as its fundamental importance in a democratic

republic, this Court is also conscious that such a right is subject to reasonable restrictions under Article 19(2) of the Constitution.

21. Thus note of caution has been sounded by this Court in *Dinesh Trivedi, M.P. & Others v. Union of India & others* – (1997) 4 SCC 306 where it has been held as follows:

> "…Sunlight is the best disinfectant. But it is equally important to be alive to the dangers that lie ahead. It is important to realize that undue popular pressure brought to bear on decision makers in Government can have frightening side-effects. If every action taken by the political or executive functionary is transformed into a public controversy and made subject to an enquiry to soothe popular sentiments, it will undoubtedly have a chilling effect on the independence of the decision maker who may find it safer not to take any decision. It will paralyse the entire system and bring it to a grinding halt. So we have two conflicting situations almost enigmatic and we think the answer is to maintain a fine balance which would serve public interest."

(para 19, page 314)

22. The Act has six Chapters and two Schedules. Right to Information has been defined under Section 2(j) of the Act to mean as follows:

> "(j) "right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to-
>
> (i) inspection of work, documents, records;
>
> (ii) taking notes, extracts, or certified copies of documents or records;
>
> (iii) taking certified samples of material;
>
> (iv) obtaining information in the form of diskettes, floppies,

tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;"

23. Right to Information has also been statutorily recognised under Section 3 of the Act as follows:

"**3. Right to information.-** Subject to the provisions of this Act, all citizens shall have the right to information."

24. Section 6 in this connection is very crucial. Under Section 6 a person, who desires to obtain any information under this Act, shall make a request in writing or through electronic means in English or Hindi or in the official language of the area in which the application is being made, accompanying such fee as may be prescribed. Such request may be made to the Central Public Information Officer or State Public Information Officer, as the case may be, or to the Central Assistant Public Information Officer or State Assistant Public Information Officer. In making the said request the applicant is not required to give any reason for obtaining the information or any other personal details excepting those which are necessary for contacting him.

25. It is quite interesting to note that even though under Section 3 of the Act right of all citizens, to receive information, is statutorily recognised but Section 6 gives the said right to any person. Therefore, Section 6, in a sense, is wider in its ambit than Section 3.

26. After such a request for information is made, the primary obligation of consideration of the request is of the Public Information Officer as provided under Section 7. Such request has to be disposed of as expeditiously as possible. In any case within 30 days from the date of receipt of the request either the information shall be provided or the same may be rejected for any of the reasons provided under Sections 8 and 9. The proviso to Section 7 makes it clear that when it concerns

the life or liberty of a person, the information shall be provided within forty-eight hours of the receipt of the request. Sub-section (2) of Section 7 makes it clear that if the Central Public Information Officer or the State Public Information Officer, as the case may be, fails to give the information, specified in sub-section (1), within a period of 30 days it shall be deemed that such request has been rejected. Sub-section (3) of Section 7 provides for payment of further fees representing the cost of information to be paid by the person concerned. There are various sub-sections in Section 7 with which we are not concerned. However, Sub-section (8) of Section 7 is important in connection with the present case. Sub-section (8) of Section 7 provides:

"(8) Where a request has been rejected under sub-section (1), the Central Public Information Officer or State Public Information Officer, as the case may be shall communicate to the person making the request,-

(i) The reasons for such rejection;

(ii) the period within which an appeal against such rejection may be preferred; and

(iii) the particulars of the appellate authority.

27. Sections 8 and 9 enumerate the grounds of exemption from disclosure of information and also grounds for rejection of request in respect of some items of information respectively. Section 11 deals with third party information with which we are not concerned in this case.

28. The question which falls for decision in this case is the jurisdiction, if any, of the Information Commissioner under Section 18 in directing disclosure of information. In the impugned judgment of the Division Bench, the High Court held that the Chief Information Commissioner acted beyond his jurisdiction by passing the impugned decision dated 30th May, 2007 and 14th August, 2007. The Division Bench also held that

under Section 18 of the Act the State Information Commissioner is not empowered to pass a direction to the State Information Officer for furnishing the information sought for by the complainant.

29. If we look at Section 18 of the Act it appears that the powers under Section 18 have been categorized under clauses (a) to (f) of Section 18(1). Under clauses (a) to (f) of Section 18(1) of the Act the Central Information Commission or the State Information Commission, as the case may be, may receive and inquire into complaint of any person who has been refused access to any information requested under this Act [Section 18(1)(b)] or has been given incomplete, misleading or false information under the Act [Section 18(1)(e)] or has not been given a response to a request for information or access to information within time limits specified under the Act [Section 18(1)(c). We are not concerned with provision of Section 18(1)(a) or 18(1)(d) of the Act. Here we are concerned with the residuary provision under Section 18(1)(f) of the Act. Under Section 18(3) of the Act the Central Information Commission or State Information Commission, as the case may be, while inquiring into any matter in this Section has the same powers as are vested in a civil court while trying a suit in respect of certain matters specified in Section 18(3)(a) to (f). Under Section 18(4) which is a non-obstante clause, the Central Information Commission or the State Information Commission, as the case may be, may examine any record to which the Act applies and which is under the control of the public authority and such records cannot be withheld from it on any ground.

30. It has been contended before us by the respondent that under Section 18 of the Act the Central Information Commission or the State Information Commission has no power to provide access to the information which has been requested for by any person but which has been denied to him. The only order which can be passed by the Central Information Commission or the State Information Commission, as the case may be, under Section 18 is an order of penalty provided under Section 20.

However, before such order is passed the Commissioner must be satisfied that the conduct of the Information Officer was not bona fide.

31. We uphold the said contention and do not find any error in the impugned judgment of the High court whereby it has been held that the Commissioner while entertaining a complaint under Section 18 of the said Act has no jurisdiction to pass an order providing for access to the information.

32. In the facts of the case, the appellant after having applied for information under Section 6 and then not having received any reply thereto, it must be deemed that he has been refused the information. The said situation is covered by Section 7 of the Act. The remedy for such a person who has been refused the information is provided under Section 19 of the Act. A reading of Section 19(1) of the Act makes it clear. Section 19(1) of the Act is set out below:-

> "19. Appeal. - (1) Any person who, does not receive a decision within the time specified in sub-section (1) or clause (a) of sub-section (3) of section 7, or is aggrieved by a decision of the Central Public Information Officer or the State Public Information Officer, as the case may be, may within thirty days from the expiry of such period or from the receipt of such a decision prefer an appeal to such officer who is senior in rank to the Central Public Information Officer or the State Public Information Officer as the case may be, in each public authority:
>
> Provided that such officer may admit the appeal after the expiry of the period of thirty days if he or she is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time."

33. A second appeal is also provided under sub-section (3) of Section 19. Section 19(3) is also set out below:-

> "(3) A second appeal against the decision under sub-

section (1) shall lie within ninety days from the date on which the decision should have been made or was actually received, with the Central Information Commission or the State Information Commission:

Provided that the Central Information Commission or the State Information Commission, as the case may be, may admit the appeal after the expiry of the period of ninety days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time."

34. Section 19(4) deals with procedure relating to information of a third party. Sections 19(5) and 19(6) are procedural in nature. Under Section 19(8) the power of the Information Commission has been specifically mentioned. Those powers are as follows:-

"19(8). In its decision, the Central Information Commission or State Information Commission, as the case may be, has the power to,—

(a) require the public authority to take any such steps as may be necessary to secure compliance with the provisions of this Act, including—

(i) by providing access to information, if so requested, in a particular form;

(ii) by appointing a Central Public Information Officer or State Public Information Officer, as the case may be;

(iii) by publishing certain information or categories of information;

(iv) by making necessary changes to its practices in relation to the maintenance, management and destruction of records;

(v) by enhancing the provision of training on the right to information for its officials;

(vi) by providing it with an annual report in compliance with clause (b) of sub-section (1) of section 4;

(b) require the public authority to compensate the complainant for any loss or other detriment suffered;

(c) impose any of the penalties provided under this Act;

(d) reject the application."

35. The procedure for hearing the appeals have been framed in exercise of power under clauses (e) and (f) of sub-section (2) of Section 27 of the Act. They are called the Central Information Commission (Appeal Procedure) Rules, 2005. The procedure of deciding the appeals is laid down in Rule 5 of the said Rules Therefore, the procedure contemplated under Section 18 and Section 19 of the said Act is substantially different. The nature of the power under Section 18 is supervisory in character whereas the procedure under Section 19 is an appellate procedure and a person who is aggrieved by refusal in receiving the information which he has sought for can only seek redress in the manner provided in the statute, namely, by following the procedure under Section 19. This Court is, therefore, of the opinion that Section 7 read with Section 19 provides a complete statutory mechanism to a person who is aggrieved by refusal to receive information. Such person has to get the information by following the aforesaid statutory provisions. The contention of the appellant that information can be accessed through Section 18 is contrary to the express provision of Section 19 of the Act. It is well known when a procedure is laid down statutorily and there is no challenge to the said statutory procedure the Court should not,

in the name of interpretation, lay down a procedure which is contrary to the express statutory provision. It is a time honoured principle as early as from the decision in *Taylor v. Taylor* [(1876) 1 Ch. D. 426] that where statute provides for something to be done in a particular manner it can be done in that manner alone and all other modes of performance are necessarily forbidden. This principle has been followed by the Judicial Committee of the Privy Council in *Nazir Ahmad v. Emperor* [AIR 1936 PC 253(1)] and also by this Court in *Deep Chand v. State of Rajasthan* – [AIR 1961 SC 1527, (para 9)] and also in *State of U.P. v. Singhara Singh* reported in AIR 1964 SC 358 (para 8).

36. This Court accepts the argument of the appellant that any other construction would render the provision of Section 19(8) of the Act totally redundant. It is one of the well known canons of interpretation that no statute should be interpreted in such a manner as to render a part of it redundant or surplusage.

37. We are of the view that Sections 18 and 19 of the Act serve two different purposes and lay down two different procedures and they provide two different remedies. One cannot be a substitute for the other.

38. It may be that sometime in statute words are used by way of abundant caution. The same is not the position here. Here a completely different procedure has been enacted under Section 19. If the interpretation advanced by the learned counsel for the respondent is accepted in that case Section 19 will become unworkable and especially Section 19(8) will be rendered a surplusage. Such an interpretation is totally opposed to the fundamental canons of construction. Reference in this connection may be made to the decision of this Court in *Aswini Kumar Ghose and another v. Arabinda Bose and another* – AIR 1952 SC 369. At page 377 of the report Chief Justice Patanjali Sastri had laid down:

> "It is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute".

39. Same was the opinion of Justice Jagannadhadas in *Rao Shiv Bahadur Singh and another v. State of U.P.* – AIR 1953 SC 394 at page 397:

> "It is incumbent on the court to avoid a construction, if reasonably permissible on the language, which would render a part of the statute devoid of any meaning or application".

40. Justice Das Gupta in *J.K. Cotton Spinning & Weaving Mills Co. Ltd. v. State of Uttar Pradesh and others* – AIR 1961 SC 1170 at page 1174 virtually reiterated the same principles in the following words:

> "the courts always presume that the Legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect".

41. It is well-known that the legislature does not waste words or say anything in vain or for no purpose. Thus a construction which leads to redundancy of a portion of the statute cannot be accepted in the absence of compelling reasons. In the instant case there is no compelling reason to accept the construction put forward by the respondents.

42. Apart from that the procedure under Section 19 of the Act, when compared to Section 18, has several safeguards for protecting the interest of the person who has been refused the information he has sought. Section 19(5), in this connection, may be referred to. Section 19(5) puts the onus to justify the denial of request on the information officer. Therefore, it is for the officer to justify the denial. There is no such safeguard in Section 18. Apart from that the procedure under Section 19 is

a time bound one but no limit is prescribed under Section 18. So out of the two procedures, between Section 18 and Section 19, the one under Section 19 is more beneficial to a person who has been denied access to information.

43. There is another aspect also. The procedure under Section 19 is an appellate procedure. A right of appeal is always a creature of statute. A right of appeal is a right of entering a superior forum for invoking its aid and interposition to correct errors of the inferior forum. It is a very valuable right. Therefore, when the statute confers such a right of appeal that must be exercised by a person who is aggrieved by reason of refusal to be furnished with the information. In that view of the matter this Court does not find any error in the impugned judgment of the Division Bench. In the penultimate paragraph the Division Bench has directed the Information Commissioner, Manipur to dispose of the complaints of the respondent no.2 in accordance with law as expeditiously as possible.

44. This Court, therefore, directs the appellants to file appeals under Section 19 of the Act in respect of two requests by them for obtaining information vide applications dated 9.2.2007 and 19.5.2007 within a period of four weeks from today. If such an appeal is filed following the statutory procedure by the appellants, the same should be considered on merits by the appellate authority without insisting on the period of limitation.

45. However, one aspect is still required to be clarified. This Court makes it clear that the notification dated 15.10.2005 which has been brought on record by the learned counsel for the respondent vide I.A. No.1 of 2011 has been perused by the Court. By virtue of the said notification issued under Section 24 of the Act, the Government of Manipur has notified the exemption of certain organizations of the State Government from the purview of the said Act. This Court makes it clear that those notifications cannot apply retrospectively. Apart from that the same exemption does not cover allegations of corruption

and human right violations. The right of the respondents to get the information in question must be decided on the basis of the law as it stood on the date when the request was made. Such right cannot be defeated on the basis of a notification if issued subsequently to time when the controversy about the right to get information is pending before the Court. Section 24 of the Act does not have any retrospective operation. Therefore, no notification issued in exercise of the power under Section 24 can be given retrospective effect and especially so in view of the object and purpose of the Act which has an inherent human right content.

46. The appeals which the respondents have been given liberty to file, if filed within the time specified, will be decided in accordance with Section 19 of the Act and as early as possible, preferably within three months of their filing. With these directions both the appeals are disposed of.

47. There will be no order as to costs.

R.P. Appeals disposed of.

M/S. KAMAL TRADING PRIVATE LIMITED (NOW KNOWN AS MANAV INVESTMENT & TRADING CO. LTD.)

v.

STATE OF WEST BENGAL & ORS.

(Civil Appeal No. 10878 of 2011)

DECEMBER 13, 2011

[G.S. SINGHVI AND RANJANA PRAKASH DESAI, JJ.]

Land Acquisition Act, 1894 – ss. 5A, 4 and 6 – Acquisition of premises for public purpose – Notification and declaration u/ss. 4 and 6 – Challenge to – Writ petition seeking quashing of the Notification – On the ground that report by the Second Land Acquisition Officer was vitiated due to non-compliance of s. 5A(2) and non-application of mind by the concerned officer to the objections u/s. 5A(1) – Dismissed by the High Court – On appeal, held: Owners were not given any hearing as contemplated under s. 5A(2) which was their substantive right – Report submitted by the Second Land Acquisition Officer was utterly laconic, bereft of any recommendations and not satisfactory – Thus, Notification u/s. 4 and declaration u/s. 6 quashed and set aside.

s.5A – Right under – Scope of – Held: Proceedings under the LA Act are based on the principle of eminent domain – s.5A is the only protection available to a person whose lands are sought to be acquired – s.5A(1) gives a right to any person interested in any land which has been notified that the land is needed for a public purpose to raise objections – Under s.5A(2), Collector has to give the objector an opportunity of being heard – Collector if necessary, can make further inquiry and make a report to the appropriate Government containing his recommendations on the objections for the decision of the appropriate Government – Hearing contemplated u/s.5A(2) is necessary to enable the Collector to deal effectively with the objections raised against

the proposed acquisition and make a report – Report of the Collector is not an empty formality – Thereafter, declaration u/s. 6 has to be made only after the appropriate Government is satisfied on consideration of the report made by the Collector under Section 5A(2) – Said Act being an ex-proprietary legislation, its provisions are to be construed strictly.

The State of West Bengal requisitioned the floors of the appellant Company along with owner companies under the provisions of the West Bengal Premises Requisition and Control (Temporary Provision) Act, 1947. The appellant came to know that the State Government instead of releasing the said floors from requisition was planning to acquire the said premises in exercise of its powers under the Land Acquisition Act, 1894. The appellant along with the owner companies filed writ petition seeking direction to the State to release the said floors from requisition. The State Government issued a Notification dated 29/7/1997 under Section 4 of the LA Act stating that the said floors are needed for the public purpose and published the same in the Government Gazette. The objections were raised under Section 5A of the LA Act. The Second Land Acquisition Officer issued a notice fixing date of hearing of the objections but adjourned the hearing as requested by the appellant. The Second Land Acquisition Officer however, refused to adjourn the matter any further. He rejected the second request. It was the appellant's case that while they were waiting for further communication about the date of hearing, the State Government issued a declaration dated 24/10/1997 under Section 6 of the LA Act wherein it was stated that the Government was satisfied that the said floors were needed for the public purpose and the same was published in the Gazette on 29/10/1997. The Special Land Acquisition Officer proceeded to submit report dated 30/9/1997. The appellants along with the owner

companies filed writ petition praying for quashing Notifications dated 29/7/1997 on the grounds that the report submitted by the Second Land Acquisition Officer was vitiated due to violation of the rule of hearing enshrined in Section 5A(2) of the LA Act and non-application of mind by the concerned officer to the objections filed under Section 5A(1) of the LA Act. The Single Judge of the High Court dismissed both the writ petitions. Aggrieved, the appellant filed an appeal and the same was also dismissed. Therefore, the appellant filed the instant appeal.

Disposing of the appeal, the Court

HELD: 1.1 Section 5A(1) of the Land Acquisition Act, 1894 gives a right to any person interested in any land which has been notified under Section 4(1) as being needed or likely to be needed for a public purpose to raise objections to the acquisition of the said land. Sub-section (2) of Section 5A requires the Collector to give the objector an opportunity of being heard in person or by any person authorized by him in this behalf. After hearing the objections, the Collector can, if he thinks it necessary, make further inquiry. Thereafter, he has to make a report to the appropriate Government containing his recommendations on the objections together with the record of the proceedings held by him for the decision of the appropriate Government and the decision of the appropriate Government on the objections shall be final. The proceedings under the LA Act are based on the principle of eminent domain and Section 5A is the only protection available to a person whose lands are sought to be acquired. It is a minimal safeguard afforded to him by law to protect himself from arbitrary acquisition by pointing out to the concerned authority, inter alia, that the important ingredient namely 'public purpose' is absent in the proposed acquisition or the acquisition is mala fide.

The LA Act being an ex-proprietary legislation, its provisions will have to be strictly construed. [Para 10] [539-G 540-A-D]

1.2 Hearing contemplated under Section 5A(2) is necessary to enable the Collector to deal effectively with the objections raised against the proposed acquisition and make a report. The report of the Collector referred to in this provision is not an empty formality because it is required to be placed before the appropriate Government together with the Collector's recommendations and the record of the case. It is only upon receipt of the said report that the Government can take a final decision on the objections. The declaration under Section 6 has to be made only after the appropriate Government is satisfied on the consideration of the report, if any, made by the Collector under Section 5A(2). The appropriate Government while issuing declaration under Section 6 of the LA Act is required to apply its mind not only to the objections filed by the owner of the land in question, but also to the report which is submitted by the Collector upon making such further inquiry thereon as he thinks necessary and also the recommendations made by him in that behalf. Sub-section (3) of Section 6 of the LA Act makes a declaration under Section 6 conclusive evidence that the land is needed for a public purpose. Formation of opinion by the appropriate Government as regards the public purpose must be preceded by application of mind as regards consideration of relevant factors and rejection of irrelevant ones. It is, therefore, that the hearing contemplated under Section 5A and the report made by the Land Acquisition Officer and his recommendations assume importance. It is implicit in this provision that before making declaration under Section 6 of the LA Act, the State Government must have the benefit of a report containing recommendations of the Collector submitted under Section 5A(2) of the LA Act. The recommendations

must indicate objective application of mind. [Para 11] [549-E-H; 541-A-D]

Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai and Ors. **(2005) 7 SCC 627: 2005 (3) Suppl. SCR 388 – relied on.**

2.1 According to the appellant, notification under Section 4 of the LA Act was not served on owner companies. However, upon coming to know of this notification, the appellant vide their letter dated 8/9/1997 submitted objections. The Second Land Acquisition Officer adjourned the hearing on one occasion as requested by the appellant. He, however, refused to adjourn the matter any further. The second request was rejected. Looking to the nature of the issues involved, the Second Land Acquisition Officer could have adjourned the proceedings after putting the appellant to terms because hearing the representative of the owner companies was mandatory. In any event, if he did not want to adjourn the proceedings and wanted to consider the objections in the absence of counsel for the owner companies and assuming such a course is permissible in law, he should have dealt with the objections carefully and not in such a lighthearted manner because heavy responsibility rested on his shoulders. In the report, he noted the objections. He then noted that the officers of the Acquiring Body vehemently protested against the statements made in the appellant's letter and stated that the said statements are false, arbitrary and groundless and they simply endeavour to oust the Acquiring Body by hook or by crook. [Paras 19 and 20] [543-E-H; 544-A-E]

2.2 It cannot be said that the Second Land Acquisition Officer had applied his mind to the objections raised by the appellant. The Second Land Acquisition Officer only reproduced the contentions of the officers of

the Acquiring Body. The objections taken by the appellants were rejected on a very vague ground. Mere use of the words 'for the greater interest of public' does not lend the report the character of a report made after application of mind. Though the declaration under Section 6 of the LA Act must be set aside because the appellant was not given hearing as contemplated under Section 5A(2) of the LA Act, which is the appellant's substantive right, it must be recorded that in the facts of the case, the report submitted by the Second Land Acquisition Officer is totally unsatisfactory. His report is utterly laconic and bereft of any recommendations. He was not expected to write a detailed report but, his report, however brief, should have reflected application of mind. As to which report made under Section 5A(2) could be said to be a report disclosing application of mind would depend on the facts and circumstances of each case. [Para 21] [545-C-F]

2.3 The High Court wrongly rejected the prayer made by the appellant that the notification under Section 4 and declaration under Section 6 of the LA Act be quashed and set aside. Since no hearing was given to the appellant resulting in non compliance of Section 5A of the LA Act, the declaration under Section 6 of the LA Act dated 24/10/1997 published in the Government Gazette on 29/10/1997 is set aside. The State Government cannot now rely upon notification dated 29/7/1997 for the purposes of issuing fresh declaration under Section 6(1) of the LA Act and the same is also set aside. Thus, the impugned judgment and order of the High Court is set aside. [Para 22] [545-G-H; 546-A-B]

Padma Sundara Rao (Dead) & Ors. v. State of T.N. and Ors. **(2002) 3 SCC 533: 2002 (2) SCR 383 – followed.**

Union of India v. Mukesh Hans **(2004) 8 SCC 14;** *Dev*

Saran v. State of Uttar Pradesh **(2011) 4 SCC 769;** *Radhy Shyam V. State of Uttar Pradesh* **(2011) 5 SCC 553;** *Jayabheri Properties Private Limited & Ors. v. State of Andhra Pradesh and Ors*. **(2010) 5 SCC 590: 2010 (4) SCR 75;** *Munshi Singh v. Union of India* **(1973) 2 SCC 337: 1973 (1) SCR 973;** *Om Prakash v. State of Uttar Pradesh* **(1998) 6 SCC 1: 1998 (3) SCR 643;** *State of Punjab v. Gurdial Singh* **(1980) 2 SCC 471: 1980 (1) SCR 1071– referred to.**

Case Law Reference:

(2004) 8 SCC 14	**Referred to**	**Para 15**
2005 (3) Suppl. SCR 388	**Relied on**	**Para 11**
(2011) 4 SCC 769	**Referred to**	**Para 16**
(2011) 5 SCC 553	**Referred to**	**Para 17**
2010 (4) SCR 75	**Referred to**	**Para 18**
1973 (1) SCR 973	**Referred to**	**Para 13**
1998 (3) SCR 643	**Referred to**	**Para 14**
1980 (1) SCR 1071	**Referred to**	**Para 14**
2002 (2) SCR 383	**Followed**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10878 of 2011.

From the Judgment and Order dated 19.08.2009 of the High Court of Calcutta in F.M.A. No. 40 of 2004.

Dr. A.M. Singhvi, Susmit Pushkar and Amit Bhandary for the Appellant.

Soumitra G. Chaudhuri, Abhijit Sengupta and B.P. Yadav for the Respondents.

The Judgment of the Court was delivered by

(SMT.) RANJANA PRAKASH DESAI, J. 1. Leave granted.

2. This appeal, by grant of special leave, is directed against the judgment and order dated 19/8/2009 passed by the High Court at Calcutta dismissing the appeal filed by the appellant.

3. The appellant, which is a private limited company was entrusted by seventeen joint owners of the premises known as "Industry House" at No.10, Camac Street, Calcutta – 700 017 (for short, "**the said premises**"), to look after the day-to-day management and maintenance of the said premises as also to initiate proceedings for and on their behalf. The seventeen joint owners include respondents 6, 7 and 8 herein and one Pilani Investment (hereinafter referred to as "**owner companies**" for convenience). They are seized and possessed of certain floors of the said premises. The State of West Bengal requisitioned the said floors under the provisions of the West Bengal Premises Requisition and Control (Temporary Provision) Act, 1947 (for short, "**the 1947 Act**"). Under the 1947 Act, the maximum period of requisition was fixed at 25 years from the date of initial order of requisition and the State Government was obliged to release the property under requisition after expiry of 25 years. It is the case of the appellant that, in fact, the release of the said floors was in contemplation of the concerned authorities. However, enquiries made by the appellant revealed that the State Government was planning to acquire the said premises in exercise of its powers under the Land Acquisition Act, 1894 (for short, "**the LA Act**"). The appellant along with owner companies, therefore, filed Writ Petition No.22859 (W) of 1997 praying for a writ of mandamus directing the State to release the said floors from requisition.

4. Instead of releasing the said floors from requisition, the State Government issued a notification dated 29/7/1997 under

Section 4 of the LA Act stating, inter alia, that the said floors are needed for the public purpose viz. for permanent office accommodation of Public Works Department. The said notification was published in the Government Gazette on 12/8/1997. It is the case of the appellant that the owner companies raised objections vide letter dated 8/9/1997 under Section 5A of the LA Act. The Second Land Acquisition Officer issued notice dated 23/9/1997 fixing date of hearing of the objections on 26/9/1997. On receipt of the said notice, the representative of the appellant met the Second Land Acquisition Collector on 25/9/1997 and by letter of even date, requested that the hearing fixed on 26/9/1997 be postponed till after 29/9/1997 because the Constituted Attorney of the appellant was held up in Mumbai and was unable to attend the hearing. The Second Land Acquisition Collector issued another notice dated 26/9/1997 fixing the date of hearing of the objections on 30/9/1997. By letter dated 29/9/1997, the appellant again requested for adjournment till after 28/10/1997 on the ground that its Constituted Attorney was unable to attend and the advocate was out of station. According to the appellant, while they were waiting for further communication about the date of hearing, the State Government issued a declaration dated 24/10/1997 under Section 6 of the LA Act, which was published in the Gazette on 29/10/1997. In the said declaration, it was stated that the Government was satisfied that the said floors were needed for the public purpose. The Special Land Acquisition Officer did not accept the appellant's request for further adjournment and proceeded to submit report dated 30/9/1997.

5. The appellants along with the owner companies filed Writ Petition No.25632(W) of 1997 and prayed for quashing notifications dated 29/7/1997. One of the grounds taken by them was that the report submitted by the Second Land Acquisition Officer was vitiated due to violation of the rule of hearing enshrined in Section 5A(2) of the LA Act and non application of mind by the concerned officer to the objections filed under Section 5A(1) of the LA Act.

6. By an order dated 3/12/2003, the learned Single Judge dismissed both the writ petitions. FMA No.40 of 2004 filed by the appellant against dismissal of Writ Petition No.25632(W) of 1997 was dismissed by the Division Bench. Hence, this appeal by special leave.

7. We have heard Dr. Singhvi, learned senior counsel appearing for the appellant and Mr. Chaudhari, learned senior counsel appearing for the contesting respondents, at some length. Though several points are raised in this appeal, Dr. Singhvi addressed us on violation of Section 5A of the LA Act as according to him, this point goes to the root of the matter.

8. Dr. Singhvi submitted that hearing contemplated under Section 5A of the LA Act is not an empty formality. He submitted that the said right has been raised to the level of a fundamental right by this Court. Learned senior counsel argued that the acquisition of the land is a serious matter and when the State decides to deprive a person of his property by taking recourse to LA Act, it is bound to afford him an opportunity to file objections under Section 5A(1) of the LA Act and of being heard by the Collector in terms of Section 5A(2) of the LA Act. Learned senior counsel then submitted that the Second Land Acquisition Officer wrongly rejected the genuine prayer made by the appellant vide letter 29/9/1997 for adjournment on the ground that the counsel was out of station. He argued that even if the concerned officer was not inclined to adjourn the case, he was duty bound to consider the objections raised by the appellant with necessary seriousness and decide the same by assigning reasons. Dr. Singhvi submitted that although the report of the Second Land Acquisition Officer makes a mention of the objections raised by the appellant, but the same have not at all been dealt with and, thus, the report made by the Second Land Acquisition Officer, which contained recommendations for the acquisition of land suffers from the vice of non application of mind. In support of his submissions,

Dr. Singhvi relied upon the judgments of this Court in *Union of India v. Mukesh Hans*[1], *Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai & Ors.*[2], *Dev Saran v. State of Uttar Pradesh*[3], *Radhy Shyam V. State of Uttar Pradesh*[4].

9. Mr. Chaudhary, learned senior counsel for the respondents argued that the Second Land Acquisition Officer did not commit any illegality by declining the appellant's request for adjournment because the sole object of such request was to delay finalization of the acquisition proceedings. Learned senior counsel emphasized that if the counsel for the appellant was not available on 30/9/1997, i.e., the date to which the hearing was adjourned by the Second Land Acquisition Officer, the appellant should have made alternative arrangement and the concerned officer did not commit any error by declining the repeated request for adjournment made on its behalf. Mr. Chaudhary then submitted that the report submitted by the Special Land Acquisition Officer does not suffer from the vice of non application of mind because he had duly considered the objections raised by the appellant. In support of his argument, he relied upon the judgment of this Court in *Jayabheri Properties Private Limited & Ors. v. State of Andhra Pradesh & Ors.*[5] where according to him, a similar contention raised by the appellants therein was rejected on the ground that adequate opportunity had been given to the appellants to voice their objections and the objections were duly considered by the Special Deputy Collector. Counsel submitted that in the circumstances, the appeal may be dismissed.

10. Section 5A(1) of the LA Act gives a right to any person interested in any land which has been notified under Section 4(1) as being needed or likely to be needed for a public purpose

1. (2004) 8 SCC 14.
2. (2005) 7 SCC 627.
3. (2011) 4 SCC 769.
4. (2011) 5 SCC 553.
5. (2010) 5 SCC 590.

to raise objections to the acquisition of the said land. Sub-section (2) of Section 5A requires the Collector to give the objector an opportunity of being heard in person or by any person authorized by him in this behalf. After hearing the objections, the Collector can, if he thinks it necessary, make further inquiry. Thereafter, he has to make a report to the appropriate Government containing his recommendations on the objections together with the record of the proceedings held by him for the decision of the appropriate Government and the decision of the appropriate Government on the objections shall be final. It must be borne in mind that the proceedings under the LA Act are based on the principle of eminent domain and Section 5A is the only protection available to a person whose lands are sought to be acquired. It is a minimal safeguard afforded to him by law to protect himself from arbitrary acquisition by pointing out to the concerned authority, inter alia, that the important ingredient namely 'public purpose' is absent in the proposed acquisition or the acquisition is mala fide. The LA Act being an ex-proprietary legislation, its provisions will have to be strictly construed.

11. Hearing contemplated under Section 5A(2) is necessary to enable the Collector to deal effectively with the objections raised against the proposed acquisition and make a report. The report of the Collector referred to in this provision is not an empty formality because it is required to be placed before the appropriate Government together with the Collector's recommendations and the record of the case. It is only upon receipt of the said report that the Government can take a final decision on the objections. It is pertinent to note that declaration under Section 6 has to be made only after the appropriate Government is satisfied on the consideration of the report, if any, made by the Collector under Section 5A(2). As said by this Court in *Hindustan Petroleum Limited,* the appropriate Government while issuing declaration under Section 6 of the LA Act is required to apply its mind not only to the objections filed by the owner of the land in question, but also

to the report which is submitted by the Collector upon making such further inquiry thereon as he thinks necessary and also the recommendations made by him in that behalf. Sub-section (3) of Section 6 of the LA Act makes a declaration under Section 6 conclusive evidence that the land is needed for a public purpose. Formation of opinion by the appropriate Government as regards the public purpose must be preceded by application of mind as regards consideration of relevant factors and rejection of irrelevant ones. It is, therefore, that the hearing contemplated under Section 5A and the report made by the Land Acquisition Officer and his recommendations assume importance. It is implicit in this provision that before making declaration under Section 6 of the LA Act, the State Government must have the benefit of a report containing recommendations of the Collector submitted under Section 5A(2) of the LA Act. The recommendations must indicate objective application of mind.

12. We may make a brief reference to the judgments on which reliance has been placed by Dr. Singhvi, which support the view taken by us.

13. In *Munshi Singh v. Union of India*[6], this Court while dealing with Section 5A of the LA Act observed as under:

> "7. Section 5-A embodies a very just and wholesome principle that a person whose property is being or is intended to be acquired should have a proper and reasonable opportunity of persuading the authorities concerned that acquisition of the property belonging to that person should not be made. ... The legislature has, therefore, made complete provisions for the persons interested to file objections against the proposed acquisition and for the disposal of their objections. It is only in cases of urgency that special powers have been conferred on the appropriate Government to dispense with the provisions of Section 5-A."

6. (1973) 2 SCC 137.

14. In *Om Prakash v. State of Uttar Pradesh*[7], referring to its earlier judgment in *State of Punjab v. Gurdial Singh*[8], this Court raised the right under Section 5A of the LA Act to the level of fundamental right and observed that inquiry under Section 5A is not merely statutory but also has a flavour of fundamental rights under Articles 14 and 19 of the Constitution though right to property has now no longer remained a fundamental right, at least, observation regarding Article 14 vis-à-vis Section 5A of the LA Act would remain apposite.

15. In *Mukesh Hans*, this Court reiterated that right of representation and hearing contemplated under Section 5A is a very valuable right of a person whose property is sought to be acquired and he should have appropriate and reasonable opportunity of persuading the concerned authorities that the acquisition of the property belonging to that person should not be made. This court further held that the right given to an owner/ person interested under Section 5A to object to the acquisition proceedings is not an empty formality and is a substantive right which can be taken away for good and valid reason and within the limitations prescribed under Section 17(4) of the LA Act.

16. In *Hindustan Petroleum Corporation,* this Court again referred to *Om Prakash* and observed that it is trite that hearing given to a person must be an effective one and not a mere formality. This Court observed that formation of opinion as regards the public purpose as also suitability thereof must be preceded by application of mind as regards consideration of relevant factors and rejection of irrelevant ones. This Court further observed that the State in its decision-making process must not commit any misdirection in law. This Court observed that it cannot be disputed that Section 5A of the LA Act confers a valuable important right and having regard to the provisions contained in Article 300-A of the Constitution, it has been held to be akin to a fundamental right. Pertinently, this Court made

7. (1998) 6 SCC 1.

8. (1980) 2 SCC 471.

it clear that in a case where there has been total non-compliance or substantial non-compliance with the provisions of Section 5A of the LA Act, the Court cannot fold its hands and refuse to grant relief to the appellant. Again in *Dev Saran,* this Court reiterated the same view.

17. In *Radhy Shyam,* this Court was considering a case where the State had invoked urgency clause under Section 17(4) and dispensed with inquiry under Section 5A. This Court observed that the legislation which provides for compulsory acquisition of the private property by the State falls in the category of ex-propriatory legislation and such legislation must be construed strictly. The property of a citizen cannot be acquired by the State without complying with the mandate of Sections, 4, 5A and 6 of the LA Act.

18. The decision of this Court in *Jayabheri* on which counsel for the respondent has placed reliance does not take any contrary view. The Court had adverted to the facts of that case and concluded that there was no violation of Section 5A of the LA Act.

19. According to the appellant, notification under Section 4 of the LA Act was not served on owner companies. However, upon coming to know of this notification, the appellant vide their letter dated 8/9/1997 submitted objections running into four pages containing 8 paragraphs. We have already noted that the Second Land Acquisition Officer adjourned the hearing on one occasion as requested by the appellant. He, however, refused to adjourn the matter any further. The second request was rejected. We feel that looking to the nature of the issues involved, the Second Land Acquisition Officer could have adjourned the proceedings after putting the appellant to terms because hearing the representative of the owner companies was mandatory. In any event, if he did not want to adjourn the proceedings and wanted to consider the objections in the absence of counsel for the owner companies and assuming such a course is permissible in law, he should have dealt with

the objections carefully and not in such a lighthearted manner because heavy responsibility rested on his shoulders. In the report, he has noted the objections as under:

> "(i) Notification U/S 4 has not been published in the Newspapers nor publicly notified.
>
> (ii) Premise is under requisition under the W Bengal Premises Requisition & Control (Temporary Provisions) Act, 1947 from 16/09/72 and is about to complete 25 years on 15/09/97 when as per the Law release of the premises is expected.
>
> (iii) Anticipating impending release, tie-up has been made to accommodate foreign ventures/ industrialists.
>
> (iv) *LA Collector has shown colourful authority by extending this acquisition proceeding."*

20. He has then noted that the officers of the Acquiring Body vehemently protested against the statements made in the appellant's letter and stated that the said statements are false, arbitrary and groundless and they simply endeavour to oust the Acquiring Body by hook or by crook. The paragraphs which contain the submissions and the so-called reasons of the Second Land Acquisition Officer need to be quoted.

> "*Heard the officers present from the Requiring Body. They vehemently protested as regards the statements contained in this particular letter. Their submissions in short that the statements made by the interested persons are all fake, arbitrary and groundless. They simply endeavour to oust the Requiring Body by hook or crook in order to grab this office space so that in turn can realize higher rent. Further, the purpose of the Requiring Body is very much public oriented and if it is no acquired they will suffer immensely. They further submitted that*

acquisition proceeding to be completed as quickly as possible inasmuch as they have the time bound programmes to implement it as per guidelines of Government for the greater interest of public.

In view of these circumstances and for greater interest of the public, the submissions made by the interested persons by their letter dated 8/9/1997 are overruled."

21. By no stretch of imagination, it can be said that the Second Land Acquisition Officer had applied his mind to the objections raised by the appellant. The above-quoted paragraphs are bereft of any recommendations. The Second Land Acquisition Officer has only reproduced the contentions of the officers of the Acquiring Body. The objections taken by the appellants are rejected on a very vague ground. Mere use of the words 'for the greater interest of public' does not lend the report the character of a report made after application of mind. Though in our opinion, the declaration under Section 6 of the LA Act must be set aside because the appellant was not given hearing as contemplated under Section 5A(2) of the LA Act, which is the appellant's substantive right, we must record that in the facts of this case, we are totally dissatisfied with the report submitted by the Second Land Acquisition Officer. His report is utterly laconic and bereft of any recommendations. He was not expected to write a detailed report but, his report, however brief, should have reflected application of mind. Needless to say that as to which report made under Section 5A(2) could be said to be a report disclosing application of mind will depend on the facts and circumstances of each case.

22. Having examined this case, in the light of the law laid down by this Court, we are of the opinion that the High Court wrongly rejected the prayer made by the appellant that the notification under Section 4 and declaration under Section 6 of the LA Act be quashed and set aside. The impugned judgment and order of the High Court, therefore, needs to be set aside and is, accordingly, set aside. Since no hearing was

given to the appellant resulting in non compliance of Section 5A of the LA Act, the declaration under Section 6 of the LA Act dated 24/10/1997 published in the Government Gazette on 29/10/1997 must be set aside and is set aside. In view of the judgment of the Constitution Bench of this Court in *Padma Sundara Rao (Dead) & Ors v. State of T.N. & Ors*[9], the State Government cannot now rely upon notification dated 29/7/1997 for the purposes of issuing fresh declaration under Section 6(1) of the LA Act. The said notification dated 29/7/1997 issued under Section 4 is also, therefore, set aside. It would be, however, open to the State Government to initiate fresh land acquisition proceedings in accordance with law if it so desires.

23. We make it clear that nothing said by us in this judgment should be treated as expression of our opinion on the merits of the case of either side.

24. The appeal is disposed of in the aforestated terms.

N.J. Appeal disposed of.

9. (2002) 3 SCC 533.

DEEPTI BHANDARI
v.
NITIN BHANDARI & ANR.
(Special Leave Petition (Crl.) No. 5213 of 2010)

DECEMBER 14, 2011

[ALTAMAS KABIR, SURINDER SINGH NIJJAR AND J. CHELAMESWAR, JJ.]

Child and Family Welfare:

Girl child of a couple involved in matrimonial litigation – Visitation rights of father and grand parents of the child – Earlier, litigation in courts at Jaipur – Visitation rights were granted to the father – Subsequently, mother with child shifted to Delhi – Transfer petition by mother for transfer of cases filed by her husband against her at Jaipur to Delhi and an SLP to shift the place of visitation to Delhi – HELD: It is the father who should make an effort to meet his minor child in Delhi as and when he wishes to do so – The mother can have no objection whatsoever to such an arrangement and must also ensure that the child is able to meet her father in terms of the order of the Court on all weekends in Delhi instead of the second and fourth Saturday of each month – The visitation rights granted to the father will have equal application to his parents and they too will be at liberty to visit the minor child in Delhi, as and when they wish to do so, along with her father – In the event, the child is willing, the father may also take her out for the day and return her to the custody of the mother within 6.00 p.m – This arrangement will continue, until further orders.

Transfer Petition:

Matrimonial dispute between couple whose marriage had been performed at Jaipur – Husband filing a case u/s 9 of

Hindu Marriage Act and another under Guardians and Wards Act in Family Court at Jaipur – Subsequently wife shifted to Delhi and filed transfer petitions seeking transfer of cases to Delhi – HELD: Transfer petitions filed by the wife are allowed – Let both the cases be transferred from the Family Court at Jaipur to a Family Court of competent jurisdiction in Delhi – The transferor court is directed to send the records of the cases to the transferee court, so that the matter may be heard and disposed of by the transferee court with the utmost expedition.

CRIMINAL APPELLATE JURISDICTION : Special Leave Petition (Criminal) No. 5213 of 2010.

From the Judgment and Order dated 05.05.2010 of the High Court of Rajasthan at Jaipur in Criminal Misc. Petition No. 1977 of 2009.

WITH

T.P. (C) Nos. 856-857 of 2010.

Indu Malhotra, Harish Pandey, Vivek Jain, C. Chandra, Dr. Kailash Chand, Mukul Kumar, Prashant Bhagwati and Pragati Neekhra, Respondent-In-Person for the appearing parties.

The Order of the Court was delivered by

O R D E R

ALTAMAS KABIR, J. 1. The Petitioner and the Respondent No.1 were married to each other according to Hindu rites at Jaipur in the State of Rajasthan on 20th February, 2007. A girl child, Mannat, was born prematurely to the couple on 3rd April, 2008, and had to be kept in incubator for about three weeks. It is the Petitioner's grievance that while they were on their honeymoon in Mauritius, the Respondent No.1, husband, began to treat her with physical and mental cruelty. Even during her pregnancy, she was ill-treated. Ultimately,

being unable to withstand the physical and mental cruelty inflicted both on the Petitioner and her minor daughter, the Petitioner was compelled to leave the matrimonial home and return to her parents on 7th October, 2008.

2. On 6th December, 2008, the Respondent No.1, husband, filed an application under Section 9 of the Hindu Marriage Act, 1955 (Case No.609 of 2008) against the Petitioner, for restitution of conjugal rights. Unable to bear the shock of the incidents, which had taken place since the Petitioner's marriage with the Respondent No.1, the Petitioner's grandparents suffered heart and paralytic attacks, as a result of which they have become completely bed-ridden. According to the Petitioner, on account of the cruelty meted out to her and the child, the Petitioner filed FIR No.7 of 2009 complaining of offences alleged to have been committed by the Respondent No.1 punishable under Sections 498-A and 406 IPC.

3. It is the Petitioner's further case that in order to settle the matter peacefully, the Petitioner entered into a compromise with the Respondent No.1 on 25th February, 2009, so that she could start her life all over again and to acquire financial independence to provide for herself and for providing proper care to the child on her own. Pursuant to the terms of the compromise, the Petitioner withdrew her complaint under Sections 498-A and 406 IPC, but the Respondent No.1 failed to appear before the Family Court No.2 at Jaipur on 2nd December, 2010, to present a Petition for mutual divorce, as had been agreed upon in the compromise.

4. At this stage, it may be mentioned that on 5th May, 2009, the Petitioner filed a complaint against the Respondent No.1 and his family members under the provisions of the Protection of Women from Domestic Violence Act, 2005, hereinafter referred to as 'PWD Act') before the Upper Civil Judge (A,B) and Judicial Magistrate Serial No.18 Jaipur City,

Jaipur, being Criminal Legal Case No.13 of 2009. Soon, thereafter, on 1st June, 2009, charge-sheet was filed against the Respondent No.1 and his family members in FIR No.7 of 2009 which had been filed by the Petitioner under Sections 498-A and 406 IPC. The next day, on 2nd June, 2009, the Respondent No.1, husband, moved an application under Section 21 of the above Act for visitation rights, which was dismissed by the learned Judge, Family Court.

5. The Respondent No.1 filed Criminal Appeal No.455 of 2009 on 25th August, 2009 against the aforesaid order dated 2nd June, 2009, before the Court of Upper District Judge (Fast Track) No.9, Jaipur City, Jaipur, which dismissed the same.

6. On 18th September, 2009, the Respondent No.1 filed a Petition under Section 482 Cr.P.C. (S.B. Criminal Misc. Petition No.1977 of 2009) for quashing of the charge-sheet in FIR No.7 of 2009 and further proceedings before the learned Judicial Magistrate-I, No.15, Jaipur City, Jaipur, were stayed therein. On 7th October, 2009, the Respondent No.1 filed another Petition under Section 482 Cr.P.C. (S.B. Criminal Misc. Petition No.2139 of 2009) for quashing of Criminal Legal Case No.13 of 2009 filed by the Petitioner under Section 12 of the PWD Act, 2005. The High Court also stayed the said proceedings pending before the Upper Civil Judge (A,B) and Judicial Magistrate, Serial No.18, Jaipur City, Jaipur.

7. On 22nd January, 2010, when both the matters came up before the High Court for consideration, the High Court directed the Petitioner and the Respondent No.1 to settle their disputes and to apply for divorce by mutual consent within 15 days. The order was passed in the presence of both the parties. While giving the aforesaid directions, the High Court also passed orders allowing visitation rights to the Respondent No.1, husband, in respect of the minor child.

8. On 17th February, 2010, the Respondent No.1 filed S.B. Criminal Revision Petition No.1 of 2010 before the Jaipur

Bench of the Rajasthan High Court against the order dated 25th August, 2009 passed in Criminal Appeal No.455 of 2009 dismissing his application for visitation rights. The Respondent NO.1 also filed Application No.3051 of 2010 in S.B. Criminal Misc. Petition No.1977 of 2009 praying for similar visitation rights. On 8th April, 2010, the said application for visitation rights was allowed and the Petitioner was directed to arrange for the meeting of the Respondent No.1 with the Petitioner and their minor daughter at the office of the learned counsel for the Respondent No.1 on every Saturday between 11.00 a.m. and 1.00 p.m.

9. This is the genesis of the problem which is the subject matter of the present Special Leave Petition.

10. According to the Petitioner, on 14th April, 2010, the Petitioner's brother got admission with I.I.P.M. in Delhi, which required him to shift to Delhi for his higher education and the Petitioner also decided to come to Delhi to establish herself professionally to be able to maintain herself and her minor daughter. According to the Petitioner, since then she has been residing in Delhi and the order directing visitation rights to the Respondent No.1 to meet the minor child at Jaipur in the office of the learned counsel for the Respondent No.1 became extremely difficult for her. The Petitioner thereupon moved an application in the High Court on 30th April, 2010, for modification of the order of 8th April, 2010, and instead of Jaipur, to shift the place of visitation to Delhi. The said application was disallowed by the High Court on 5th May, 2010, resulting in the filing of the Special Leave Petition on 17th June, 2010.

11. During the pendency of these proceedings, the Petitioner also filed Transfer Petition (Civil) Nos.856-857 of 2010 for transfer of Case No.279 of 2009, which had been filed by the Respondent No.1 under Section 9 of the Hindu Marriage Act and Case No.65 of 2009 also filed by him under Section

25 of the Guardians and Wards Act, 1890, from the Family Court at Jaipur to a Family Court of competent jurisdiction in Delhi. One of the grounds taken in the Transfer Petitions is that in the interest of the child, this Court had directed the Respondent No.1 to visit the child on the 2nd and 4th Saturday of each month at an address in New Delhi and the Petitioner was directed to take the child on the 1st and 3rd Saturday of each month to an address in Jaipur to enable the Respondent No.1 to meet his minor daughter. It was also submitted that the Petitioner had received threats that the case should be pursued in Jaipur instead of Delhi and that fearing for her safety and that of the minor child, she had prayed that the proceedings referred to hereinabove pending before the Court at Jaipur be transferred to a Family Court, having competent jurisdiction, to hear and try the matter in Delhi.

12. As will be seen from the narration of facts which intervened between the Petitioner and the Respondent No.1 during their brief matrimonial obligations towards each other, the child has now become the source of acrimony between them.

13. Although, it was repeatedly urged on behalf of the Respondent No.1 that the Petitioner was still residing in Jaipur and not in Delhi and that the Transfer Petitions had been filed only to cause harassment to him and the other members of his family, such suggestions were strongly denied on behalf of the Petitioner. It was submitted on her behalf that on account of her minor child and the threats extended to her, it would prove extremely difficult for her to defend the case instituted against her by the Respondent No.1 or to conduct the cases which she had filed against the Respondent No.1 and his family members in FIR No.7 of 2009, in which charge-sheet had been filed, in Jaipur. In any event, considering the difficulties on either side in attending to the several cases pending between them and in order to balance the same, we are inclined to accept the submissions made on behalf of the Petitioner and to modify the

order dated 8th April, 2010, whereby the Petitioner was directed to arrange for the meeting of the Respondent No.1 with herself and their minor daughter in the office of the learned counsel for the Respondent No.1 on every Saturday between 11.00 a.m. and 1.00 p.m. and also the subsequent order dated 5th May, 2010, passed by the High Court rejecting her prayer to move the place of visitation from Jaipur to Delhi.

14. It is true that transfer of the several cases to Delhi is likely to cause some inconvenience to the Respondent No.1 and his family members, but it cannot be denied that it would be easier for the Respondent No.1 to attend to the proceedings in Delhi than for the Petitioner to attend to the same in Jaipur, while staying in Delhi with her minor child. We, therefore, see no substance in the persistent demand of the Respondent No.1 that he should be allowed to meet the Petitioner and their minor child at Jaipur to enable him and his family members to meet the child on a regular basis. In our view, it is the Respondent No.1 who should make an effort to meet his minor child in Delhi as and when he wishes to do so. The Petitioner can have no objection whatsoever to such an arrangement and must also ensure that the child is able to meet her father in terms of the order of this Court on all weekends in New Delhi instead of the second and fourth Saturday of each month.

15. As far as the difficulty expressed on behalf of the parents of the Respondent No.1 is concerned, they will be free to apply to the Trial Court for exemption from personal appearance on the dates of the different cases and if such applications are made, the same should be considered by the Trial Court looking to the physical difficulties that may be faced by the parents of the Respondent No.1, who are both considerably aged. The visitation rights granted to the Respondent No.1 will have equal application to his parents and they too will be at liberty to visit the minor child in Delhi, as and when they wish to do so, along with the Respondent No.1.

16. The application for modification of the order dated 8th April, 2010, filed by the Petitioner before the High Court on 30th April, 2010, which was dismissed by the High Court, is, accordingly allowed along with the Transfer Petitions filed by the Petitioner. The order of 8th April, 2010, is modified to the extent indicated above, whereby the Respondent No.1 and his parents will be entitled to meet the minor child, Mannat, on every Saturday in New Delhi, between 10.00 a.m. and 6.00 p.m. In the event, the child is willing, the Respondent No.1 may also take her out for the day and return her to the custody of the Petitioner within 6.00 p.m. This arrangement will continue, until further orders.

17. In addition, Transfer Petition (Civil) Nos.856-857 of 2010 filed by the Petitioner are allowed. Let Case No.279 of 2009, which had been filed by the Respondent No.1 under Section 9 of the Hindu Marriage Act and Case No.65 of 2009, also filed by him under Section 25 of the Guardians and Wards Act, 1890, be transferred from the Family Court at Jaipur to a Family Court of competent jurisdiction in Delhi. The transferor Court is directed to send the records of the aforesaid cases to the transferee Court, so that the matter may be heard and disposed of by the transferee Court with the utmost expedition.

18. In view of the facts involved, the parties will each bear their own costs in these proceedings.

R.P. Matters disposed of.

SHRI MORVI SARVAJANIK KELAVNI MANDAL
SANCHALIT MSKM B.ED. COLLEGE
v.
NATIONAL COUNCIL FOR TEACHERS' EDUCATION AND ORS.
(Civil Appeal No. 11215 of 2011)

DECEMBER 16, 2011

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

National Council of Teachers' Education Act, 1993: s.17 – Withdrawal of recognition – Recognition granted to appellant-institution for offering course of B.Ed. – Withdrawal of recognition on the ground of inadequacy of built up area available to the institution, the land underlying the structure not being in the name of the institution, the institution being run in a building that was used by two other institutions and the lecturers employed not having requisite qualifications – Held: Inspection was conducted more than once and said deficiencies were pointed out which seriously affected its capacity to impart quality education and training to future teachers – However, deficiencies specifically pointed out were not removed by the appellant-institution – Therefore, withdrawal of recognition was justified – Prayer for permitting the students to continue in the appellant-institution for session 2011-12 on sympathetic ground also rejected since recognition of the institution stood withdrawn on 20th July, 2011 which meant that while it had no effect qua admissions for the academic session 2010-2011, it was certainly operative qua admissions made for the academic session 2011-12 which commenced from 1st August, 2011 onwards – Education/Educational institutions.

The appellant-trust established a college which was

granted recognition on 29.5.2007 under Section 14(3)(a) of the NCTE Act for offering a B.Ed. with an intake of 100 students. On 27.7.2008, the NCTE issued a notice to the appellant to show cause why the recognition should not be withdrawn in terms of Section 17 of the Act in view of the deficiencies pointed out in the notice like inadequacy of built up area available to the institution, the land underlying the structure not being in the name of the appellant-trust and the college being run in a building that was used by two other institutions. The recognition was withdrawn by the NCTE since the appellant did not respond to the show cause notice within the period stipulated for the purpose. The appellant filed a special civil application challenging the order of withdrawal of recognition. The High Court directed the appellant to remove the deficiencies pointed out by the NCTE and gave liberty to the NCTE to conduct fresh inspection and pass appropriate orders. In compliance with the directions of the High Court, the inspection was conducted by the NCTE after receiving intimation from the appellant that the deficiencies were removed. However, NCTE sent a fresh notice pointing out several deficiencies. Meanwhile the appellant moved High Court for direction to the University to allot students to the appellant. The High Court directed the University to allot the students of the appellant for the academic session 2011-12. In the meantime, the Western Regional Committee issued an order withdrawing the recognition granted to the appellant. The appellant filed writ petition before the High Court challenging the order of withdrawal of recognition which was dismissed. The instant appeals were filed challenging the order of the High Court.

Dismissing the appeals, the Court

HELD: 1. The present is one such case where the institution established by the appellant was inspected

more than once and several deficiencies that seriously affect its capacity to impart quality education and training to future teachers specifically were pointed out. Inadequacy of space and staff, apart from other requirements stipulated under the provisions of the Act and the Regulations, is something which disqualifies any institution from seeking recognition. Such deficiencies were not disputed nor can the same be disputed in the light of the reports submitted by the inspecting teams from time to time, including the report submitted on the basis of the latest inspection that was conducted pursuant to the directions issued by the High Court. It is difficult to appreciate how the institution could have reported compliance with the requirements of the regulations and complete removal of the deficiencies after the order passed by the High Court when the institution had neither the land standing in its name nor the building constructed in which it could conduct the training programme. The fact that the institution was being run in a building which was shared by two other colleges was itself sufficient to justify withdrawal of the recognition granted in its favour. It was also noted by the inspecting team that four lecturers employed by the appellant did not have the requisite M.Ed. qualification. Therefore, the institution was lacking in essential infrastructural facilities which clearly justified withdrawal of the recognition earlier granted to it. [Para 11] [565-D-H; 566-A]

State of Maharashtra v. Vikas Sahebrao Roundale and Ors. **(1992) 4SCC 435: 1992 (3) SCR 792 – relied on.**

2. The recognition of the institution stood withdrawn on 20th July, 2011 which meant that while it had no effect qua admissions for the academic session 2010-2011 it was certainly operative qua admissions made for the academic session 2011-12 which commenced from 1st August, 2011 onwards. The fact that there was a

modification of the said order of withdrawal on 24th August, 2011 did not obliterate the earlier order dated 20th July, 2011. The modifying order would relate back and be effective from 20th July, 2011 when the recognition was first withdrawn. Such being the position admissions made for the academic session 2011-2012 were not protected under the statute. Secondly, students should not be allowed to continue in unrecognised institutions only on sympathetic considerations. [Para 12 & 13] [566-G-H; 567-A]

Chairman, Bhartia Education Society and Anr. v. State of Himachal Pradesh and Ors. **(2011) 4 SCC 527: 2011 (2) SCR 461;** *N.M. Nageshwaramma v. State of Andhra Pradesh and Anr.* **(1986) Supp. SCC 166;** *Andhra Kesari Educational Society v. Director of School* Education **(1989) 1 SCC 392: 1988 (3) Suppl. SCR 893 – referred to.**

3. The institution established by the appellant was not equipped with the infrastructure required under the NCTE Act and the Regulations. It was not in a position to impart quality education, no matter admissions for the session 2011-2012 were made pursuant to the interim directions issued by the High Court. Therefore, the prayer for permitting the students to continue in the unrecognised institution of the appellant or directing that they may be permitted to appear in the examination is rejected. However, this order will not prevent the respondent-University from examining the feasibility of reallocating the students who were admitted through the University process of selection and counselling to other recognised colleges to prevent any prejudice to such students. Such re-allocation for the next session may not remedy the situation fully qua the students who may have to start the course afresh but it would ensure that if such admissions/reallocation is indeed feasible, the students may complete their studies in a recognised college

instead of wasting their time in a college which does not enjoy recognition by the NCTE. However, this aspect is left entirely for the consideration of the University at the appropriate level, having regard to its Rules and Regulations and subject to availability of seats for such adjustment to be made as also the terms and conditions on which the same could be made. This order shall also not prevent the affected students from seeking such reliefs against the appellant college as may be legally permissible including relief by way of refund of the fee recovered from them. [Para 17] [569-G-H; 570-A-D]

Managing Committee of Bhagwan Budh Primary Teachers Training College and another v. State of Bihar & Ors. **(1990) Supp. SCC 722;** *State of Tamil Nadu and Ors. v. St. Joseph Teachers Training Institute and Anr.* **(1991) 3 SCC 87: 1991 (2) SCR 231 – relied on.**

Case Law Reference:

1992 (3) SCR 792	**relied on**	**Para 10, 16**
2011 (2) SCR 461	**referred to**	**Para 8, 16**
(1986) Supp. SCC 166	**referred to**	**Para 8, 13**
1988 (3) Suppl. SCR 893	**referred to**	**Para 8**
(1990) Supp. SCC 722	**relied on**	**Para 14**
1991 (2) SCR 231	**relied on**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 11215 of 2011.

From the Judgment & Order dated 07.10.2011 of the High Court of Gujarat at Ahmedabad in Special Civil Application No. 9485 of 2011.

WITH

C.A. No. 11216 of 2011.

K.V. VIswanathan, Nikhil Goel, Prateek Y. Jasami, Marsook Bafaki for the Appellant.

Ramesh P. Bhatt, Amitesh Kumat, Ravi Kant, Priti Kumar (for Navin Prakash), K.V. Sreekumar, Hematika Wahi, Satyabrut Pandu, R. Pradha for the Respondents.

The Judgment of the Court was delivered by

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

2. These appeals arise out of an order dated 7th October, 2011 passed by the High Court of Gujarat at Ahmedabad, whereby Special Civil Application No.9485 of 2011 has been dismissed and order dated 20th July, 2011 as modified by order dated 24th August, 2011 issued by the Western Regional Committee under Section 17 of the National Council of Teachers' Education (for short 'NCTE') Act, 1993 withdrawing the recognition of the B.Ed. College established by the appellant upheld.

3. The appellant-Trust has established a college under the name and style Shri Morvi Sarvajanik Kelavni Mandal Sanchalit MSKM B.Ed. College, Rajkot. The college had the benefit of recognition granted in its favour in terms of an order dated 29th May, 2007 under Section 14 (3)(a) of the NCTE Act for offering a B.Ed. with an annual intake of 100 students. Shortly after the grant of the said recognition, the NCTE issued a notice dated 27th July, 2008 to the appellant to show cause why the recognition should not be withdrawn in terms of Section 17 of the Act in view of the deficiencies pointed out in the notice like inadequacy of built-up area available to the institution, the land underlying the structure not being in the name of the appellant-Trust and the college being run in a building that is used by two other institutions.

4. The recognition was finally withdrawn by the NCTE on 29th November, 2008 primarily because the appellant had failed to respond to the show cause notice within the period

stipulated for the purpose. The withdrawal order was, however, successfully challenged before the High Court by the appellant with the High Court issuing certain directions including a direction to the appellant-college to remove the defects pointed out by the NCTE and to offer the institution for a fresh inspection by the NCTE. The High Court also directed that while admissions for the current year shall not be affected by the withdrawal of recognition, in the event of non-compliance with the requirements of the Regulations, the institution shall not be permitted to admit any student for the next year. The NCTE was given liberty to have a fresh inspection conducted and pass appropriate orders in accordance with law after issuing a notice to the institution.

5. In compliance with the directions of the High Court, the appellant by its letter dated 20th December, 2010 intimated to the NCTE that the deficiencies in question had been removed and invited the NCTE to depute a team for a fresh inspection of the college. An inspection was accordingly conducted that culminated in the issue of a fresh notice to the appellant again pointing out several deficiencies in the institution including inadequacy of space, staff and the fact that the college had no land in its own name and that the institution was being run in a building which was being used by two other colleges. The appellant appears to have sent a reply to the said show-cause notice but before a final decision could be taken on the same, the appellant filed Special Civil Appeal No.6507 of 2011 before the High Court for a mandamus to the University to allot students to the appellant-college. By an order dated 14th June, 2011, the High Court directed the University to allot the students to the appellant-college for the academic session 2011-2012. In the meantime, the Western Regional Committee issued an order on 20th July, 2011 withdrawing the recognition granted to the appellant-college in exercise of its powers under Section 17 of NCTE Act. The order contained as many as nine different grounds for the said withdrawal. Aggrieved, the appellant filed Special Civil Application No.9485 of 2011 before the High

Court, *inter alia*, contending that the withdrawal of recognition was on grounds that went beyond the show-cause notice issued to the institution. It was also contended that pursuant to the directions of the High Court the University had allotted 60 students to the college who were on its rolls and whose future was likely to be adversely affected by the withdrawal order.

6. While the writ petition filed by the appellant was still pending, Western Regional Committee issued a modified withdrawal order dated 24th August, 2011 relying upon the visiting team report which found the following deficiencies:

(i) *The Institution neither had land on the date of submission of application as per Clause 7(D) of the NCTE regulations 2002, nor does it have the land even today.*

(ii) The Institution is running in a flat of Multi Storied Residential Building.

(iii) Registered lease deed of the flat was executed on 18.03.2011, that is beyond the time limit of 31.12.2010 as prescribed by the Hon'ble High Court.

(iv) One of the lecturers was not qualified as on the date of appointment.

7. The High Court was not happy with the above order as is evident from an interim order dated 30th August, 2011 whereby the Regional Director, Western Regional Committee, National Council for Teacher Education, Bhopal, was directed to send a new team to inspect the institution and submit a fresh report regarding the defects and deficiencies in the infrastructure provided by the college. An inspection committee was accordingly deputed by the NCTE who filed a report before the High Court in a sealed cover. The report, *inter alia*, stated:

"The team had done the inspection of infrastructure,

institutional facilities etc. The C.D. is enclosed. The videography had been in a continuous manner. The four corners of land and four corners of the buildings are prominently picturised. The photography of land, building, instructional facilities, staff is also done. (C.D. and album enclosed).

The Hon'ble High Court has directed to do the inspection with regards to the defects shown in the withdrawal order.

The inspection is done accordingly following the orders of the Hon'ble High Court.

The observations of the visiting team regarding the defects/deficiencies are noted below:

(i) It is true that the institution does not have the registered land document and is occupying the land belonging to Shri Uma Education Trust.

(ii) *It is true that the institution has submitted the building plan of Shri Uma Education Trust. This building plan was approved by Sarpanch, Vajdi (Virda). The approval of Rajkot Urban Development Authority is still not obtained by the Uma Education Trust.*

(iii) *It is true that the land use certificate submitted by the Institution is about the land of Uma Education Trust.*

(iv) *It is true that the Institution does not have its own land and building. The institution is running on the premises of the Uma Education Trust.*

(v) *The teaching staff profile is approved by In-charge Vibhagiya Officer, Saurashtra University on 18.02.2009 on 11.05.2011 and 13.05.2011. Four lecturers have no M.Ed. qualifications. One common observed that all lists were approved by in-charge, Vibhagiya Officer of the Unversity.*

(vi) *Uma B.Ed. college and Jalaram B.Ed. College are being run on the same premises.*

(vii) *It is true that the institution has submitted the building plan of Shri Uma Education Trust. This building plan was approved by the Sarpanch, Vajdi (Virda). The approval of Rajkot Urban Development Authority is still not obtained by the Uma Education Trust.*

(viii) Morvi Sarvajanik Kelevani Mandal and Jalaram Education Trust are unilaterally merged with Uma Education Trust without due authorisation of the competent authority and also without the approval of the WRC. The matter is still under correspondence.

(ix) *The institution/Morvi Sarvajanik Kelavani Mandal did not possess adequate land or govt. land acquired on long terms lease basis or on ownership."*

8. The High Court upon a consideration of the relevant records including the inspection report placed before it, dismissed the writ petition relying upon the decisions of this Court in *Chairman, Bhartia Education Society and Anr. v. State of Himachal Pradesh and Ors.* (2011) 4 SCC 527, *N.M. Nageshwaramma v. State of Andhra Pradesh and Anr.* (1986) Supp. SCC 166, *Students of Dattatraya Adhyapak Vidyalya v. State of Maharashtra and Ors.* SLP (C) No.2067 of 1991, decided on 19.2.1991, *Andhra Kesari Educational Society v. Director of School Education* (1989) 1 SCC 392 and a few others. The High Court held that the appellant was not entitled to any relief in the writ proceedings filed on its behalf and accordingly dismissed the writ petition. Hence the present appeals, assail the said judgment and order.

9. We have heard learned counsel for the parties and perused the record.

10. Mushroom growth of ill-equipped, under-staffed and un-

recognised educational institutions was noticed by this Court in *State of Maharashtra v. Vikas Sahebrao Roundale and Ors.* (1992) 4 SCC 435. This Court observed that the field of education had become a fertile, perennial and profitable business with the least capital outlay in some States and that societies and individuals were establishing such institutions without complying with the statutory requirements. The unfortunate part is that despite repeated pronouncements of this Court over the past two decades deprecating the setting up of such institutions. The mushrooming of the colleges continues all over the country at times in complicity with the statutory authorities, who fail to check this process by effectively enforcing the provisions of the NCTE Act and the Regulations framed thereunder.

11. The present is one such case where the institution established by the appellant has been inspected more than once and several deficiencies that seriously affect its capacity to impart quality education and training to future teachers specifically pointed out. Inadequacy of space and staff, apart from other requirements stipulated under the provisions of the Act and the Regulations, is something which disqualifies any institution from seeking recognition. Such deficiencies have not been disputed before us nor can the same be disputed in the light of the reports submitted by the inspecting teams from time to time, including the report submitted on the basis of the latest inspection that was conducted pursuant to the directions issued by the High Court. It is difficult to appreciate how the institution could have reported compliance with the requirements of the regulations and complete removal of the deficiencies after the order passed by the High Court when the institution had neither the land standing in its name nor the building constructed in which it could conduct the training programme. The fact that the institution was being run in a building which was shared by two other colleges was itself sufficient to justify withdrawal of the recognition granted in its favour. It was also noted by the inspecting team that four lecturers employed by the appellant

did not have the requisite M.Ed. qualification. Suffice it to say that the institution was lacking in essential infrastructural facilities which clearly justified withdrawal of the recognition earlier granted to it.

12. Confronted with the above position, learned counsel for the appellant argued that the students admitted to the college for the academic session 2011-2012 could be allowed to appear in the examination to avoid prejudice to them and to save their careers. A similar contention urged before the High Court has been rejected by it relying upon the decisions of this Court in which decisions this Court has not favoured grant of such relief to students admitted to unrecognised institution on consideration of misplaced sympathy. The High Court has also noted that the students had been transferred to other recognised colleges and that in any case students admitted for the academic session 2011-2012 could not be allowed to continue in an institution which did not have the requisite infrastructure prescribed under the NCTE Regulations and norms. It was argued on behalf of the appellants that the High Court was not right in observing that students had been transferred to other institutions. At any rate the order withdrawing recognition could not, according to the learned counsel, affect students admitted to the institution for the academic session 2011-2012 as the withdrawal order could only be prospective in nature and having been passed in August, 2011 was relevant only for the academic session 2012-2013. We do not think so, firstly, because the recognition of the institution stood withdrawn on 20th July, 2011 which meant that while it had no effect qua admissions for the academic session 2010-2011 it was certainly operative qua admissions made for the academic session 2011-12 which commenced from 1st August, 2011 onwards. The fact that there was a modification of the said order of withdrawal on 24th August, 2011 did not obliterate the earlier order dated 20th July, 2011. The modifying order would in our opinion relate back and be effective from 20th July, 2011 when the recognition was first withdrawn. Such

being the position admissions made for the academic session 2011-2012 were not protected under the statute.

13. Secondly, because this Court has in a long line of decisions rendered from time to time disapproved of students being allowed to continue in unrecognised institutions only on sympathetic considerations. In *N.M. Nageshwaramma* (supra) this Court while dealing with the prayer for grant of permission to the students admitted to unrecognised institution observed:

> "3. xxxxxx
>
> We are unable to accede to these requests. These institutions were established and the students were admitted into these institutes despite a series of press notes issued by the Government. If by a fiat of the court we direct the Government to permit them to appear at the examination we will practically be encouraging and condoning the establishment of unauthorised institutions. It is not appropriate that the jurisdiction of the court either under Article 32 of the Constitution or Article 226 should be frittered away for such a purpose. The Teachers Training Institutes are meant to teach children of impressionable age and we cannot let loose on the innocent and unwary children, teachers who have not received proper and adequate training. *True they will be required to pass the examination but that may not be enough. Training for a certain minimum period in a properly organised and equipped Training Institute is probably essential before a teacher may be duly launched. We have no hesitation in dismissing the writ petitions with costs.*"
>
> (emphasis supplied)

14. To the same effect is the decision of this Court in *Managing Committee of Bhagwan Budh Primary Teachers Training College and another v. State of Bihar & Ors.* (1990)

Supp. SCC 722, where this Court observed:

> **"2.** It is not possible to grant any such permission as prayed for because the granting of such permission would be clearly violating the provisions of the Education Act (see the judgments in S.L.P. No. 12014 of 1987 decided on November 25, 1987 and the *A.P. Christians Medical Educational Society v. Government of A.P.*)….".

15. In *State of Tamil Nadu and Ors. v. St. Joseph Teachers Training Institute and Anr.* (1991) 3 SCC 87, this Court once again found fault with the grant of relief to students admitted to unrecognised institutions on humanitarian grounds. This Court said:

> *"6. The practice of admitting students by unauthorised educational institutions and* then seeking permission for permitting the students to appear at the examination has been looked with disfavour by this Court*. …….. In A.P. Christians Medical Educational Society v. Government of A.P (1986) 2 SCC 667, a similar request made on behalf of the institution and the students for permitting them to appear at the examination even though affiliation had not been granted, was rejected by this Court. The court observed that any direction of the nature sought for permitting the students to appear at the examination without the institution being affiliated or recognised would be in clear transgression of the provision of the Act and the regulations. The court cannot be a party to direct the students to disobey the statute as that would be destructive of the rule of law. The Full Bench noted these decisions and observations and yet it granted relief to the students on humanitarian grounds. Courts cannot grant relief to a party on humanitarian grounds contrary to law. Since the students of unrecognised institutions were legally not entitled to appear at the examination held by the Education Department of the government, the High*

Court acted in violation of law in granting permission to such students for appearing at the public examination. The directions issued by the Full Bench are destructive of the rule of law. Since the Division Bench issued the impugned orders following the judgment of the Full Bench, the impugned orders are not sustainable in law."

(emphasis supplied)

16. Reference may also be made to *State of Maharashtra v. Vikas Sahebrao Roundale and Ors.* (supra) and *Chairman, Bhartia Education Society v. Himachal Pradesh & Ors.* (supra). In the latter case this Court observed :

"**15.** The practice of admitting students by unrecognised institutions and then seeking permission for the students to appear for the examinations has been repeatedly disapproved by this Court (see *N.M. Nageshwaramma v. State of A.P, A.P. Christian Medical Educational Society v. Govt. of A.P.* and *State of Maharashtra v. Vikas Sahebrao Roundale*[4]). We, therefore, find no reason to interfere with the decision of the High Court rejecting the prayer of the students admitted in 1999 to regularise their admissions by directing the Board to permit them to appear for the JBT examination conducted by it. The two appeals (CAs Nos. 1228 and 1229 of 2011) filed by the Society/Institute and the students in regard to the 1999 admissions are therefore liable to be dismissed."

17. There is no distinguishing feature between the cases mentioned above and the case at hand for us to strike a discordant note. The institution established by the appellant is not equipped with the infrastructure required under the NCTE Act and the Regulations. It is not in a position to impart quality education, no matter admissions for the session 2011-2012 were made pursuant to the interim directions issued by the High Court. We have, therefore, no hesitation in rejecting the prayer for permitting the students to continue in the unrecognised

institution of the appellant or directing that they may be permitted to appear in the examination. We, however, make it clear that this order will not prevent the respondent-University from examining the feasibility of reallocating the students who were admitted through the University process of selection and counselling to other recognised colleges to prevent any prejudice to such students. Such re-allocation for the next session may not remedy the situation fully qua the students who may have to start the course afresh but it would ensure that if such admissions/reallocation is indeed feasible, the students may complete their studies in a recognised college instead of wasting their time in a college which does not enjoy recognition by the NCTE. We, however, leave this aspect entirely for the consideration of the University at the appropriate level, having regard to its Rules and Regulations and subject to availability of seats for such adjustment to be made as also the terms and conditions on which the same could be made. This order shall also not prevent the affected students from seeking such reliefs against the appellant college as may be legally permissible including relief by way of refund of the fee recovered from them.

18. With the above observations, these appeals fail and are hereby dismissed with costs assessed at Rs.20,000/-.

D.G. Appeals dismissed.

P. MAHALINGAM

v.

MONICA KUMAR & ANR.

Contempt Petition (Crl.) No. 7 of 2010

WITH

Criminal Appeal No. 2323 of 2011

DECEMBER 16, 2011

[DALVEER BHANDARI AND A.K. PATNAIK, JJ.]

Constitution of India, 1950 – Articles 32, 226 and 136 – Writ Petition by appellants-medical students alleging harassment by Chairman of Educational Trust – Direction by Supreme Court to serve notice by way of Dasti upon the SHO, Police Station – Appellants subjected to brutality in police station by Inspector and his subordinates when they went to serve the notice – Complaint made to Senior Superintendent of Police but not dealt with properly – Writ petition by the appellants seeking CBI inquiry into the incident – Dismissed by the High Court holding that since FIR was not registered, the prayer for CBI inquiry at this stage could not be considered and directed the appellants to file an application u/s. 156(3) Cr.P.C. – Appeal filed before Supreme Court – Direction by Supreme Court to District and Sessions Judge to inquire into the incident and he assigned the inquiry to Additional Chief Judicial Magistrate who submitted the report – Held: Report of the Additional Chief Judicial Magistrate prima facie establish acts and/or omissions of the various police personnel which were committed when the appellants had gone to the police station to serve the Dasti summons issued by this Court and which amounted to misconduct of serious nature – Thus, direction issued to respondent No. 1 to treat the said report as a preliminary report and initiate disciplinary proceedings against the police personnel named in the conclusions thereof, giving to the police personnel

reasonable opportunity of being heard in respect of the charges and complete the disciplinary proceedings within one year – Impugned order of the High Court is set aside – In the contempt petition, direction issued to the Chairman of Educational Trust and another not to enter into the premises of the Medical College, its administrative block, its hospital, its hostel and the residence of the medical students.

CRIMINAL ORIGINAL JURISDICTION : Contempt Petition (Crl.) No. 7 of 2010.

IN

Criminal Appeal No. 2323 of 2011.

From the Judgment & Order dated 05.12.2009 of the High Court of Judicature at Allahabad in Criminal Misc. Writ Petition No. 23839 of 2009.

WITH

Crl. Appeal No. 2323 of 2011.

K.K. Venugopal, P.N. Mishra, A.K. Ganguli, Shail K. Dwivedi, AAG, Prasaht Bhushan, Pranav Sachdeva, S. Chandra Shekhar, Pooja Dhar, Ashwarya Sinha, Manoj Kumar, Ramraghvendra, Alok Kumar, Amit Singh, Rajeev K. Dubey (for Kamalendra Mishra), C.D. Singh for the appearing parties.

The Order of the Court was delivered by

O R D E R

A.K. PATNAIK, J.

Criminal Appeal No. 2323 of 2011 (Arising out of Special Leave Petition (Crl.) No. 666 of 2010)

1. Leave granted.

2. This is an appeal by way of special leave under Article 136 of the Constitution against the order dated 05.12.2009 of

the Division Bench of the Allahabad High Court dismissing the Criminal Misc. Writ Petition No.23839 of 2009 of the appellants.

3. The relevant facts as stated in the Special Leave Petition briefly are that the appellants studied M.B.B.S. course in the Santosh Medical College at Ghaziabad in Uttar Pradesh and respondent No.2 is the Chairman of the Maharaji Educational Trust which has established the medical college. The appellant No.1 filed Writ Petition No.33 of 2009 in this Court under Article 32 of the Constitution complaining of harassment by respondent No.2 and by the police and on 13.05.2009, this Court passed orders directing issue of notice in the writ petition. On 22.05.2009, the Registrar of this Court directed that the notice be served by way of dasti on the unserved respondents in the writ petition. When the appellants went to serve the respondent No. 4, who was then the SHO of Police Station Sector 39, NOIDA, Gautam Budh Nagar, U.P., on 28.05.2009 at about 10.30 A.M., the respondent No.4 and his subordinates started brutally assaulting them with *lathis*, shoes and fists and caused numerous injuries on all parts of their bodies. Thereafter, the appellants got themselves examined at Lok Nayak Government Hospital, New Delhi, and an x-ray of the hand of appellant No.1 was also taken which disclosed a fracture and thus her left hand was put in plaster. The appellants made a written complaint to the Senior Superintendent of Police, NOIDA, on 29.05.2009 but he refused to accept the complaint.

4. The appellants then filed Criminal Misc. Petition No.9226 of 2009 in Writ Petition (Criminal) No.33 of 2009 complaining of the aforesaid assault and on 07.07.2009, this Court passed an order that the Criminal Misc. Petition be placed along with the main matter and in the meanwhile directed the appellants to approach the District Magistrate, NOIDA, regarding the grievances. The appellants approached the District Magistrate, NOIDA, but they were informed that he was on vacation. The City Magistrate, however, called the

appellants to his office and took the video recorded statements but did not do anything in the matter. On 20.07.2009, this Court dismissed the Writ Petition (Criminal) No.33 of 2009 and granted liberty to the appellants to approach the High Court under Article 226 of the Constitution, if so advised. Thereafter, the appellants filed Writ Petition (Criminal) No.23839 of 2009 before the High Court praying *inter alia* for a CBI inquiry into the incident which took place on 28.05.2009 when the appellant had gone to serve dasti summons on respondent No.4. The High Court, however, held in the impugned order that in this case the FIR had not been registered and there was no question for considering any prayer for CBI inquiry at this stage and instead directed that the appellants may file an application under Section 156(3) of the Criminal Procedure Code, 1973 (for short 'the Cr.P.C.') and in case any such application is filed, the Magistrate may pass appropriate orders thereon. With the aforesaid observations, the High Court dismissed the writ petition.

5. The respondent No.4 has filed an affidavit stating that the appellants were not assaulted in the police station on 28.05.2009 as alleged by the appellants. In the affidavit, however, the respondent No.4 has stated that on 28.05.2009 when the appellant had gone to the Police Station to serve the dasti summons, it was noticed that they were video recording with a sting camera and this was objected to and articles were seized from them in the presence of three public witnesses and the appellants gave an apology later.

6. The appellants have filed a rejoinder reiterating that they were assaulted on 28.05.2009 at 10.30 A.M. and they were detained in the Police Station of Section Sector 39, NOIDA, for 4 to 5 hours and during this period the appellants were repeatedly assaulted and abused and the appellant No.1 was molested by respondent No.4 and they were released only after the mother of the appellants called the Senior Superintendent

of Police of NOIDA, who thereafter called the respondent No.4 to release the appellants at about 4.00 P.M.

7. After hearing learned counsel for the parties, we passed orders on 11.05.2010 directing the District and Sessions Judge, Gautam Budh Nagar, U.P., to enquire into the incident of 28.05.2009 when the appellants had gone to serve the dasti summons of this Court and pursuant to the aforesaid order dated 11.05.2010, the District and Sessions Judge, Gautam Budh Nagar, U.P., assigned the inquiry to the Additional Chief Judicial Magistrate III of Gautam Budh Nagar, U.P., who after conducting the enquiry has submitted the report dated 16.11.2010. We have considered the objections to the report and heard learned counsel for the parties. The conclusions in the report dated 16.11.2010 of the Additional Chief Judicial Magistrate III of Gautam Budh Nagar, U.P., are extracted hereinbelow:

"1. Ms. Monica Kumar and Shri Manish Kumar had gone to Sector 39 Police Station in NOIDA on 28.05.2009 for serving a dasti notice of Hon'ble Supreme Court upon Shri Anil Samania, Station House Officer, Sector 39 Police Station in NOIDA.

2. Ms. Monica Kumar and Shri Manish Kumar were subjected to brutality in Sector 39 Police Station, NOIDA by Shri Anil Samania, Inspector, Shri J.K. Gangwar, Sub Inspector and few Constables.

3. Tailored entries have been made on 28.05.2009 in the General Diary of the Police Station for cover up.

4. The complaint in the matter was made with serious allegations against Shri Anil Samania but the complaint was not dealt with properly and the matter was given a decent burial.

5. The Sub-Inspector, In-Charge of the Complaint Cell in

the office of the Senior Superintendent of Police, Gautam Budh Nagar, Shri Rishi Pal Singh, failed in his duty to place the complaint before the higher authorities for proper action in the matter.

6. The Superintendent of Police (Traffic), Gautam Budh Nagara, Shri Ajay Sahdav, failed in his supervisory duty in as much as without perusal of the accusations in the complaint and the action taken/required thereon, allowed entombment of the grievance in the complaint.

7. The Senior Superintendent of Police, Gautam Budh Bagar Shri Ashok Kumar Singh appears to have shut his eyes to what had happened in the Police Station on 28.05.2009.

8. Involvement of Dr. P. Mahalingam in the incident on 28.05.2009 could not be established. Thus, it cannot be said that the complainants were packed down at the will of the Chairman of Santosh Medical College, Ghaziabad, Shri P. Mahalingam."

8. Thus, the conclusions in the report dated 16.11.2010 of the Additional Chief Judicial Magistrate quoted above are that the appellants were subjected to brutality in Sector 39 Police Station, NOIDA, by Inspector Anil Samania (Respondent No.4), Shri J.K. Gangwar, Sub-Inspector and few constables and tailored entries were made on 28.05.2009 in the General Diary of the Police Station for a cover up and when a complaint was made to the Senior Superintendent of Police, Gautam Budh Nagar, U.P., the Sub-Inspector, In-charge of the Complaint Cell Shri Rishipal Singh failed in his duty to place the complaint before the higher authorities for proper action in the matter. The further conclusion in the report dated 16.11.2010 of the Additional Chief Judicial Magistrate is that the Superintendent of Police (Traffic), Gautam Budh Nagar, U.P., Ajay Sahdav, failed in his supervisory duty and allowed entombment of the grievance in the complaint and the Senior Superintendent of

Police, Gautam Budh Nagar, Ashok Kumar Singh appears to have shut his eyes to what had happened in the Police Station on 28.05.2009. The conclusions in the report dated 16.11.2010 of the Additional Chief Judicial Magistrate *prima facie* establish acts and/or omissions of the various police personnel which were committed when the appellants had gone to the police station to serve the dasti summons issued by this Court and which amount to misconduct of serious nature. We, therefore, direct the respondent No.1 to treat the report dated 16.11.2010 of the Additional Chief Judicial Magistrate III of Gautam Budh Nagar, U.P., as a preliminary report and initiate disciplinary proceedings against the police personnel named in the conclusions thereof and conduct the disciplinary proceedings in accordance with the relevant rules, giving to the police personnel reasonable opportunity of being heard in respect of the charges as provided in the Rules and in Article 311(2) of the Constitution and complete the disciplinary proceedings within one year from today.

9. It will also be open for the appellants to file criminal complaint under Section 200 of the Cr.P.C. on the basis of the conclusions in the report dated 16.11.2010 of the Additional Chief Judicial Magistrate III of Gautam Budh Nagar, U.P., before the appropriate Magistrate for prosecuting only those police personnel who are alleged to have committed any offence, and if such a complaint is filed, the same will be dealt with in accordance with law.

10. The impugned order of the High Court is set aside and the appeal is allowed to the extent indicated above. No costs.

Contempt Petition (Crl.) No.7 of 2010 in Criminal Appeal No. 2323 of 2011 (Arising out of Special Leave Petition (Crl.) No. 666 of 2010)

When this Contempt Petition was heard along with S.L.P. (Crl.) No.666 of 2010, Mr. K.K. Venugopal, learned counsel for the applicant, submitted that an apology has been given by the

contemnors pursuant to the orders passed by this Court in Criminal Appeal No.968 of 2009 (arising out of S.L.P. (Crl.) No.5593 of 2006) and this apology is in force. He further submitted that the facts stated in the Contempt Petition would show that the contemnors are repeatedly intimidating the applicant and his family members and for this reason the applicant has made a prayer to the Court to pass an order commanding the contemnors not to enter within 100 metres of the premises of Santosh Medical College and its administrative block, hospital, hostel and the residence of the applicant.

2. In reply, Mr. Prashant Bhushan, learned counsel for the contemnors, relying upon the averments in the reply, submitted that Santosh Medical College is next to the residence of the contemnors and that the Medical College is on the main public road, which is the only road that leads to the city and shopping complex from the residence of the contemnors. He submitted that the bank and the public transport are also next to the office of the Medical College. He submitted that if any order as prayed for by the applicant is passed by this Court then the contemnors will be deprived of access to the city and the shopping complex as well as the bank and the public transport.

3. We cannot possibly direct the contemnors not to go to any public place such as the public road, bank, shopping complex but considering all aspects of the matter, we direct that the two contemnors will not enter into the premises of Santosh Medical College, its administrative block, its hospital, its hostel and the residence of the applicant. The Contempt Petition is disposed of accordingly.

N.J. Matters disposed of.

##NEXT FILE

JETHA BHAYA ODEDARA

v.

GANGA MALDEBHAI ODEDARA AND ANR.

(SLP (Crl.) No. 4010 of 2011)

DECEMBER 16, 2011

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

Code of Criminal Procedure, 1973 – s. 439 – Bail – Respondent and his companions charged u/ss. 302, 307, 324, 147, 148, 149, 323, 504, 507(2) IPC read with s.25(1) of the Arms Act and s. 135 of Bombay Police Act – Trial court rejected the application for grant of bail, however, the High Court granted bail to the respondent – Special Leave Petition by the respondent seeking cancellation of grant of bail – Held: Bail order was passed nearly two years back – It is not the case of the complainant that the respondent has during this period either tried to tamper with the evidence or committed any other act that may affect the fairness of the trial – There was no gun shot injury caused by the firearm carried by the respondent to either the complainant or any other person involved in the incident – Thus, order granting bail not interfered with at this stage.

Appellant-complainant registered an FIR against the respondent and his companions for offences punishable under Sections 302, 307, 324, 147, 148, 149, 323, 504,

507(2) IPC read with Section 25(1) of the Arms Act, and Section 135 of the Bombay Police Act. A charge sheet was filed before the Sessions Judge and thereafter, the case was taken up for trial. The respondent filed an application before the trial court for grant of bail and the same was dismissed. The respondent filed an application before the High Court which was allowed. Therefore, the appellant-complainant filed the instant appeal.

Dismissing the Special Leave Petition, the Court

HELD: If the allegations made in the special leave petition and those made in the counter affidavit are correct, the incident appears to have been the result of a gang war between 'K' Gang of which the respondent is said to be a member and 'A' Gang of which the complainant-petitioner and some of the witnesses are said to be active members. While no one including a gangster has any right to take law into his own hands or to criminally assault any other gangster operating in any area or any one else for that matter, the fact that two gangs appear to be at war with each other and involved in commission of several offences, makes it imperative that the rival versions presented before the Court in connection with the incident in question are examined carefully and with added circumspection. The bail order was passed nearly two years back. It is not the case of the complainant that the respondent has during this period either tried to tamper with the evidence or committed any other act that may affect the fairness of the trial. Equally significant is the fact that there was no gunshot injury to either the complainant or the deceased or any other person involved in the incident. In the circumstances and keeping in view the fact that the prosecution shall be free to apply for cancellation of bail should the respondent fail to comply with any of the conditions imposed upon him by the High Court in the

order under challenge, the order granting bail is not interfered with at this stage. [Paras 5 and 6]

CRIMINAL APPELLATE JURISDICTION : SLP (Crl.) No. 4010 of 2011.

From the Judgment & Order dated 13.09.2010 of the High Court of Gujarat at Ahmedabad in Criminal Misc. Application No. 9119 of 2010.

D.N. Ray, Lokesh K. Choudhary, Sumita Ray for the Petitioner.

Meenakshi Arora, Hemantika Wahi, Jesal, Ashwini Kumar for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. The High Court of Gujarat at Ahmedabad has by its order dated 13th September, 2010 allowed Criminal Misc. -Application No.9119/2010 and enlarged the respondent, Ganga Maldebhai Odedara on bail under Section 439 of Code of Criminal Procedure. The present Special Leave Petition has been filed by the complainant assailing the said order.

2. Briefly stated, the prosecution case is that 14th January, 2007, being Makar Sankranti Day, the complainant-Jetha Bhaya Odedara, the petitioner before us, was sitting at the house of one Abha Arjan, along with Navgan Arasi, Rama Arasi Jadeja, Suresh Sanghan Odedara and a few ladies of the house, named, Aarsi Munja, Maliben and Puriben. At around 8.00 p.m. one Ramde Rajsi Odedara, one of the accused persons is alleged to have come to the place where the complainant was sitting and started using abusive language. He was asked not to do so, thereupon he left the place only to return a few minutes later with accused Punja Ram, Lakha Ram, Devsi Rama, Vikram Keshu Odedara, Gangu Ranmal, Vikram

Devsi Odedara, Ramde Rajsi Odedara and the respondent and some others armed with knives and a pistol which the -- respondent was allegedly carrying with him. The accused persons started abusing and assaulting the complainant and others who were sitting with him resulting in knife injuries to Vikram Keshu, Navgan Arasi, Rama Arasi and Puriben. Respondent Ganga Maldebhai Odedara is alleged to have fired multiple rounds from the pistol in the air exhorting his companions to kill the complainant and others with him. Navgan Arasi died in the hospital on account of the injuries sustained by him leading to the registration of FIR No. I Cr.No.4/2007 in the Kirti Mandir Police Station, Porbandar City against the respondent and his companions for offences punishable under Sections 302, 307, 324, 147, 148, 149, 323, 504, 507 (2) of IPC read with Section 25(1) of the Arms Act and Section 135 of the Bombay Police Act. With the death of the deceased, Navgan Arasi, in due course the investigation was completed and a charge sheet for the offences mentioned above filed before the Sessions Judge, Porbandar, who made over the case to Fast Track Court, Porbandar for trial and disposal in accordance with law.

3. An application, being Crl. Misc. Application No.3/2010 was then filed by the respondent before the trial Court for grant of bail which was opposed by the prosecution and eventually dismissed by its order dated 11th February, 2010. The trial Court was of the view that no case for the grant of bail to the respondent-applicant had in the facts and circumstances of the case been made out particularly in view of the fact that the respondent was involved in several criminal cases apart from the one in which he was seeking bail. The trial Court was also of the view that the respondent was a member of the gang operating in Porbandar area and that he had absconded for a month before he was arrested. It was also of the view that the role played by the respondent and his association with the other accused persons was likely to affect the smooth conduct of the trial.

4. Aggrieved by the order passed by the trial Court the respondent filed Criminal Misc. Application No.9119/2010 before the High Court of Gujarat at Ahmedabad which application as noticed earlier, was allowed by the High -Court in terms of the impugned order in this petition. The High Court has without scrutinizing and appreciating the evidence in detail come to the conclusion that the respondent had made out a case for grant of bail. The High Court also noticed the fact that no injury was caused with the help of the firearm which the respondent was allegedly carrying with him. The High Court accordingly allowed the application subject to the condition that the respondent shall not take undue advantage of his liberty, tamper with or pressurize the witnesses and that he shall maintain law and order and mark his presence before the concerned police station once in a month. He was also directed to surrender his passport and not to enter Porbandar Taluka limits for a period of six months. The present special leave petition assails the correctness of the above order.

5. We have heard learned counsel for the parties at some length. We have also gone through the record. While the petitioner-complainant has described the respondent and other accused persons as a desperate gang active in Porbandar area and involved in commission of several -offences, the respondent has in the counter affidavit filed by him made a similar allegation giving particulars of the cases registered against the petitioner and some of the witnesses. In para 4 of the counter affidavit the respondent has stated thus:

"4. xxxxxxxxx

I state that the complainants' side is a well recognised Gang, properly known as 'Arjun Gang' and 'God Mother Gang'. Prosecution witness-Abha Arjan, who is the brother of the deceased is the real son of Arjan Munja Jadeja. Arjan Munja Jadega is the real brother of deceased Sarman Munja Jadeja who was a well known history sitter of Porbandar. After death of Sarman Munja, Santokben Jadeja, properly known as 'God Mother' took the charge of Gang and it was known as God Mother Gang. Series of offences have been registered against 'Arjun Gang' and 'God Mother Gang'. Abha Arjan is the nephew of Santokben Jadeja. Abha Arjan Jadeja is involved in series of offences stated herein below:

ABHA ARJAN JADEJA

C.R. No.	Offence U/s.	Police Station
II-3068/2001	25 (1B) A, etc. of Arms Act	Madhavpur
II-101/1995	25 (1B) A, etc. of Arms Act	Kutiyana
II-28/1995	25 (1B) A, etc. of Arms Act	Kutiyana
II-33/1990	504, 506(2), etc. of IPC	Kamlabaug
I-193/1997	302, 120-B of IPC and Sec. 25 (1B) of Arms Act	Kamlabaug
I-170/1994	307, 302 etc. of IPC	Kamlabaug
II-30/1990	506(2), 114, etc. of IPC	Kamlabaug
II-54/1997	25 (1B) (A), 25 (1) (D) of Arms Act	Ranavav
II-3/1994	25 (1B) (A), 25 (1) (D) of the Arms Act	Ranavav

I-20/1990 367, 147, 325, etc. of IPC and 25 (1) A of the Arms Act Kutiyana

I-91/1990 147, 148, 149, 323, 324 of IPC Kirti Mandir

I say and submit that the complainants' side is a well recognized Gang, properly known as 'Arjun Gang' and 'God Mother Gang'. Prosecution witnesses viz. Jetha Bhaya, Suresh Sangan Odedra, Keshu Chana Kudechha, Bhima Rama Bhutiya, Prakash Punja Kadechha, Rama Arshi, Amit Nebha Bhutiya are the members of 'Arjun Gang' and 'God Mother Gang'. All these prosecution witnesses are involved in series of offences stated herein below:

JETHA BHAYA ODEDRA-COMPLAIANT

C.R. No. Offence U/s. Police Station

I-44/1995 302 of IPC Udhyognagar

I-177/1994 307, 147, 148, 149 etc. of IPC Kamlabaug

SURESH SANGAN ODEDRA

C.R. No. Offence U/s. Police Station

II-79/1993 135-B of B.P. Act Kamlabaug

I-189/1993 302 of IPC Kamlabaug

I-24/2001 323, 324 etc. of IPC Kamlabaug

II-20/1992 110, 117, 135 of B.P. Act Kamlabaug

II-61/1995 122-C of B.P. Act Kirti Mandir

BHIMA RAMA BHUTIYA

-

C.R. No. Offence U/s. Police Station

III- /1991 66B & 65E of Prohibition Act Kirti Mandir

I-101/1991 323, 324, 325, 114 of IPC and Section 135 of B.P. Act. Kirti Mandir

III-5132/2003 66(1)B and 65(1)E of Prohibition Act Kirti Mandir

I-44/1993 279, 337, 338 of IPC and 177, 184, etc. M.V. Act Udhyognagar

I-252/1991 302 of IPC and 25(1) of Arms Act and 135 of B.P. Act Kamlabaug

I-30/1993 302 of IPC Madhavpur

I-46/1993 147, 325, 149, etc. of IPC Madhavpur

III-18/1992 66-B, 65E of the Prohibition Act Madhavpur

II-28/1995 25 (1) B-A of Arms Act Kutiyana

II-3003/2001 Madhavpur	142 of B.P. Act	
I-49/2001 Udhyognagar	447, 323, 506 (2), etc. of IPC	
III-5085/2000 Madhavpur	66-B, 66EE of Prohibition Act	
I-54/2000 Madhavpur	66-B, 65Ee of Prohibition Act	
II-3054/2000 Madhavpur	142 of B.P. Act	
I-17/1994 Madhavpur	143, 506 (2) of IPC	

PRAKASH PUNJA KUCHHADIYA

C.R. No.	Offence U/s.	Police Station
II-97/2007 Mandir	135 of B.P. Act	Kirti
II-3025/2002 Mandir	135 of B.P. Act	Kirti
III-5275/2002 Act	66-1-B, 85(1-3) of Prohibition	Kirti Mandir
III-5052/1999 Act	66-1-B, 85(1-3) of Prohibition	Kirti Mandir
I-102/2001 177 of M.V. Act	279, 337 of IPC and 337, 184,	Kirti Mandir

RAMA ARSHI JADEJA

C.R. No.	Offence U/s.	Police Station
II-96/2007 Mandir	135 of B.P. Act	Kirti

AMIT NEBHA BHUTIYA

C.R. No.	Offence U/s.	Police Station
III-5019/1999 Kirti Mandir	66(1) B of Prohibition Act	

6. The petitioner has not filed any rejoinder to the counter affidavit filed on behalf of the respondent. If the allegations made in the special leave petition and those made in the counter affidavit are correct, the incident appears to have been the result of a gang war between 'Kotda Gang' of which the respondent is said to be a member and 'Arjun Gang' of which the complainant-petitioner and some of the witnesses are said to be active members. It is true that while no one including a gangster has any right to take law into his own hands or to criminally assault any other gangster operating in any area or any one else for that matter, the fact that two gangs appear to be at war with each other and involved in commission of several offences, makes it imperative that the rival versions presented before the Court in connection with the incident in question are examined carefully and with added circumspection. Having said that we need to note that the bail order was passed as early as on 11th February, 2010 i.e. nearly two years back. It is not the case of the complainant that the respondent has during this period either tried to tamper with the evidence or committed any other act that may affect the fairness of the trial. Equally significant is the fact that there was no gunshot injury to either the complainant or the deceased or any other person involved in the incident. In the circumstances and keeping in view the fact that the prosecution shall be free to apply for cancellation

of bail should the respondent fail to comply with any of the conditions imposed upon him by the High Court in the order under challenge, we are not inclined to interfere with the order granting bail at this stage.

7. The special leave petition is dismissed with these observations. We make it clear that nothing said by us in this order shall prejudice either the prosecution or the defence. The observations made by us are relevant only for the disposal of the petition and will not be taken to be the expression of any opinion on the merits of the case pending before the court below.

N.J. Special Leave Petition dismissed.

HELIOS & MATHESON INFORMATION TECHNOLOGY LTD. & ORS.

v.

RAJEEV SAWHNEY & ANR.

(Special Leave Petition (Crl.) No. 4606 of 2011 etc.)

DECEMBER 16, 2011

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

Code of Criminal Procedure, 1973:

Criminal Revision – Scope of – Order of Additional Chief Metropolitan Magistrate taking cognizance and directing summons to issue on a criminal complaint alleging offences of cheating and forgery, set aside by the Additional Sessions Judge – Order of Additional Sessions set aside by High Court – Held: The averments made in the complaint when taken at their face value, make out a case against the accused – The complaint does contain assertions with sufficient amount of clarity on facts and events which if taken as proved can culminate in an order of conviction – Therefore, there is no error or perversity either in the order of the Magistrate taking cognizance and issuing process or in the order of the High Court in setting aside the order of Additional Sessions Judge – There is no reason to interfere with the order passed by the High Court in exercise of jurisdiction under Article 136 of the Constitution – Constitution of India, 1950 – Article 136.

Criminal Revision – Adducing of evidence – Accused producing photocopies of documents in revision before Additional Sessions Judge, who set aside the order of the Magistrate – Held: In a revision petition, photocopies of documents produced by the accused for the first time could not be entertained and made a basis for setting aside an order passed by the trial court and dismissing a complaint which otherwise made out the commission of an offence – The accused is entitled to set up his defence before the trial court at the proper stage.

s.202 – Criminal complaint – Non-disclosure of the fact of a previous complaint – Order of Additional chief Metropolitan Magistrate taking cognizance and issuing process set aside by Additional Sessions Judge in revision – HELD: On the date the Magistrate took cognizance of the offences alleged in the complaint filed before him, no other complaint was pending in any other court, as the previous complaint had been quashed without a trial on merits – Mere filing of a previous complaint could not in the circumstances be a bar to the filing of another complaint or to the proceedings based on such complaint being taken to their logical conclusion – So also the High Court was correct in holding that there was no violation of the provision of s. 202 Cr.P.C. to warrant interference in exercise of revisional powers by the Sessions Judge.

Respondent no. l filed a criminal complaint before the Additional Chief Metropolitan Magistrate, alleging commission of offences punishable u/s 417, 420, 465,

467, 468 and 471 read with s. 120B, IPC, by the petitioners. Specific allegations were made in the complaint to the effect that the petitioners had entered into a conspiracy to defraud the complainant and for that purpose accused no 4 had played an active role apart from fabricating a Board resolution when no such resolution had in fact been passed. The Magistrate recoded prima facie satisfaction about the commission of offences stated to have been committed, took cognizance and directed issuance of process against the accused. The said order was challenged in revisions petitions before the Additional Sessions Judge, who set aside the order of the Magistrate holding that although the allegations regarding fabrication of a resolution, taken at their face value, made out a prima facie case of fraud against the accused yet the minutes of a subsequent meeting allegedly held on 19.7.2005, a photocopy whereof was filed in the criminal revisions, ratified the resolution allegedly passed on 28.6.2005, and as such no case of fraud or cheating was made out against the accused. The High Court set aside the order of the Additional Sessions Judge.

Dismissing the petitions, the Court

HELD: 1.1 The averments made in the complaint when taken at their face value, make out a case against the accused. The complaint does contain assertions with sufficient amount of clarity on facts and events which if taken as proved can culminate in an order of conviction against the accused persons. That is, precisely the test to be applied while determining whether the court taking cognizance and issuing process was justified in doing so. [para 8]

1.2 There is no error or perversity in the view taken by the High Court that in a revision petition photocopies of documents produced by the accused for the first time, could not be entertained and made a basis for setting aside an order passed by the trial court and dismissing a complaint which otherwise made out the commission of an offence. The accused is, doubtless, entitled to set up his defence before the trial court at the proper stage, confront the witnesses appearing before the court with any document relevant to the controversy and have the documents brought on record as evidence to enable the trial court to take a proper view regarding the effect thereof. But no such document, the genuineness whereof was not admitted by the parties to the proceedings, could be introduced by the accused in the manner it was sought to be done. That apart, whether or not the document dated 19.7.2005, could possibly have the effect of ratifying the resolution allegedly passed on 28.6.2005 was also a matter that could not be dealt with summarily, especially when the former did not even make a reference to the latter. [para 9-10]

Minakshi Bala v. Sudhir Kumar and Ors. **(1994) 4 SCC 142 – relied on**

2.1 On the date the Additional Chief Metropolitan Magistrate, Mumbai, took cognizance of the offences in the complaint filed before him no other complaint was pending in any other court, as the complaint before the Magistrate at Bangalore had been quashed without a trial on merits. Mere filing of a previous complaint could not in the circumstances be a bar to the filing of another complaint or for proceedings based on such complaint being taken to their logical conclusion. So also the High Court was correct in holding that there was no violation of the provision of s. 202 Cr.P.C. to warrant interference in exercise of revisional powers by the Sessions Judge. [para 11]

2.2 The complaint in the instant case, does make specific allegations which would call for a proper inquiry and trial and the Magistrate had indeed recorded a prima facie conclusion to that effect. There is no reason to interfere with the order passed by the High Court, in exercise of jurisdiction under Article 136 of the Constitution of India. [para 12-13]

Pepsi Foods Ltd. and Anr. V. Special Judicial Magistrate and Ors. **1997 (5) Suppl. SCR 12 = (1998) 5 SCC 749 and** *State of Orissa v. Debendra Nath Padhi* **2004 (6) Suppl. SCR 460 = (2005) 1 SCC 568 – relied on.**

Case Law Reference:

(1994) 4 SCC 142	**relied on**	**para 9**
1997 (5) Suppl. SCR 12	**relied on**	**para 12**
2004 (6) Suppl. SCR 460	**relied on**	**para 12**

CRIMINAL APPELLATE JURISDICTION : SLP (Crl.) No. 4606 of 2011 etc.

From the Judgment & Order dated 06.05.2011 of the High Court of Judicature at Bombay in Criminal Revision Application No. 441 of 2008.

WITH

SLP (Crl.) No. 4672 of 2011.

K.K. Venugopal, Altaf Ahmed, Siddharth Dave, Jemtiben AO, Vibha Datta Makhija, Ankur Tomer, Navkesh Betia, Sandeep Narain, S. Narain & Co. for the Petitioner.

The following Judgment of the Court was delivered by

T.S. THAKUR, J. 1. These Special Leave Petitions arise out of an order dated 6th May, 2011, passed by the High Court of Judicature at Bombay in Criminal Revision Application No.441 of 2008 whereby the High Court has set aside order dated 13th August, 2008 passed by the Additional Sessions Judge, Greater Bombay in Revision Applications No.449, 460 and 853 of 2007 and restored that made by the Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai taking cognizance of offences allegedly committed by the petitioners.

2. Respondent No.1, Rajeev Sawhney filed Criminal Complaint No.20/SW/2007 before Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai, alleging commission of offences punishable under Sections 417, 420, 465, 467, 468, 471 read with Section 120B of IPC by the petitioners. The complaint set out the relevant facts in great detail and made specific allegations to the effect that petitioners had entered into a conspiracy to defraud him and for that purpose Shri Pawan Kumar, arrayed as accused No.4 in the complaint, had played an active role apart from fabricating a Board resolution when no such resolution had, in fact, been passed. On receipt of the complaint the Additional Chief Metropolitan Magistrate recorded prima facie satisfaction about the commission of offences punishable under Sections 417, 420, 465, 467, 468, 471, read with Section 120B of IPC, took cognizance and directed issuance of process against the accused persons. Aggrieved by the said order, Revision Petitions No.449, 460, 853 of 2007 were filed by the accused persons before the Additional Sessions Judge, Greater Bombay, challenging the order taking cognizance and the maintainability of the complaint on several grounds. The revision petitions were eventually allowed by the Additional Sessions Judge, Greater Bombay by his order dated 13th August, 2008 and the summoning order set aside. The Additional Sessions Judge came to the conclusion that although the allegations regarding fabrication of a resolution, taken at their face value, made out a prima facie case of fraud against

the accused persons yet the minutes of a subsequent meeting allegedly held on 19th July, 2005, a photocopy of which was filed along with Criminal Revision No.460/2007 ratified the resolution allegedly passed on 28th June, 2005. The Court on that premise concluded that no fraud or cheating was made out against the accused persons. The Court observed:

> "The question *is only in respect* of the incident 28/06/2005 *if this incident averred in* the complaint is t*aken as it is without any more facts then certainly leads a prima facie case of playing fraud.* However, in this case, it is seen from the record that the *complainant had meeting on 19/07/2005*, the minutes *of the meeting are produced at* page No.293 in Criminal Revision No.460/2007. *This meeting and its minutes are not disputed. The relevant portion of the minutes on 19/07/2005 relevant for our purposes are as under*:
>
> > "Mr. Rajeev Sawhney has agreed to approve and sign the circular resolution for opening the Bank Account of VMoksha Mauritius with State Bank of Mauritius and obtaining the loan facility for the purposes of receiving the purchase consideration and remittance of the subscription money for the issue of preference shares in favour of VMoksha Mauritius with effect from the time of execution and exchange of the above Undertaking and the modification letter for the Escrow Arrangement."
>
> *This ratifies the act of 28/06/2005, therefore the minutes of the meeting which is signed by the complainant himself and accused No.4. Mr. Pawan Kumar and other directors etc. if perused the act of 28/06/2005 is ratified* and the complainant thus consented to that act. Therefore, there remained nothing of the cheating to the complainant by the accused."
>
> (emphasis is supplied)

3. The Court also found fault with the complainant suppressing the fact of a complaint having been filed before the Additional Chief Metropolitan Magistrate at Bangalore and the alleged non-observance of the provisions of Section 202 of the Cr.P.C.

4. The above order was then challenged by the complainant, Shri Rajeev Sawhney before the High Court of Bombay in Criminal Revision Application No.441 of 2008. The High Court came to the conclusion that the Additional Sessions Judge had fallen in error on all three counts. The High Court noticed that the complaint filed before the IV Additional Chief Metropolitan Magistrate at Bangalore had been quashed by the Karnataka High Court on account of a more comprehensive complaint having been filed before the Additional Chief Metropolitan Magistrate at Mumbai. Consequently, on the date the Additional Chief Metropolitan Magistrate took cognizance of the offence alleged against the accused persons there was no complaint other than the one pending before the said Court. The complainant could not, therefore, be accused of having suppressed any material information from the trial Court to call for any interference by the Sessions Court on that count.

5. As regards the alleged non-observance of the provisions of Section 202 Cr.P.C. the High Court came to the conclusion that the provision of Section 202 Cr.P.C. had been complied with by the Magistrate while taking cognizance and issuing process.

6. On the question of ratification of the resolution allegedly passed on 28th June, 2005, the High Court held that the Sessions Judge was not justified in entertaining a photocopy of the document relied upon by the accused at the revisional stage, placing implicit reliance upon the same and interfering with the on-going proceedings before the Magistrate. The High Court observed:

> "The third ground on which the learned Addl. Sessions

Judge had allowed the revision of the accused persons and quashed the process was that the acts in dispute were ratified in the meeting dated 19.7.2001. It appears that during the arguments before the Addl. Sessions Judge, a photocopy of a document purporting to be minutes of the meeting of the advisers of the complainant and accused No.4 Pawan Kumar held on 19.7.2005 was produced to show that the parties had approved the act of opening the account in the name of the Company and securing the loan on 28.6.2005. Firstly, this document was produced for the first time before the Addl. Sessions Judge in the revision application. This document could be treated as a defence of the accused persons. That document was not available before the Addl. C.M.M. when he passed the order. Secondly, this document being the defence could not be taken into consideration for the purpose of deciding whether prima facie case is made out for issuing process. The learned Addl. Sessions Judge observed that signature on the document was not disputed. In fact, the stage of proving that document or admitting signature on that document had never arisen. The original document was not before the Court and only a photocopy of the document purporting to be minutes of the meeting was filed and on the basis of such photocopy produced during the revision application by the accused persons, the learned Addl. Sessions Judge jumped to the conclusion that such a resolution was passed and the acts of 28.6.2005 were ratified. In my opinion, it will not be appropriate for the Addl. Sessions Judge."

7. The present Special Leave Petitions assail the correctness of the view taken by the High Court.

8. Appearing for the petitioners M/s. K.K. Venugopal and Altaf Ahmed, learned senior counsels strenuously argued that the High Court was not justified in reversing the view taken by the Sessions Judge and in remitting the matter back to the trial Court. We do not think so. The reasons are not far to seek. We say so because the averments made in the complaint when taken at their face value, make out a case against the accused. We have gone through the averments made in the complaint and are of the view that the complaint does contain assertions with sufficient amount of clarity on facts and events which if taken as proved can culminate in an order of conviction against the accused persons. That is, precisely the test to be applied while determining whether the Court taking cognizance and issuing process was justified in doing so. The legal position in this regard is much too well-settled to require any reiteration.

9. Learned counsel for the petitioners made a valiant attempt to argue that the Revisional Court was justified in receiving documents from the accused persons at the hearing of the revision and decide the legality of the order taking cognizance on that basis. Before the High Court a similar contention was raised but has been turned down for reasons that are evident from a reading of the passage extracted by us above. We see no error or perversity in the view taken by the High Court that in a revision petition photocopies of documents produced by the accused for the first time, could not be entertained and made a basis for setting aside an order passed by the trial Court and dismissing a complaint which otherwise made out the commission of an offence. The accused is doubtless entitled to set up his defence before the trial Court at the proper stage, confront the witnesses appearing before the Court with any document relevant to the controversy and have the documents brought on record as evidence to enable the trial Court to take a proper view regarding the effect thereof. But no such document, the genuineness whereof was not admitted by the parties to the proceedings, could be introduced by the accused in the manner it was sought to be done. We may in this regard gainfully refer to the decision of this Court in *Minakshi Bala v. Sudhir Kumar and Ors.* (1994) 4 SCC 142 where one of the questions that fell for consideration was whether in a revision petition challenging an order framing

charges against the accused, the latter could rely upon documents other than those referred to in Sections 239 and 240 of the Cr.P.C. and whether the High Court would be justified in quashing the charges under Section 482 of the Cr.P.C. on the basis of such documents. Answering the question in the negative this Court held that while an order framing charges could be challenged in revision by the accused persons before the High Court or the Sessions Judge, the revisional Court could in any such case only examine the correctness of the order framing charges by reference to the documents referred to in Sections 239 and 240 of the Cr.P.C and that the Court could not quash the charges on the basis of documents which the accused may produce except in exceptional cases where the documents are of unimpeachable character and can be legally translated into evidence. The following passage is, in this regard, apposite:

> **"7.** If charges are framed in accordance with Section 240 CrPC on a finding that a prima facie case has been made out — as has been done in the instant case — the person arraigned may, if he feels aggrieved, invoke the revisional jurisdiction of the High Court or the Sessions Judge to contend that the charge-sheet submitted under Section 173 CrPC and documents sent with it did not disclose any ground to presume that he had committed any offence for which he is charged and the revisional court if so satisfied can quash the charges framed against him. To put it differently, once charges are framed under Section 240 CrPC the High Court in its revisional jurisdiction would not be justified in relying upon documents other than those referred to in Sections 239 and 240 CrPC; nor would it be justified in invoking its inherent jurisdiction under Section 482 CrPC to quash the same except in those rare cases where forensic exigencies and formidable compulsions justify such a course. We hasten to add even in such exceptional cases the High Court can look into only those documents which are unimpeachable and can be legally translated into relevant evidence."

10. It is interesting to note that even in the present SLPs the petitioner has filed an unsigned copy of the alleged minutes of the meeting dated 19th July, 2005. We do not think that we can possibly look into that document without proper proof and without verification of its genuineness. There was and is no clear and unequivocal admission on the record, at least none was brought to our notice, regarding the genuineness of the document or its probative value. The complainant-respondent in this petition was also not willing to concede that the document relied upon could possibly result in the ratification of an act which was *non est* being a mere forgery. At any rate the document could not be said to be of unimpeachable character nor was there any judicial compulsion much less an exceptional or formidable one to allow its production in revisional proceedings or to accept it as legally admissible evidence for determining the correctness of the order passed by the trial Court. That apart whether or not document dated 19th July, 2005, could possibly have the effect of ratifying the resolution allegedly passed on 28th June, 2005 was also a matter that could not be dealt with summarily, especially when the former did not even make a reference to the latter.

11. The alternative contention urged by learned counsel for the petitioners that there was suppression of information by the complainant as regards filing of a previous complaint before the Magistrate at Bangalore is also without any substance. The fact that the complaint previously filed had been quashed by the High Court on account of filing of a comprehensive complaint out of which these proceedings arise is, in our opinion, a complete answer to the charge of suppression. As on the date the Additional Chief Metropolitan Magistrate, Mumbai, took cognizance of the offences in the complaint filed before him no other complaint was pending in any other Court, the complaint before the Magistrate at Bangalore having had been quashed without a trial on merits. Mere filing of a previous complaint

could not in the above circumstances be a bar to the filing of another complaint or for proceedings based on such complaint being taken to their logical conclusion. So also the High Court was, in our opinion, correct in holding that there was no violation of the provision of Section 202 Cr.P.C. to warrant interference in exercise of revisional powers by the Sessions Judge.

12. Reliance placed by learned counsel for the petitioners upon the decisions of this Court in *Pepsi Foods Ltd. and Anr. v. Special Judicial Magistrate and Ors.* (1998) 5 SCC 749 and *State of Orissa v. Debendra Nath Padhi* (2005) 1 SCC 568 is of no avail. In the former case this Court simply recognized that taking of cognizance is a serious matter and that the magistrate must apply his mind to the nature of the allegations in the complaint, and the material placed before him while issuing process. The complaint in the present case, as noticed earlier, does make specific allegations which would call for a proper inquiry and trial and the magistrate had indeed recorded a prima facie conclusion to that effect. So also the decision in *Debendra Nath Padhi* (supra) does not help the petitioner. That was a case where the question was whether at the stage of framing of charge, the accused could seek production of documents to prove his innocence. Answering the question in the negative this Court held:

> "The law is that at the time of framing charge or taking cognizance the accused has no right to produce any material. No provision in the Code of Criminal Procedure, 1973 (for short the "Code") grants to the accused any right to file any material or document at the stage of framing of charge. That right is granted only at the stage of the trial. Satish Mehra case, (1996) 9 SCC 766 holding that the trial court has powers to consider even materials which the accused may produce at the stage of Section 227 of the Code has not been correctly decided. It is well settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence."

13. In the result, we see no reason to interfere with the order passed by the High Court in exercise of our jurisdiction under Article 136 of the Constitution of India. The Special Leave Petitions are accordingly dismissed.

R.P. Special Leave Petitions dismissed.

M/S ALLIED MOTORS LTD.

v.

M/S BHARAT PETROLEUM CORPN. LTD.

Civil Appeal11200 of 2011

DECEMBER 16, 2011

[DALVEER BHANDARI AND DIPAK MISRA, JJ.]

PUBLIC DISTRIBUTION :

Petrol pump – Samples of petrol/motor spirit taken – The following day dealership terminated – Held: There has been a total violation of the provisions of law and the principles of natural justice – Samples were collected in complete violation of the procedural laws and in non-adherence of the guidelines – The haste in which 30 years old dealership was terminated even without giving show-cause notice and/or giving an opportunity of hearing, clearly indicates that the entire exercise was carried out on non-existent, irrelevant and extraneous considerations – Motor Spirit and High Speed Diesel Regulation of Supply and Distribution and Prevention of Malpractices) Order,1999 – Marketing Discipline Guidelines – Costs.

The appellant, who was running a Petrol Pump, filed a writ petition before the High Court challenging the order

dated 16.5.2000 by which its dealership was terminated. It was the case of the appellant that in the morning of 15.5.2000, an unauthorized Police Officer accompanied by the official of the respondent-Bharat Petroleum Corporation Ltd., conducted a raid at its petrol pump; that the samples taken were in complete violation of the mandatory provisions of the Motor Spirit and High Speed Diesel (Regulation of Supply and Distribution and Prevention of Malpractices) Order, 1999; that the samples were taken from six sources but the prescribed number of 12 samples were not handed over to the appellant; that the samples were taken in plastic containers, which was in complete violation of Clause 5(3) of the Order of 1999; and that the action of the respondent was pre-meditated and malafied. The writ petition of the appellant was dismissed by the Single Judge and so also its letter patent appeal by the Division Bench of the High Court.

Allowing the appeal, the Court

HELD: 1.1 In the instant case, the samples were taken on 15-5-2000. On the very next day i.e. on 16-5-2000, without even giving a show-cause notice and/or giving an opportunity of hearing, the respondent-Corporation terminated the dealership of the appellant. The appellant had been operating the petrol pump for the respondent for the last 30 years and was given 10 awards declaring its dealership as the best petrol pump in the entire State of NCT Delhi. During this period, on a number of occasions, samples were tested by the respondent and were found to be as per specifications. The haste in which 30 years old dealership was terminated even without giving show-cause notice and/or giving an opportunity of hearing clearly indicates that the entire exercise was carried out by the respondent-Corporation on non-existent, irrelevant and extraneous considerations. There has been a total violation of the provisions of law and the principles of natural justice. Samples were collected in complete violation of the procedural laws and in non-adherence to the guidelines of the respondent Corporation. [Para 58-59]

1.2 It is clear from Clause (d) of s.1 of the Marketing Discipline Guidelines, that its provisions prescribe termination only in case of second instance of adulteration of Motor Spirits. It is an admitted case that this was the first instance of alleged adulteration of Motor Spirits. [para 19]

1.3 On consideration of the totality of the facts and circumstances of the case, it becomes imperative in the interest of justice to quash and set aside the termination order of the dealership. Accordingly, the same is quashed. Consequently, the respondent-Corporation is directed to handover the possession of the petrol pump and restore the dealership of petrol pump to the appellant within three months. The Costs to be paid by the respondent Corporation to the appellant are quantified at Rs. 1,00,000. [Para 60-61]

Harbanslal Sahnia and Another v. Indian Oil Corporation Ltd. and Another **(2003) 2 SCC 107;** *Bharat Filling Station and Anr. vs. Indian Oil Corporaion Ltd.* **104 (2003) DLT 601** *Bharat Filling Station and Another v. Indian Oil Corporation Ltd. Ramana Dayaram Shetty v. International Airport Authority of India and Others* **1979 (3) SCR 1014 = (1979) 3 SCC 489;** *Kumari Shrilekha Vidyarthi and Others v. State of U.P. and Others* **1990 (1) Suppl. SCR 625 = (1991) 1 SCC 212;** *Karnataka State Forest Industries Corporation v. Indian Rocks* 2008 **(15) SCR 96 = (2009) 1 SCC 150;** *Gujarat State Financial Corporation v. M/s. Lotus Hotels Pvt. Ltd.* **(1983) 3 SCC 379 – cited.**

Nazir Ahmad v. King Emperor **AIR 1936 PC 253 - cited.**

Case Law Reference:

(2003) 2 SCC 107	**cited**	**para 17**
104 (2003) DLT 601	**cited**	**para 25**
1979 (3) SCR 1014	**cited**	**para 26**
AIR 1936 PC 253	**cited**	**para 51**
1990 (1) Suppl. SCR 625	**cited**	**para 54**
2008 (15) SCR 96	**cited**	**para 55**
(1983) 3 SCC 379	**cited**	**para 56**

DALVEER BHANDARI, J. 1. Leave granted.

2. This appeal is directed against the judgment dated 11th August, 2009 delivered in Letters Patent Appeal No.296 of 2009 by the Division Bench of the High Court of Delhi upholding the judgment dated 6th May, 2009 passed by the learned Single Judge in Writ Petition (Civil) No.2927 of 2005.

3. The main issue which arises for adjudication in this appeal pertains to the termination of the dealership of the appellant in an illegal and arbitrary manner.

4. According to the appellant, it had been operating the petrol pump for the last 30 years and during this period it was given 10 awards from time to time declaring its dealership as the best petrol pump in the entire State of NCT of Delhi. On a number of occasions, samples of the appellant were tested by the respondent-Corporation and on each occasion its samples were found to be as per the specifications.

5. According to the appellant, it had maintained highest standards and norms of an excellent petrol pump, yet, the respondent-Corporation, in a clandestine manner, terminated its dealership in the most arbitrary manner and in total violation of the principles of natural justice.

6. It was further urged by the appellant that its dealership was terminated without even issuing any show cause notice and/or giving an opportunity of hearing to it. The termination of dealership was contrary to the mandatory procedural provisions of law. According to the appellant, the said termination was mala fide, arbitrary and illegal.

7. It may be pertinent to mention that in the morning of 15th May, 2000, an unauthorized police officer accompanied by the officials of the respondent conducted a raid at the appellant's petrol pump. According to the appellant, the raid was illegal as an unauthorized police officer could not conduct a search and seize the samples of the appellant.

8. The appellant urged that the samples taken in this raid were in complete violation of the mandatory procedural provisions of law as provided under the Motor Spirit and High Speed Diesel (Regulation of Supply and Distribution and prevention of Malpractices) Order, 1999 (hereinafter referred to as "Order"). The appellant while reproducing the relevant provisions of law has submitted as under:-

(a) Clause 4 of the said Order provides for power of search and seizure. Sub-Clause (A) of the section authorizes any police officer not below the rank of the Deputy Superintendent of Police (for short, DSP) duly authorized or any Officer of the concerned Oil Company not below the rank of Sales Officer to take samples of the products and/or seize any of the stocks of the product which the officer has reason to believe has been or is being or is about to be used in contravention of the said Order.

9. In the present case, however, the samples were collected in complete violation of the aforesaid provisions. The Police official who had conducted the raid and collected the samples was admittedly below the rank of DSP. This is also recorded in the Metropolitan Magistrate's order dated 27.5.2002 passed in FIR No.193 of 2000 wherein it is stated as under:

"In the present case the search and seizure was conducted by an unauthorized police officer of the rank of Inspector which is totally contrary to the mandatory provisions of the said Clause 4."

(b) Sub-Clause (B) of Clause 4 of the said Order provides that while exercising the power of seizure under Clause 4 (A) (iv) the authorised officer shall record in writing the reasons for doing so, a copy of the which shall be given to the dealer.

10. According to the appellant, in the present case, no such reasons in writing were provided.

(c) Clause 5(2) of the said Order lays down the procedure for sampling of product which provides that "the Officer authorised in Cl. 4 shall take, sign and seal six samples of 1 litre each of the Motor Spirit or 2 of 1 lit. each of the High Speed Diesel, 2 samples of the Motor Spirit (or one of High Speed Diesel) would be given to the Dealer or transporter or concerned person under acknowledgement with instruction to preserve the sample in his safe custody till the testing or investigations are completed, 2 samples of MS (and/or one of HSD), would be kept by the concerned Oil Company or department and the remaining two samples of MS (and/or one of HSD) would be used for laboratory analysis."

11. The appellant urged that in the present case, samples were allegedly taken from 6 sources. Therefore, the respondent Corporation as per the provision should have taken 36 samples (6 samples from each of the source) and handed over 12 samples (2 from each of the 6 sources) to the appellant, being the dealer, under acknowledgement. The respondent Corporation however, neither took 36 samples, nor did it hand over the prescribed number of 12 samples to the appellant. This is clear from the counter affidavit filed by the respondent in Writ Petition (C) No.7382 of 2001 placed on record. It is clearly stated in the counter affidavit filed by the respondent Corporation that it is pertinent to state that two samples from each of the tanks containing adulterated products were drawn by the answering respondent in the presence of the police officials of the crime branch and the representative of the appellant as well.

12. Out of these two samples, one sample was retained by the crime Branch of Delhi Police and another by the respondent, Bharat Petroleum Corporation Limited (for short BPCL). It has, therefore, been clearly admitted that only 2 samples as opposed to 6 samples were drawn from each tank and that no sample was handed over to the appellant. Furthermore, the learned counsel appearing for the respondent in the proceedings before the Division Bench in LPA No.296 of 2009, has specifically admitted, as is also recorded in page

8 of the impugned order that "there was no receipt of two samples from each source being handed over to appellant". It is also relevant to state that in all previous representations made by the appellant to the respondent and previous writ petitions filed, the respondent has never denied the averment that 2 samples were not handed over to the appellant.

(d) Clause 5(3) of the said Order provides that "Samples shall be taken in clean glass or aluminium containers. Plastic containers shall not be used for drawing samples."

13. According to the appellant, in the present case, plastic containers were used for drawing samples in complete violation of the said provision. This is also recorded in the Metropolitan Magistrate's order dated 27.5.2002 wherein it is stated that in Clause 5 of the order it was specifically legislated that the sample shall be taken in clean glass or aluminium containers and plastic containers would not be used for drawing out the samples. But in clear contravention to the mandatory provisions, plastic containers were used by the police officer while drawing samples. From the file, it is clear that sample Nos.7, 8 and 9 were drawn from the car of the complainant in plastic containers by the police and therefore, the report on the basis of the samples taken in the plastic containers cannot be relied upon at all.

(e) Clause 5(4) of the said Order provides that "The sample label should be jointly signed by the officer who has drawn the sample, and the dealer or transporter or concerned person or his representative and the label shall contain information as regards the product, name of retail outlet, quantity of sample, date, name and signature of the officer, name and signature of the dealer or transporter or concerned person or his representative."

According to the appellant, this was not done.

14. The Metropolitan Magistrate's order dated 27.5.2002 passed in FIR No.193 of 2000 specifically records as follows:

"The law being as noticed above, it is very clear that the search and seizure is bad in law and is in contravention of mandatory provisions of the Essential Commodities Act and contravention of Motor Spirits (High Speed Diesel Act) and in any case the prosecution cannot establish its case against any of the accused and accused persons are liable to be discharged on this very ground and no charge should be framed… There is no evidence whatsoever to show that petrol supplied was adulterated or not."

15. The appellant referred to section I (c) of Chapter 6 of the Guidelines of 1998 which provides as follows:

"Wherever samples are drawn, either pursuant to random checks or where adulteration is suspected, 3 sets of signed and sealed samples (6x1 ltr of MS and 3x1 ltr of HSD) should be collected from the RO, out of which one set should be kept with the dealer, one with the company and the third to be sent for laboratory resting within 10 days. For the sample kept with the dealer, proper acknowledgement will be obtained and the dealer will be instructed to preserve the same in his safe custody till the testing/investigation are completed."

16. According to the appellant, it is clear that the samples were collected in violation of mandatory procedure of law as provided under the said Order and therefore the termination order passed on the basis of test reports of samples so collected is completely illegal and liable to be set aside.

17. The appellant relied on the case of *Harbanslal Sahnia and Another v. Indian Oil Corporation Ltd. and Another* (2003) 2 SCC 107, wherein the Indian Oil Corporation terminated the

dealership of Harbanslal Sahnia on the basis that the sample drawn from the petrol pump did not meet the standard specification. This Court found that two government orders providing for the procedure for taking samples had been violated and in view of the same found that the failure of the sample taken became irrelevant and non-existent fact which could not have been relied upon for terminating dealership, and quashed the order terminating the dealership and restored possession. It is submitted that the fact that two samples were not left with the appellant is not only a violation of the mandatory principles of law but also of fair play and natural justice as the appellant is deprived of its valuable right to contest the veracity of the test reports. This provision of law is the single most important check on arbitrary action by the respondent.

18. According to the appellant, these samples were taken in violation of the mandatory provisions of law. The test reports, given on 16.5.2000, formed the basis for the termination of the appellant's dealership. The termination was in clear violation of the procedures prescribed by law. The termination was also in violation of mandatory Marketing Discipline Guidelines and the prescribed procedures. The termination was also in violation of the principles of natural justice and fairplay. According to the appellant, this is clear from the following facts:-

(a) Clause (d) of Section 1 of the Marketing Disciplines provides that: If the samples is certified to be adulterated, after laboratory test, a show cause notice should be served on the dealer and explanation of the dealer sought within 7 days of the receipt of the show cause notice. Thus under the said provision seven days is to be given to the dealer to provide an explanation and only if explanation is found unsatisfactory can appropriate action be taken. In the instant case, however, no show cause notice was given and no opportunity was given to the appellant to provide any explanation. Instead appellant's dealership was summarily terminated on the very date the alleged test reports certifying the sample to be adulterated was received i.e. 16.5.2000, the very next day after the samples were taken. It is relevant to state that the premeditated nature and mala fide of the test reports was writ large as the test reports on the basis of which the appellant's dealership was allegedly terminated itself indicated "terminated dealer".

(b) Clause (d) of Section 1 of the Marketing Discipline Guidelines further provides that if the explanation of dealer is not satisfactory, the Company should take action as follows:

a. Fine of Rs.1 lakh and suspension of sales and supplies for 45 days in the first instances;

b. Termination in the second instance.

19. It is thus clear from the above provision that the Guidelines prescribe termination only in case of second instance of adulteration of Motor Spirits. It is an admitted case that this was the first instance of alleged adulteration of Motor Spirits.

20. One of the grounds taken by the respondent-Corporation for termination in its letter dated 16.5.2000 was that "in the past also a product sample collected from the retail outlet was found to have failed specification." This earlier offence in respect of the "product sample" referred to in the order of 16.5.2000, was, however, in respect of lube sample and not petrol/MS. This is clear from the Delhi High Court's order dated 9.9.2004 passed in WP (C) No.7382 of 2001, which records respondent Corporation's counsel's submission in that respect as below: "It was also emphasized that there was

a past history where inspection of the outlet had been carried out on 12.12.1998 and Lubes samples were collected which were found off-specifications."

21. It is also submitted that a previous alleged case of off-spec lube, does not make the first alleged case of motor spirit adulteration, a second offence of motor spirit adulteration. Off-spec lube is not a case of adulteration which is clear from the definition of "adulteration" set out in the Marketing Discipline Guidelines which defines "adulteration" as "the introduction of any foreign substance into motor spirit/high speed diesel illegally or unauthorizedly." Lube falls into a completely different category and is in a separate chapter in the Marketing Discipline Guidelines being Chapter 7 as contrasted from Chapter 6 which deals with "Adulteration of Product". Chapter 7 of the said guidelines separately provides for prevention of irregularities at retail outlet in respect of lubes. Clause 9 of the said Chapter provides the following punishments in case of sales of adulterated lubes.

a. Suspension of sales and supplies of all products for 15 days along with a fine of Rs.20,000/- in the first instance.

b. Suspension of sales and supplies for 30 days along with a fine of Rs.50,000/- in the second instance.

c. Termination in the third instance.

22. Thus while the guidelines provide for termination of dealership in the second instance of adulteration of petrol/MS, the punishments prescribed for adulteration of lubes provides for termination only in case of third instance.

23. Further, the fourth note provided at the end of this Chapter 6 provides as under:

"In case, two or more irregularities are detected at the same time at the same RO, action will be taken in line with what is listed in MDG under the relevant category for each irregularity."

24. According to the appellant, the respondent has clearly acted in violation/contravention of, or at the very least in departure from, the Motor Spirits High Speed Diesel Order and the Marketing Discipline Guidelines and has also acted contrary to the principles of natural justice and fair play both in respect of taking samples which formed the basis of termination, as also in respect of the termination of dealership.

25. The appellant referred to the decision in *Bharat Filling Station and Another v. Indian Oil Corporation Ltd.* 104 (2003) DLT 601 wherein the Delhi High Court specifically referred the Market Discipline Guidelines. Relevant part of the judgment is reproduced as under:-

"As noted above, IOC, whenever enters into dealership agreement, executes memorandum of agreement which lays down standard terms and conditions. These conditions, *inter alia*, include provisions for termination of the dealership as well. It is provided that the agreement can be terminated by giving required notice. It may however be mentioned that at the same time in order to ensure that such agreements with the dealers are worked out in a systematic manner and the respondent IOC does not invoke the termination clause arbitrarily, Government of India has issued Marketing Discipline Guidelines.

26. The appellant also referred to the decision of this Court in *Ramana Dayaram Shetty v. International Airport Authority of India and Others* (1979) 3 SCC 489, wherein this Court held that "it is well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them." It is submitted that the respondent was bound

to act in accordance with the Marketing Discipline Guidelines

27. It is further submitted that in the case of *Ramana Dayaram Shetty (supra)*, this Court held that "the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including awards of jobs, contracts, quotas, licenses etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

28. The appellant further submitted that in the present case the respondent has departed from the standard norms laid down in the Marketing Discipline Guidelines and the standard norms of natural justice and fairplay and that such departure was clearly arbitrary, irrational, unreasonable and discriminatory.

29. The appellant urged that the respondent Corporation terminated the dealership without even issuing show-cause notice and/or providing any opportunity of hearing. The termination is clearly in violation of the principles of natural justice.

30. The appellant also asserted that the termination was mala fide is further strengthened by the fact of an internal email of the respondent dated 3 days after the raid on May 18, 2000 stating that "the samples were taken as complaint samples but the comments on the test result were given due to reasons explained to you over the phone."

31. It is also stated that another email dated 22nd May, 2000 recorded that "Delhi Territory had drawn samples regularly from the retail outlet. All 10 samples drawn in 1999-2000 were found on spec." Despite this, the dealership had already been terminated the very day after the raid.

32. The appellant also urged that the order of the Delhi High Court in Writ Petition (Civil) No.7382 of 2001 dated 9.9.2004 directed the respondent to give a show cause notice, personal hearing and pass a reasoned order. It was not given and the appellant was constrained once again to approach the High Court who then directed the respondent to grant the appellant a personal hearing at a higher level. The action of the respondent is *mala fide* which is reflected from the fact that at various stages the respondent-Corporation has tried to improve its case by supplanting reasons in support of the termination. This is clear from the following facts:

i. The first notice dated 16.5.2000 terminating the dealership points out the following three grounds for termination

   a. One of the samples during the raid and taken from the laboratory testing had failed specification of U.L.P.

   b. In the past also a product sample collected from the retail outlet was found to have failed specification; and

   c. Breach of agreement between the parties vide which the appellant had covenanted not to adulterate petroleum products.

ii. Despite the fact that termination order was quashed by the High Court vide its order dated 9.9.2004 passed in W.P. (C) No.7328 of 2001, with specific direction to the respondent to give the appellant personal hearing and pass a reasoned order, the respondent Corporation vide letter 22.11.2004