SARASWATI SUGAR MILLS
v.
COMMISSIONER OF CENTRAL EXCISE, DELHI-III
(Civil Appeal No.5295 of 2003)

AUGUST 02, 2011

[D.K. JAIN AND H.L. DATTU, JJ.]

Central Excise Rules, 1944 – Rule 57Q – Exemption Notification No.67/1995-CE dated 16.03.1995 exempted duty in respect of "capital goods", as defined in Rule 57Q if they were manufactured in a factory and used within the factory of production – Assessee-appellant, manufacturer of Sugar and Molasses, fabricated Iron and Steel structures in its factory and captively used them within the factory for installation and effective functioning of sugar manufacturing machineries falling under item nos. 2 and 3 of the table to Rule 57Q – Whether the Iron and Steel structures were in the nature of components of the said sugar manufacturing machineries and therefore, required to be treated as capital goods falling under item no.5 of the table to Rule 57Q and consequently exempt from payment of excise duty by virtue of Notification No.67/1995-CE dated 16.03.1995 – Held: Anything required to make the goods a finished item can be described as a component part – If an article is an element in the composition of another article made out of it, such an article may be described as a component of another article – For the purpose of manufacturing cane sugar in a sugar industry, the essential machineries that are required are sugar presses, diffusers, vaccum pans, evaporators and sugar handling equipments, crystallizers, sugar grader, elevator and cooling tower – The iron and steel structures in question were not essential requirements in the sugar manufacturing unit and did not satisfy description of 'components' of the machineries used in the installation of Sugar Manufacturing Plant –

Assessee therefore not entitled to benefit of the said Exemption Notification – Central Excise Tariff Act, 1985 – Chapter Heading 73 of the Schedule.

Notification – Exemption Notification – Interpretation of – Held: Since exemption notifications are issued under delegated legislative power, they have full statutory force – An exemption notification has to be strictly construed – The conditions for taking benefit under the notification are also to be strictly interpreted – When the wordings of notification is clear, then the plain language of the notification must be given effect to – By way of an interpretation or construction, the Court cannot add or substitute any word while construing the notification either to grant or deny exemption – The Courts are also not expected to stretch the words of notification or add or subtract words in order to grant or deny the benefit of exemption notification.

Interpretation of statutes – Rules framed under the Statute – Interpretation of – Held: They should be read as a part of the Statute itself and require to be interpreted as intra vires to the Act under which they have been issued.

Words and Phrases – "Component" – Meaning of – Held: In order to determine whether a particular article is a component part of another article, the correct test would be to look both at the article which is said to be component part and the completed article and then come to a conclusion whether the first article is a component part of the whole or not – One must first look at the article itself and consider what its uses are and whether its only use or its primary or ordinary use is as the component part of another article – In common parlance, components are items or parts which are used in the manufacture of the final product and without which, final product cannot be conceived of.

The assessee-appellant is a manufacturer of Sugar and Molasses. It was availing MODVAT credit facility on

the excise duty paid for the capital goods used in the factory for manufacturing process under Rule 57Q of the Central Excise Rules, 1944. However, certain machineries like cane milling plant, clarification plant, evaporator and pan boiling plant, power generation plant etc., which are specified as capital goods in terms of Serial Nos. 2 and 3 of the Table below Sub-Rule 1 of Rule 57Q of the Rules, required the support of structural items for their installation. In view of this, the assessee started manufacturing iron and steel structures for installation of the said machineries. Thereafter, the assessee filed declaration under Rule 57Q of the Rules declaring Iron and Steel structures under sub-heading 7308.90 of Chapter 73 as capital goods and claiming exemption under the Notification No. 67/95-CE dated 16.03.1995. The said Notification exempted capital goods, as defined in Rule 57Q of the Rules, manufactured and used within the factory from the excise duty leviable on such goods as specified in the schedule to the Central Excise Tariff Act, 1985.

However, the Assistant Commissioner, Central Excise levied excise duty upon the assessee-appellant and imposed penalty of Rs.5,00,000/- on ground that the Notification was not applicable to the said Iron and Steel structures. The Commissioner (Appeals) upheld the order of the Assistant Commissioner. The Tribunal affirmed the demand of duty on the ground that Chapter 73 of Schedule to the Tariff, Act under which the said Iron and Steel structures fall, was not specified in the Table below Rule 57Q of the Rules and the machineries purchased by the assessee were complete in itself, but reduced the amount of penalty to Rs.1,00,000/-.

In the instant appeals, the appellant contended that the Iron and Steel structures fabricated and captively used by it were in the nature of components of the sugar

manufacturing plant and therefore, the said structures were capital goods in terms of Serial no. 5 of the Rule 57Q of the Rules and consequently exempt from payment of excise duty by virtue of Notification No.67/1995-CE dated 16.03.1995.

Dismissing the appeal, the Court

HELD: 1. The Central Excise Tariff Act, 1985 prescribes the rate of duty for each chapter head and sub-head. The Tariff Act has authorized the Central Govt. to modify the rates/duty by issuing notifications. Since exemption notifications are issued under delegated legislative power, they have full statutory force. The Notification No.67/95-CE dated 16.03.1995 specifically exempts capital goods as defined in Rule 57Q of the Central Excise Rules, 1944. The other condition that is envisaged in the Notification is that the 'capital goods' should be manufactured in a factory and used within the factory of production. If these twin conditions are satisfied, the capital goods are exempt from payment of excise duty. A party claiming exemption has to prove that he/it is eligible for exemption contained in the notification. An exemption notification has to be strictly construed. The conditions for taking benefit under the notification are also to be strictly interpreted. When the wordings of notification is clear, then the plain language of the notification must be given effect to. By way of an interpretation or construction, the Court cannot add or substitute any word while construing the notification either to grant or deny exemption. The Courts are also not expected to stretch the words of notification or add or subtract words in order to grant or deny the benefit of exemption notification. [Para 7] [594-F-H; 595-A-D]

Bombay Chemicals (P) Ltd. vs. CCE **(1995) Supp (2) SCC 646: 1995 (3) SCR 369 – relied on.**

2. While interpreting the Rules, which are framed under the Statute, they should be read as a part of the Statute itself and require to be interpreted as intra vires to the Act under which they have been issued. [Para 8] [595-E]

3. The expression "components" is not defined under the Act. Therefore, reference can be made to dictionaries to understand the meaning of the expression "components". In order to determine whether a particular article is a component part of another article, the correct test would be to look both at the article which is said to be component part and the completed article and then come to a conclusion whether the first article is a component part of the whole or not. One must first look at the article itself and consider what its uses are and whether its only use or its primary or ordinary use is as the component part of another article. There cannot possibly be any serious dispute that in common parlance, components are items or parts which are used in the manufacture of the final product and without which, final product cannot be conceived of. [Paras 10, 11, 12] [596-E; 597-C-F]

Star Paper Mills v. Collector of Central Excise **(1989) 4 SCC 724: 1989 (3) SCR 892;** *CCE v. Allied Aid Conditioning Corporation* **2006 (202) ELT 209 (SC);** *Modi Rubber Ltd. v. Union of India*, **(1997) 7 SCC 13: 1997 (3) Suppl. SCR 519 and** *Hindustan Sanitaryware & Industries Ltd. & Lakshmi Cement v. Collector of Customs* **(2000) 10 SCC 224 – referred to.**

Webster Comprehensive dictionary; *Oxford Advanced Learner's Dictionary*, Volume 1, International Edition; *Advanced Law Lexicon*, **3rd Edition 2005, (by P. Ramanatha Aiyar) and** *Encyclopaedic Law Lexicon*, **Volume 2008-09 Edition, by Justice C.K. Thakkar – referred to.**

4. The process of making sugar commences from the stage of collecting the harvest, cleansing and grinding, juicing, clarifying, evaporation, crystallization, refining and lastly separation and packing. For the purpose of manufacturing cane sugar in a sugar industry, the essential machineries that are required are sugar presses, diffusers, vaccum pans, evaporators and sugar handling equipments, crystallizers, sugar grader, elevator and cooling tower. Under the Notification, the Central Government had exempted duty in respect of "capital goods", as defined in Rule 57 Q of the Rules if they were utilized in a place where such goods were manufactured and used within the factory of production. The Notification specifically states that what is exempted under the Notification are "capital goods" as defined in Rule 57Q. Rule 57Q specifies five categories of items as capital goods. It is not the case of the assessee or its counsel that the exemption claimed was on Items 1 to 4 of the Table to Rule 57Q but as components which would fall under item No.5 of the Table to Rule 57Q. Therefore, in order to get the benefit of non excise duty on Iron and Steel Structures, it had to be established by the assessee that Iron and Steel Structures were utilized as component parts for the finished products, viz. vacuum pan, crystallizers, sugar grader, elevator, cooling tower etc. [Para 18] [599-G-H; 600-A-E]

ANALYSIS AND CONCLUSION :

5.1. It appears, in the light of the meaning of the expression 'component parts' that the iron and steel structures are not essential requirements in the sugar manufacturing unit. Anything required to make the goods a finished item can be described as component parts. Iron and Steel structures would not go into the composition of vacuum pans, crystallizers etc. If an article is an element in the composition of another article made out of it, such an article may be described as a

component of another article. Thus, structures in question do not satisfy description of 'components'. Therefore, the Tribunal was right in the view it took. [Para 19] [600-F-G]

5.2. The further contention canvassed by the appellant that the Tribunal was not correct in holding that the assessee failed to establish that the steel structures were components of the capital goods as specified in the Table below Rule 57Q of the Rules and, therefore, not eligible for exemption under the notification, requires to be answered with reference to Circular No. 276/110/96-TRV dated 02.12.1996 issued by the Central Board of Excise and Customs (CBEC). The period in dispute is July 1999 to September 1999. The Circular is dated 02.12.1996. Therefore, it was applicable to the disputed period. The Circular provides that all parts, components, accessories, which are to be used with the capital goods of Clauses (a) to (c) of Explanation (1) of Rule 57Q and classifiable under any Chapter heading are eligible for availing of MODVAT Credit. However, while denying exemption under the notification, the Tribunal concluded that the goods in question, which comes under Chapter Heading 73 of the Tariff Act has not been specified in the table below rule 57Q. There is no fault with the reasoning of the Tribunal, since the Circular, on which reliance is now placed by the appellant, was not produced before the Tribunal and, therefore, going by the language employed in Rule 57Q, there is justification for the Tribunal for coming to the aforesaid conclusion. In view of the circular, which is now brought to the notice of this Court, the Tribunal was not correct to reject the claim of the assessee on the aforesaid ground. However, this finding will not assist the assessee, since Iron and Steel structures are not the components of machineries used in the installation of Sugar Manufacturing Plant. [Paras 21, 22] [601-C-D; 602-C-G]

Simbhaoli Sugar Mills Ltd. V. Commissioner of Centra, **2001 (135) E.L.T. 1239 (Tri.-Del) – not approved.**

CCE vs. Rajasthan Spinning and Weaving Mills Ltd. **(2010) 255 ELT 481 (SC) – referred to.**

Case Law Reference:

1995 (3) SCR 369	**relied on**	**Para 7**
1989 (3) SCR 892	**relied on**	**Para 11**
2006 (202) ELT 209 (SC)	**relied on**	**Para 11**
1997 (3) Suppl. SCR 519	**relied on**	**Para 15**
(2000) 10 SCC 224	**relied on**	**Para 16**
(2010) 255 ELT 481 (SC)	**referred to**	**Para 23**
2001 (135) ELT 1239 (Tri-Del)	**referred to**	**Para 25**

CIVIL APPELLATE JURISDICTION : Civil Appeal 5295 of 2003.

From the Judgment & Order dated 10.12.2002 of the Custom Excise & Gold (Control) Appellate Tribunal, New Delhi in Appeal No. E/186/2002-B.

V. Lakshmi Kumaran, Alok Yadav, Rajesh Kumar for the Appellant.

K. Swami, Binu Tamta, B.K. Prasad for the Respondent.

The Judgment of the Court was delivered by

H. L. DATTU, J. 1. This appeal is directed against the final Order of the Customs Excise and Gold (Control) Appellate Tribunal, New Delhi [hereinafter referred to as 'the Tribunal'] dated 10.12.2002. By the impugned order, the Tribunal has confirmed the order passed by the Commissioner of Central Excise (Appeals), which has affirmed the order of the Assistant

Commissioner of Central Excise, levying the duty and penalty under the Central Excise Act, 1944 (hereinafter referred to as 'the Act').

THE ISSUE :

2. The bone of contention between the Appellant-assessee [hereinafter referred to as 'the assessee'] and the Respondent [hereinafter referred to as 'the Revenue'] can be crystallized thus: Whether the Iron and Steel structures manufactured and used captively in the factory for installation of the Sugar manufacturing plant by the assessee can be classified as capital goods under Rule 57Q of the Central Excise Rules, 1944 [hereinafter referred to as "the Rules"].

THE FACTS :

3. The relevant facts for the purpose of this appeal are:- The assessee is the manufacturer of Sugar and Molasses. The assessee is availing MODVAT credit facility on the excise duty paid for the capital goods used in the factory for manufacturing process under Rule 57Q of the Rules. In April 1999, the assessee, in order to modernize the manufacturing process of sugar and molassess, has installed new machineries by replacing the old one. However, certain machineries like cane milling plant, clarification plant, evaporator and pan boiling plant, power generation plant etc., which are specified as capital goods in terms of Serial Nos. 2 and 3 of the Table below Sub-Rule 1 of Rule 57Q of the Rules, required the support of structural items for their installation. In view of this, the assessee started the manufacturing of iron and steel structures, after purchasing excise duty paid iron and steel sheets, angles, nuts and bolts etc. for the installation of the said machineries. Thereafter, the assessee has filed a declaration under Rule 57Q of the Rules declaring Iron and Steel structures under sub-heading 7308.90 of Chapter 73 as capital goods. The assessee has also filed classification declaration under Rule 173B of the Rules dated 09.07.1999 for the Iron and Steel

structures classifying it under sub-heading 7308.90 of Chapter 73 and claiming exemption under the Notification No. 67/95-CE dated 16.03.1995 [hereinafter referred to as "Notification"]. The said Notification exempts the capital goods, as defined in Rule 57Q of the Rules, manufactured and used within the factory from the excise duty leviable on such goods as specified in the schedule to the Central Excise Tariff Act, 1985 [hereinafter referred to as "the Tariff Act"]. Subsequently, the Assistant Commissioner, Central Excise Division, Ambala *vide* Office letter dated 20.01.2000 has issued a Show Cause Notice to the assessee for short payment of excise duty to the tune of Rs. 28,14,464/- for the period July, 1999 to September, 1999 as Notification is not applicable to the iron and steel structures. The said Show Cause Notice was replied by the assessee *vide* its reply dated 24.02.2000 claiming the benefit of Exemption Notification. The assessee has also produced various photographs, drawings and Certificate of the Chartered Engineers during the personal hearing before the Assistant Commissioner dated 21.03.2000 in order to show that the iron and steel structures are components of machinery and quintessential for its effective functioning. However, the Assistant Commissioner, *vide* its order dated 31.03.2000, confirmed the duty demand and imposed a penalty of Rs. 5,00,000/- on the ground that the Notification is not applicable to the said Iron and Steel structures as they are neither inputs used in relation to the manufacture of final product nor capital goods as defined in Column 2 of the Table given below Sub-Rule (1) of Rule 57Q of the Rules. The assessee, aggrieved by the order of Assistant Commissioner, preferred an appeal before the Commissioner of Central Excise (Appeals). The Commissioner (Appeals), vide its order dated 23.11.2011, confirmed the order of the Assistant Commissioner and rejected the appeal on the ground that the said Iron and Steel structures form the part of the building. Being aggrieved, the assessee preferred an appeal before the Tribunal, the same was partly allowed. The Tribunal, vide its impugned order dated 10.12.2002, reduced the amount of penalty to Rs.1,00,000/- and

affirmed the demand of duty on the ground that Chapter 73 of Schedule to the Tariff, Act under which the said Iron and Steel structures fall, has not been specified in the Table below Rule 57Q of the Rules and the machineries purchased by the assessee were complete in itself. The reasoning of the Tribunal is as under:

> "*We have considered the submission of both the sides. The Ld. Advocate had shown us certain photographs where the impugned structures were used. According to him these structures form integral part of the machinery concerned without which the machinery cannot function. On query from the Bench, the Ld. Advocate has fairly conceded that the various machineries, which have been purchased by them, were complete. Accordingly, we do not find any substance in his submissions that these structures are components of the various machine/ machineries. Notification No.67/95-CE provides exemption from payment of duty to the capital goods as defined in Rule 57Q if they are used in or in relation to the final products which are chargeable to duty. The appellants have not succeeded in establishing that the impugned structures are components of the capital goods as specified in the table below Rule 57Q of the Central Excise Rules. Chapter 73 of the Central Excise Tariff under which the impugned goods fall has also not been specified in the table below Rule 57Q. The ratio of the decision in the case of Bhanu Steels is not applicable as therein the appellants had explained that the goods were spare parts for plant and machinery installed in their factory. In the present matter, the appellants have not proved that the impugned goods are components of the machines/machineries. The ratio of the decision in the case of Wainganga is not applicable as the goods were manufactured in the factory and further these were not trusses, column and purlines as was the fact in the Wainganga case. We, therefore, hold that the benefit of*

> *Notification No.67/95 is not available to the appellants. Accordingly, we uphold the demand of duty of Excise confirmed against them. However, taking into consideration the facts and circumstances of the case, we are of the view that the penalty imposed is on the higher side and the interest of justice will be met, if the Appellants are directed to pay a penalty of only Rs.1 lakh. We order accordingly. The appeal is thus partly allowed.*"

THE COMPETING ARGUMENTS :

4. The learned counsel Shri. V. Lakshmi Kumaran submits that the Iron and Steel structures are fabricated by the assessee in its factory and subsequently, used within the factory for installation and effective functioning of the sugar manufacturing machineries which falls under Serial NoS. 2 and 3 of the Table to Rule 57Q as capital goods. The said Iron and Steel structures are in the nature of components of the sugar manufacturing plant. Therefore, the said structures are capital goods in terms of Serial no. 5 of the Rule 57Q of the Rules. He further submits that the Tribunal has grossly erred in observing that Chapter 73 of Schedule to the Tariff Act, under which the said Iron and Steel structures fall, has not been specified in the table below Rule 57Q of the Rules. In this regard, he contends that so long as the Iron and Steel Structures are used as component or accessory of the eligible machines falling under Serial No. 2 and 3, irrespective of its classification under the Tariff Act, it would be treated as capital goods as covered by Serial No. 5 of the table below Rule 57Q. In support of this argument, the learned counsel, placing reliance on the Circular dated 02.12.1996, issued by Central Board of Excise and Customs [hereinafter referred to as "the CBEC"], submits that the components, spares and accessories to the eligible capital goods under Rule 57Q have been specified as capital goods on the basis of their description, instead of classification under the Tariff Act. He further submits that the said Iron and Steel structures, once used for the installation of various machineries, become part and parcel of the sugar manufacturing plant and

without the help of said structures, the machineries cannot be installed and made functional. In other words, the said structures are also in the nature of components to the sugar manufacturing plant. He also submits, by placing reliance on Section Note 5 to Section XVI of the Tariff Act, that the expression 'machine' has to be construed as plant and any component of the machine, being part of the machine, will also become part of the plant. He further submits that this Court in *Commissioner of Central Excise, Jaipur v. Rajasthan Spinning and Weaving Mills Ltd.*, 2010 (255) E.L.T. 481 (SC) held that the steel plates and M.S. Channels, used in the fabrication of chimney, which is integral part of the diesel generating set, are capital goods in terms of Serial No. 5 of the Table below Rule 57Q the Rules. In other words, the individual items used for fabricating the component of the eligible capital goods under Serial Nos. 2 and 3, are qualified as capital goods in terms of Serial No. 5 of the Table below Rule 57Q of the Rules. The learned counsel, citing the decision of the Tribunal in *Simbhaoli Sugar Mills Ltd. V. Commissioner of Central,* 2001 (135) E.L.T. 1239 (Tri.-Del), submits that the said decision deals with exactly the same Structural Items, under Chapter heading 73.08, which are in issue before this Court and used for installation of Sugar Manufacturing Plant. He further submits that on issue of whether the Iron and Steel items fabricated at site for raising the structure to support the sugar manufacturing plant are capital goods or not under Rule 57Q, the Tribunal answered that items used for fabricating the structures, which are in the nature of components or part of the machines, are also capital goods in terms of Rule 57Q and allowed MODVAT credit on the said items. He further submits that the Special Leave Petition against this decision of Tribunal, preferred by the Revenue, has been dismissed by this Court. Drawing strength from the above decisions of this Court and the Tribunal, the learned counsel submits that the assessee is better placed as the iron and steel structures in issue form the integral and quintessential part of the Sugar manufacturing Plant and the whole machinery is so designed that without the said Iron and Steel structures, the sugar plant

cannot function. He further submits that when individual items used for fabricating the structures in the nature of components to support the machinery are treated as capital goods in terms of Rule 57Q, then it will be against logic to say that structures are not components of the machines. The learned counsel submits, by referring to a circular dated 05.08.1997 issued by the CBEC, that in case of a Wind Mill, the tower acting as a structure to support the Wind Mill constitutes an essential component of the Wind Mill. Therefore, the support tower can be treated as capital goods and the assessee can claim exemption, if provided. Drawing an analogy from the example of Wind Mill, the learned counsel submits that the Iron and Steel structures are the components or parts of the Sugar manufacturing plant and qualify as capital goods in terms of Serial No. 5 of the Table below Rule 57Q of the Rules. *Arguendo,* the learned counsel submits that the Iron and Steel structures are fabricated at the site of work for use in the construction or erection of the various machineries, therefore, can be classified under sub-heading 7308.50 under Chapter 73 of the Schedule to the Tariff Act which attracts Nil rate of duty. Alternatively, the learned counsel submits, by placing reliance on the judgment of this Court in *Commissioner of Central Excise v. Wainganga Sahkari S. Karkhana Ltd.*, 2002 (142) ELT 12 (SC), that no excise duty is payable on structural items fabricated at site and used within the site.

5. Per contra, Shri. K. Swami, learned counsel for the Revenue, supports the findings and conclusion reached by the Tribunal and the department. He further submits that the Iron and Steel structures which fall under Chapter Heading 73 of the Schedule to the Tariff Act, is neither mentioned in the Notification nor in the Table below Rule 57Q of the Rules. According to learned counsel, the Exemption Notification only exempts the capital goods as defined in Rule 57Q of the Rules. The learned counsel also argues that by applying "user test" theory, the Iron and Steel structures cannot be considered as components of

the sugar manufacturing plant. It is also submitted that the Notification requires to be strictly construed and since the assessee does not fall within the ambit of the Notification, it is not entitled for the benefit of the Notification.

THE NOTIFICATION :

6. To resolve the controversy, we need to notice the relevant Notification and Rule 57Q of the Rules. The relevant portion of Notification No.67/95-CE dated 16.03.1995 is as under:-

> "In exercise of the powers conferred by sub-section (1) of Section 5A of the Central Excise Act, 1944... the Central Government being satisfied that it is necessary in the public interest so to do hereby exempts
>
> (i) capital goods as defined in Rule 57Q of the Central Excise Rules 1944 manufactured in a factory and used within the factory of production;
>
> (ii) ...
>
> *from the whole of the duty of excise leviable thereon which is specified in the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986).*"

THE RULES :

Rule 57Q of the Central Excise Rules, 1944 reads:-

> "(1) All goods falling under heading Nos.82.02 to 82.11;
>
> (2) All goods falling under Chapter 84 (other than internal combustion engines falling under heading No.84.07 and 84.08 and of a kind used in motor vehicles, compressors falling under heading No.84.14 and of a kind used in refrigerating and air-conditioning appliances and machinery, heading or sub-heading Nos.84.15, 85.18, 8422.10, 8424.10, fire extinguishers falling under sub-heading No.8424.80, 8424.91, 8424.99, 84.29 to 84.37, 8440, 84.50, 8452, 84.69 to 84.73, 84.76, 84.78, expansion valves and solenoid valves falling under sub-heading No.8481.10 of a kind used for refrigerating and air-conditioning appliances and machinery);
>
> (3) All goods falling under Chapter 85 (other than those falling under heading Nos.85.09 to 85.13, 85.16 to 85.31 and 85.40);
>
> (4) All goods falling under heading Nos.90.11 to 90.13, 90.16, 90.17, 98.22 (other than for medical use), 90.24 to 90.31 and 90.32 (other than of a kind used for refrigeration and air-conditioning appliances and machinery);
>
> (5) *Components, spares and accessories of the goods specified against S. Nos.1 to 4 above.*"

ANALYSIS OF THIS MATERIAL :

7. The Tariff Act prescribes the rate of duty for each chapter head and sub-head. The Tariff Act has authorized the Central Govt. to modify the rates/duty by issuing notifications. Since exemption notifications are issued under delegated legislative power, they have full statutory force. The Notification No.67/95-CE dated 16.03.1995 specifically exempts capital goods as defined in Rule 57Q of the Rules. The other condition that is envisaged in the Notification is that the 'capital goods' should be manufactured in a factory and used within the factory of production. If these twin conditions are satisfied, the capital goods are exempt from payment of excise duty. A party

claiming exemption has to prove that he/it is eligible for exemption contained in the notification. An exemption notification has to be strictly construed. The conditions for taking benefit under the notification are also to be strictly interpreted. When the wordings of notification is clear, then the plain language of the notification must be given effect to. By way of an interpretation or construction, the Court cannot add or substitute any word while construing the notification either to grant or deny exemption. The Courts are also not expected to stretch the words of notification or add or subtract words in order to grant or deny the benefit of exemption notification. *In Bombay Chemicals (P) Ltd. vs. CCE* - (1995) Supp (2) SCC 646, a three Judge Bench of this Court held that an exemption notification should be construed strictly, but once an article is found to satisfy the test by which it falls in the notification, then it cannot be excluded from it by construing such notification narrowly.

8. Now coming to Rule 57Q of the Rules, these rules are framed under the Statute. While interpreting the Rules, which are framed under the Statute, they should be read as a part of the Statute itself and require to be interpreted as intra vires to the Act under which they have been issued.

Having said that, now let us consider the submission of learned counsel Shri Lakshmikumaran for the assessee who contends that Iron and Steel structurals manufactured by the assessee within its factory used for the purpose of installation of sugar manufacturing plant are components of the capital goods and therefore, exempt from payment of excise duty by virtue of Notification No.67/1995-CE dated 16.03.1995. However, Shri Swami, learned counsel for the Revenue contends that the items in dispute are independent goods manufactured by the assessee, though in its factory from the goods on which excise duty is paid cannot be construed as component parts of sugar manufacturing plant and therefore, is not entitled for the benefit of Notification No.67/1995 dated 16.03.1995.

9. As per Notification No.67/1995 dated 16.03.1995, capital goods as defined in Rule 57Q of the Rules manufactured in a factory and used within the factory of production are exempt from payment of Excise Duty. Rule 57Q of the Rules, specifies various items of goods falling under different chapter headings and sub-headings of the Tariff Act as capital goods. It is not the case of the assessee that Iron and Steel Structures manufactured by it in its factory are the goods which fall under Items 1 to 4 of Rule 57Q, though sugar manufacturing unit would fall under Item Nos. 2 and 3 of the Table to Rule 57Q of the Rules. It is the specific stand of the assessee that the goods in dispute are components of the goods specified in Items 2 and 3 of the Table to Rule 57Q of the Rules and since the capital goods include components and accessories, the Iron and Steel Structures manufactured within the factory are exempt from excise duty.

10. The expression "components" is not defined under the Act. Therefore, reference can be made to dictionaries to understand the meaning of the expression "components". In Webster Comprehensive dictionary, it is defined as '*Constituent part*'. In Oxford Advanced Learner's Dictionary, Volume 1, International Edition, the word "component" means a 'constituent part'. Further, 'constituent' means 'serving to form or compose as a necessary part'. In Advanced Law Lexicon, 3rd Edition 2005, (by P. Ramanatha Aiyar), the word 'component part' is defined as '*something which becomes an integral part of the goods in question by losing its physical and economic distinctiveness'*. It defines 'constituent' (of a component) as *'that helps make up or complete a unit or a whole's one part of something that makes up a whole'*. Encyclopaedic Law Lexicon, Volume 2008-09 Edition, by Justice C.K. Thakkar, describes the 'components' as : 'It appears, therefore, that for an article to be called a component part, it is not necessary that even it becomes part of another article, it should still retain its identity. All that is necessary to make an article, a component part is that it goes in to the

composition of another article. If an article is an element in the composition of another article made out of it, such an article may well be described as a component part of another article. It may be that the final product made may be in the nature of a compound in which case, the elements forming component parts may not be capable of any more separate identification. Equally, it may be that when a machinery is assembled out of several parts forming that machinery, those machinery, those parts, even after there being filled may retain their individuality or identity'.

11. The meaning of the expression 'components' as defined in the dictionary is accepted and adopted by this Court in the case of *Star Paper Mills Vs. Collector of Central Excise* (1989) 4 SCC 724 and the same is quoted with approval in *CCE Vs. Allied Aid Conditioning Corporation* 2006 (202) ELT 209 (SC).

12. In order to determine whether a particular article is a component part of another article, the correct test would be to look both at the article which is said to be component part and the completed article and then come to a conclusion whether the first article is a component part of the whole or not. One must first look at the article itself and consider what its uses are and whether its only use or its primary or ordinary use is as the component part of another article. There cannot possibly be any serious dispute that in common parlance, components are items or parts which are used in the manufacture of the final product and without which, final product cannot be conceived of.

13. The meaning of the expression 'component' in common parlance is that *'component part of an article is an integral part necessary to the constitution of the whole article and without it, the article will not be complete*'.

14. This Court, in Star Paper Mills (supra) has made a settled distinction while considering whether paper cores are

'components' in the manufacture of paper rolls and manufacture of paper sheets. It is stated that 'paper cores' are component parts in so far as manufacture of roll is concerned, but it is not 'component part' in the manufacture of sheets. It is useful to quote the observations made by this Court :-

> "... paper core would also be constituent part of paper and would thus fall within the term "component parts" used in the Notification in so far as manufacture of paper in rolls is concerned. Paper core, however, cannot be said to be used in the manufacture of paper in sheets as component part. We are conscious that the relevant tariff item uses the word "paper" but since paper in rolls and paper in sheets are nothing but different forms of paper, both of them would be excisable goods as paper under the relevant tariff item."

15. In *Modi Rubber Ltd. v. Union of India*, (1997) 7 SCC 13, the appellant had set up tyre and tube manufacturing plant and imported various plants and machineries. While using the plants and machineries, PPLF (Polypropylene Liner Fabric) was used as a device in the form of liner components to various machinery units to protect the rubber-coated tyre fabric from atmospheric moisture and dust. This Court held that the PPLF was not a component of the machine itself. It was not a constituent part. It was used as a Liner Fabric not only in tyre production but also in similar other industrial processes.

16. In *Hindustan Sanitaryware & Industries Ltd. & Lakshmi Cement v. Collector of Customs, (2000) 10 SCC 224*, this Court while drawing a distinction between component and spare parts observed:

> "It pertains to the meaning of the phrase "component parts". The Tribunal, in the impugned order, drew a distinction between component parts and spare parts, following its earlier decision in the case of Vaz Forwarding (P) Ltd. v. Collector of Customs[1]. *Component parts, according to it, were those which were initially used in the*

assembly or manufacture of a machine and spare parts were those parts which were used for the subsequent replacement therein of worn-out parts. The decision in Vaz Forwarding (P) Ltd.[1] and other decisions of the Tribunal were considered by a larger Bench of the Tribunal in Jindal Strips Ltd. v. Collector of Customs[2]. The larger Bench took the view that a spare part was a replacement part to replace a damaged or worn-out component but it was, nevertheless, a component part. "Component" was the genus and "spare" was a species thereof; it was a component which was used for replacement. The larger Bench judgment found that the distinction drawn in Vaz Forwarding (P) Ltd.[1] was a distinction without a difference.

2. The larger Bench decision followed decisions of this Court, and we are of the view that its view is correct. A spare part, though fitted into a machine subsequent to its manufacture, to replace a defective or worn-out part becomes a component of the machine. It is a component part."

17. The issue for our consideration, as we have already noticed, is whether the Iron and Steel Structures are components of the Capital Goods specified in the Table below Rule 57Q of the Rules. This issue can be resolved by looking into the literature which gives some glimpse how sugar is manufactured in a sugar industry and what is the essential machinery for manufacture of sugar.

18. The process of making sugar commences from the stage of collecting the harvest, cleansing and grinding, juicing, clarifying, evaporation, crystallization, refining and lastly separation and packing. For the purpose of manufacturing cane sugar in a sugar industry, the essential machineries that are required are sugar presses, diffusers, vaccum pans, evaporators and sugar handling equipments, crystallizers, sugar grader, elevator and cooling tower. We can call these

machineries as essential items in a sugar manufacturing plant. The assessee also fabricates Iron and Steel Structures for installation of the aforementioned equipments. Even according to learned senior counsel Sri Lakshmikumaran, these Iron and Steel Structures are used for effective functioning of Sugar Manufacturing Plant. Under the Notification, the Central Government had exempted duty in respect of "capital goods", as defined in Rule 57 Q of the Rules if they are utilized in a place where such goods are manufactured and used within the factory of production. The Notification specifically states that what is exempted under the Notification are "capital goods" as defined in Rule 57Q. Rule 57Q specifies five categories of items as capital goods. It is not the case of the assessee or its learned counsel that the exemption claimed was on Items 1 to 4 of the Table to Rule 57Q but as components which would fall under item No.5 of the Table to Rule 57Q. Therefore, in order to get the benefit of non excise duty on Iron and Steel Structures, it had to be established by the assessee that Iron and Steel Structures are utilized as component parts for the finished products, viz. vacuum pan, crystallizers, sugar grader, elevator, cooling tower etc.

OUR ANALYSIS AND CONCLUSION :

19. It appears to us, in the light of the meaning of the expression 'component parts' that the iron and steel structures are not essential requirements in the sugar manufacturing unit. Anything required to make the goods a finished item can be described as component parts. Iron and Steel structures would not go into the composition of vacuum pans, crystallizers etc. If an article is an element in the composition of another article made out of it, such an article may be described as a component of another article. Thus, structures in question do not satisfy description of 'components'. Therefore, in our opinion, the Tribunal was right in the view it took.

20. Sri V. Lakshmi Kumaran, learned senior counsel, submits that the Iron and Steel structures are fabricated at the

site of the work for use in the construction of the various machineries and, therefore, can be classified under sub-heading 7308.50 under Chapter 73 of the Schedule to the Act, which attracts nil rate of duty. Therefore, it is contended that even if his other contention is not accepted, the assessee should not be fastened with any duty liable under the Act. This issue was neither raised nor canvassed by the assessee before the Tribunal. Therefore, we cannot permit the learned counsel to argue this issue before us for the first time. Therefore, this contention of the learned counsel is rejected.

21. Now coming to the last contention canvassed by the learned counsel that the Tribunal is not correct in holding that the assessee failed to establish that the steel structures are components of the capital goods as specified in the Table below Rule 57Q of the Rules and, therefore, are not eligible for exemption under the notification. This issue requires to be answered with reference to Circular No. 276/110/96-TRV dated 02.12.1996 issued by the CBEC. The relevant portion of the Circular is as under :-

> "3.*The matter has been examined. With effect from 23-7-1 996, capital goods eligible for credit under Rule 57Q have been specified either by their classification or by their description. Clauses (a) to (c) of Explanation (1) of the said rule cover capital goods by their classification whereas clause (d) covers goods by their description viz, components, spares and accessories of the said capital goods. It may be noted that there is a separate entry for components, spares and accessories and no reference has been made about their classification. As such, scope of this entry is not restricted only to the components, spares and accessories falling under Chapters 82, 84, 85 or 90 but covers all components, spares and accessories of the specified goods irrespective of their classification. The same was the position prior to amendment in Rule 57Q (i.e. prior to 23-7-1996) when credit was available on components, spares and accessories of the specified capital goods irrespective of their classification.*
>
> 4. Accordingly, it is clarified that all parts, components, accessories, which are to be used with capital goods of clauses (a) to (c) of Explanation (1) of Rule 57Q and classifiable under any chapter heading are eligible for availment of Modvat credit."

22. The period in dispute is July 1999 to September 1999. The Circular is dated 02.12.1996. Therefore, it was applicable to the disputed period. It is not disputed and it cannot be disputed that the Circular provides that all parts, components, accessories, which are to be used with the capital goods of Clauses (a) to (c) of Explanation (1) of Rule 57Q and classifiable under any Chapter heading are eligible for availing of MODVAT Credit. However, while denying exemption under the notification, the Tribunal has concluded that the goods in question, which comes under Chapter Heading 73 of the Tariff Act has not been specified in the table below rule 57Q. We do not find fault with the reasoning of the Tribunal, since the Circular, on which reliance is now placed by the learned counsel, was not produced before the Tribunal and, therefore, going by the language employed in Rule 57Q, there is justification for the Tribunal for coming to the aforesaid conclusion. Since in view of the circular, which is now brought to our notice, the Tribunal was not correct to reject the claim of the assessee on the aforesaid ground. However, this finding of ours will not assist the assessee, since we have held that Iron and Steel structures are not the components of machineries used in the installation of Sugar Manufacturing Plant.

23. Before we conclude, we must further observe that Shri Lakshmikumaran drew our attention to the judgment of this Court in *CCE vs. Rajasthan Spinning and Weaving Mills Ltd.* (2010) 255 ELT 481 (SC) where the appeal preferred by the Revenue is dismissed. The facts in the said case were that the

respondent-assessee availed MODVAT credit on steel plates and M.S. channels, as capital goods in terms of Serial No.5 of the Table given below Rule 57Q, used for erection of the chimney for the diesel generating set. The parties were ad idem that diesel generating set falls under chapter heading 85 which is mentioned at Serial No.3 of the Table and also the chimney is an accessory in terms of Serial No.5 of the Table given below 57Q. The issue which was agitated before the Court was whether the Steel plates and MS Channels used in the fabrication of chimney are capital goods in terms of Serial No.5 of the Table below Rule 57Q. This Court, whilst applying the user test, had held that the steel plates and MS Channels used in the fabrication of chimney are capital goods as contemplated by Rule 57Q as the chimney is not only an accessory but also an integral part of the diesel generating set in the light of the Pollution Control laws mandating that all plants emitting effluents should be equipped with apparatus to reduce or get rid of effluent gases. We are afraid that this decision would assist the appellants in support of the contention canvassed. In this instant case, the Court was considering whether steel plates and M.S. Channels used in fabrication of chimney for diesel generating sets are entitled to avail of MODVAT credit by treating them as capital goods in terms of Rule 57Q of the Central Excise Rules. This Court, applying 'user test', has arrived at a conclusion that Steel Plates and MS Channels are used in the fabrication of chimney which is an integral part of the diesel generating set. Therefore, the test applied by this Court is whether the items that were at issue were integral part of a machinery. If that test is satisfied, there will not be any difficulty to hold a particular item of the machinery is a component part and therefore, will fall within the ambit of the expression 'capital goods'.

24. In *Simbhaoli Sugar Mills Ltd. v. Commissioner of Central Excise, Meerut*, 2001 (135) ELT 1239 (Tri-Del), the appellant is a manufacturer of sugar and availed a MODVAT credit on the joints, channels, angles and MS Beams used in

fabricating supporting structures for installation of equipments such as vacuum pan, crystallizers, sugar grader, elevator, etc., HR plates (black steel) are used in boiler of sugar plant to keep temperature high, MS bars, shapes and sections are used for erection of new cooling tower, chequred plates and ITR plates are used to construct the platforms, the cane carrier chain and spares are used to transfer the raw material/semi processed material from stage to other, as the capital goods in the terms of Rule 57Q, treating these items as the parts and components of the plant. The question which arose before the Tribunal was that whether these items used for fabricating structures to support and install various machineries of the sugar plant are capital goods in terms of the Rule 57Q. The Tribunal while allowing the MODVAT credit found that these items, except MS sections and shapes, used for raising structure to support the various machines, parts of machineries of the plant would be covered by the explanation to Rule 57Q as a capital goods. The Tribunal referred to its own decision in Malavika Steel Limited's case and without semblance of any discussion, has partly allowed the assessee's appeal. In view of our findings and the conclusion in the earlier part of the judgment, we cannot agree with the reasoning of the Tribunal.

25. In the result, this appeal fails and, accordingly, dismissed. Costs are made easy.

B.B.B. Appeal dismissed.

M/S. CITADEL FINE PHARMACEUTICALS

v.

M/S. RAMANIYAM REAL ESTATES P. LTD. & ANR.

(Civil Appeal No. 6437 of 2011)

AUGUST 08, 2011

[G.S. SINGHVI AND ASOK KUMAR GANGULY, JJ.]

Specific Relief Act, 1963 – s.9 – Specific Performance of Contract – Non-performance by plaintiff of its obligation under the contract within stipulated time – Effect of – Defendant-vendor, a partnership firm, owned 66 cents of land – It entered into an agreement for sale of said land for consideration of Rs.1 crore with plaintiff-purchaser, a company engaged in the business of constructing buildings – Of the said 66 cents, however, 19 cents were considered excess urban vacant land under the Tamil Nadu Urban Land (Ceiling and Regulations) Act – As per clause 7 of agreement, it was the plaintiff's responsibility to have the land cleared for sale from the urban land ceiling authorities – However plaintiff failed to get such clearance from the Urban Land Ceiling Authorities within stipulated time – Defendant-vendor cancelled the agreement – Suit for specific performance – Decreed by Single judge of High Court – Division Bench partly allowed appeal of defendant holding that plaintiff-respondents could be given relief of specific performance only to the extent of 47 cents of lands that were not part of the proceedings under the Tamil Nadu Act – Held: In the instant case, prior to signing of the agreement, the terms were discussed between the parties and the plaintiff-purchaser willingly took upon itself the burden of obtaining clearance from the Urban Land Ceiling Authorities within the time stipulated in the agreement – The parties clearly intended time to be of the essence of the contract (agreement) which was also evident from the commercial nature of the transaction

and the surrounding circumstances – Since the plaintiff did not discharge its burden within the time specified it was not entitled to a specific performance of the contract – Moreover, prior to filing of the suit, the defendant-vendor, in terms of the agreement, had returned the earnest money of Rs.10 lakhs by sending an accounts payee cheque of such amount in favour of the plaintiff under registered post which was refused by the plaintiff and yet the plaintiff-purchaser made averment in the plaint that the defendant-vendor be directed to return the advance amount of Rs.10 lakhs with interest – Suppression by the plaintiff of the fact that it refused to accept the said cheque of Rs.10 lakhs was a material fact – On that ground also the plaintiff-purchaser was not entitled to any relief in its suit of specific performance – Approach of the High Court both by Single Judge and the Appellate Bench not sustainable – Appeal of defendant-vendor allowed while appeal of plaintiff-purchaser dismissed – Contract Act, 1872 – s.55 – Tamil Nadu Urban Land (Ceiling and Regulations) Act, 1978.

Specific Relief Act, 1963 – Plea for discretionary relief of specific performance – Suppression of material fact by the plaintiff – Effect of – Held: When discretionary remedy is prayed for by a party, such party must come to court on proper disclosure of facts – The plaint filed before the Court in such cases must state all facts with sufficient candour and clarity – Where the plaintiff is shown to have materially misled the court or to have abused its process, or to have attempted to do so, the discretionary relief of specific performance can be denied to him – To enable the court to refuse to exercise its discretionary jurisdiction suppression must be of a material fact – However, what is a material fact, suppression whereof would disentitle the suitor to obtain a discretionary relief, would depend upon the facts and circumstances of each case – Material fact would mean a fact material for the purpose of determination of the lis.

Words and Phrases – Material fact – Meaning of.

M/s. Citadel Fine Pharmaceuticals (defendant no.1), a partnership firm, owned 66 cents of land. It entered into an agreement for sale of the said land for a consideration of Rs.1 crore with M/s. Ramaniyam Real Estates Private Limited (plaintiff), a company incorporated under the Companies Act, 1956 and engaged in the business of constructing buildings. In pursuance to the agreement, the plaintiff-purchaser paid earnest money of Rs.10 Lakhs which was received by defendant No.1-vendor.

Of the said 66 cents of land, however, 19 cents were considered excess urban vacant land under the Tamil Nadu Urban Land (Ceiling and Regulations) Act, 1978, (hereinafter 'the Tamil Nadu Act'). Subsequently, when the plaintiff preferred application in Form 37-I prescribed under Rule 48-L of the Income Tax Rules, 1962, before the Appropriate Authority for clearance of the land in question for sale vide section 269UC in Chapter XX of the Income Tax Act, 1961, the Income Tax Authority refused such clearance on the ground that as per section 6 of the Tamil Nadu Act, agreement to sell a piece of urban land declared excess vacant land, or a piece of land, part of which had been declared excess vacant urban land, was deemed as null and void.

As per clause 7 of the agreement entered between the parties, it was the plaintiff's responsibility to have the land in question cleared for sale by the urban land ceiling authorities. However, the plaintiff-purchaser failed to get clearance from the Urban Land Ceiling Authorities within the stipulated time.

Since Form 37–I was not cleared, the plaintiff sent letter to the defendant requesting that the sale be split up and two separate agreements be entered into - the first for the unencumbered 47 cents and the second for 19

cents termed as excess land by the urban land ceiling authority. This proposal was rejected by the defendant no. 1 on grounds that the agreement was not divisible; that the bar under section 6 of the Tamil Nadu Act, as pointed out by the Appropriate Authority was applicable not only in respect of the 19 cents of land termed as excess, but in fact the entire 66 cents for the reason that the said 19 cents could not be severed from the 66 cents and thus the contract was hit by illegality and was thus frustrated. The defendant-vendor cancelled the agreement, purportedly in terms of clause 9 of the agreement and returned the advance money of Rs. 10 lakhs vide a cheque in terms of clause 9, which was refused by the plaintiff.

Thereafter the plaintiff, the proposed purchaser, instituted suit for specific performance of the contract for the entire 66 cents of land. The defendant, the proposed vendor, resisted the suit contending that the suit was liable to be dismissed in view of impossibility of performance of the contract and non-performance by the plaintiff of its obligation under the contract within the stipulated time.

The Single Judge of the High Court decreed the suit holding that the suit property was in respect of agricultural land and not an urban land as contemplated under the Tamil Nadu Act; and thus the same was outside the purview of the Act; and that clause 7 of the agreement in itself was not a condition precedent to the contract. Aggrieved, defendant no.1 preferred appeal. The Division Bench partly allowed it holding that the plaintiff-respondents could be given the relief of specific performance only to the extent of 47 cents of the lands that were not part of the proceedings under the Tamil Nadu Act. Hence the present cross-appeals.

Allowing the appeal filed by M/s. Citadel Fine

Pharmaceuticals and dismissing the appeal filed by M/s. Ramaniyam Real Estates Private Limited, the Court

HELD: 1. The settled law seems to be that in a case for specific performance of contract relating to immovable property time is not normally of the essence. However, this is not an absolute proposition and it has several exceptions. In cases relating to specific performance, equity, which governs the rights of the parties, does not look always at the express term of the agreement but at the substance of it in order to ascertain whether the parties named a specific time within which completion was to take place and whether the parties in substance intended that the completion should take place within a reasonable time. Equity can operate in the construction of a contract "unless excluded by any clearly expressed stipulation". However, equity will not assist where there has been undue delay on the part of one party to the contract and one party has given notice to the other party that the defaulting party must complete the contract within a definite time. Further, equity will not assist when other circumstances will result in injustice on application of equitable principle. In this case, prior to the signing of the agreement, the terms were discussed between the parties and the plaintiff purchaser willingly took upon itself the burden of obtaining the clearance within the time stipulated in the agreement. From the terms of the agreement in this case it is clear that time was of the essence and this was clearly stipulated and understood by the parties having regard to the previous correspondence and also having regard to the laid down terms of the contract and especially when the consequence of non-completion of the terms by purchaser within the stipulated time was spelt out in clause 9. [Paras 31, 32, 33, 34 and 36] [626-B-G; 627-C-D-G; 628-B-C]

Gomathinayagam Pillai and Ors. v. Palaniswami Nadar **AIR 1967 SC 868 – relied on.**

Jamshed Khodaram Irani v. Burjorji Dhunjibhai **(1915-16) 43 I.A. 26 – referred to.**

2.1. Time may be implied as essential in a contract from the nature of the subject matter with which the parties are dealing. In a contract relating to commercial enterprise the Court is strongly inclined to hold time to be essential, whether the contract is for the purchase of land or for such purposes or more 'directly for the prosecution of trade'. The aforesaid principles squarely apply to the facts of the present case. Here the purchaser was admittedly in the business of building construction and was entering with agreement for purchasing the plot on commercial basis. The instant case relates to a contract in commercial transaction and the Court can take judicial notice of the fact that in the city of Chennai the price of real estate is constantly escalating and the clear intention of the parties, as it appears from the stipulations of the agreement, was to treat time as the essence of the contract. The court cannot attribute a different intention to the parties and cannot specifically enforce the contract at the instance of the plaintiff-purchaser who failed to perform his part of the obligation within the time stipulated. [Paras 39, 40, 41, 43 and 44] [629-E-G-H; 630-A-D-H; 631-A-B]

2.2. In *K.S. Vidyanadam's* **case, this Court explained how discretion is to be exercised by the Court before granting specific performance. It was held that the Court cannot be oblivious of the reality of constant and continuous rise in the value of urban properties and in that context the time limit set in the contract has to be strictly construed. In the case of** *Vidyanadam* **there was no such strict stipulation as time being of the essence of**

the contract as is in the instant case even then the Court refused to grant the relief of specific performance. The same question, whether time was of essence of the contract was discussed in a Constitution Bench judgment of this Court in *Chand Rani's* case. The Constitution Bench in *Chand Rani* formulated the proposition that even where parties have expressly provided time to be of the essence of the contract, such a stipulation will have to be read along with other terms of the contract. Such other terms, on a proper construction, may exclude the inference that the completion of work by a particular date was meant to be fundamental. The Judges indicated the following circumstances which may indicate a contrary inference; (a) if a contract includes clauses providing for extension of time in certain contingencies, or (b) if there are clauses for payment of fine or penalty for every day or week the work undertaken remains unfinished after the expiry of time. The Constitution Bench held that such clauses would be construed as rendering ineffective the express provision relating to time being of the essence of contract. In the instant case, in the said agreement no such clause, as aforesaid, exists. Rather the stipulation as time being of the essence of the contract was specifically mentioned in clause 10 and the consequences of non-completion are mentioned in clause 9. So the express terms of the contract and the commercial nature of the transaction and the surrounding circumstances make it clear that the parties intended time in this case to be of the essence of the contract. [Paras 45, 46, 47] [631-C-H; 632-A-F]

Chand Rani (Smt.) (Dead) by LRs. v. Kamal Rani (Smt.) (Dead) by LRs. **(1993) 1 SCC 519: 1992 (3) Suppl. SCR 798 – followed.**

K.S. Vidyanadam and Ors. v. Vairavan **(1997) 3 SCC 1: 1997 (1) SCR 993 – relied on.**

M/s. Hind Construction Contractors by its sole proprietor Bhikamchand Mulchand Jain (Dead) by LRs. v. State of Maharashtra **(1979) 2 SCC 70: 1979 (2) SCR 1147 and** *S.V. Sankaralinga Nadar v. P.T.S. Ratnaswami Nadar* **AIR 1952 Mad 389 – referred to.**

Chitty on Contracts, (Volume 1, Thirteenth Edition, Sweet & Maxwell **in paragraph 21-015;** *Treaties on Specific Performance of contracts* by *Fry* **(Sixth Edition) and** *Treaties on Specific Performance by Gareth Jones and William Goodhart(Second Edition, Butterworths)* **– referred to.**

3. Section 55 of the Indian Contract Act deals with a contract, in which time is of essence. On a combined reading of Section 9 of the Specific Relief Act and Section 55 of The Indian Contract Act it is clear that in this case the vendor as a promisee, was within its right to terminate the contract by sending the letter dated 4th September, 1996 in terms of Clause 9 of the Contract while returning the advance money of Rs.10,00,000/-. It is clear that the plaintiff had not discharged its burden within the time specified and was not entitled to a specific performance of the contract. Therefore, the approach of the High Court both by the Single Judge and the Appellate Bench cannot be sustained. [Paras 50, 51] [633-C-F]

4.1. Moreover, in the instant case by asking for specific performance of the contract, the plaintiff-purchaser was praying for a discretionary remedy. It is axiomatic that when discretionary remedy is prayed for by a party, such party must come to court on proper disclosure of facts. The plaint filed before the Court in such cases must state all facts with sufficient candour and clarity. In the instant case the plaintiff-purchaser

made an averment in the plaint that the defendant-vendor be directed to return the advance amount of Rs.10,00,000/- at the rate of 24% interest from the date of payment of the said amount till the realization and an alternative prayer to that effect was also made. However, the fact remains that prior to the filing of the suit the defendant-vendor returned the said amount of Rs.10,00,000/- by its letter dated 4th September, 1996 by an account payee cheque in favour of the plaintiff and the same was sent to the plaintiff under registered post which was refused by the plaintiff on 6.9.1996. The plaintiff suppressed this fact in the plaint and filed the suit on 9.9.1996 with a totally contrary representation before the court as if the amount has not been returned to it by the vendor. This is suppression of a material fact, and disentitles the plaintiff-purchaser from getting any discretionary relief of specific performance by Court. [Paras 53, 54] [633-H; 634-A-E

4.2. Where the plaintiff is shown to have materially misled the court or to have abused its process, or to have attempted to do so, the discretionary relief of specific performance can be denied to him. It is trite law that to enable the court to refuse to exercise its discretionary jurisdiction suppression must be of a material fact. Of course, what is a material fact, suppression whereof would disentitle the suitor to obtain a discretionary relief, would depend upon the facts and circumstances of each case. However, material fact would mean that fact which is material for the purpose of determination of the lis. In the instant case, suppression of the fact that the plaintiff refused to accept the cheque of Rs.10 lakhs sent to it by the defendant under registered post with A.D. in terms of Clause 9 of the Contract is a material fact. So on that ground also the plaintiff-purchaser is not entitled to any relief in its suit of specific performance. [Paras 55, 56, 57] [634-F-H 635-A-C]

Arunima Baruah v. Union of India and Ors. **(2007) 6 SCC 120: 2007 (5) SCR 904 – relied on.**

Armstrong v. Sheppard & Short Ltd. **(1959) 2 Q.B. 384. p.397 – referred to.**

5. M/s. Citadel Fine Pharmaceuticals is directed to return the amount of Rs.10,00,000/- by an account payee cheque to M/s. Ramaniyam Real Estates P. Ltd., if not already returned, within 4 weeks from date. In default M/s. Citadel Fine Pharmaceuticals will have to pay interest at the rate of 12% per annum on the same from the expiry of the period of 4 weeks from date till actual payment. [Para 59] [635-E-F]

Case Law Reference:

(1915-16) 43 I.A. 26	**referred to**	**Para 32**
AIR 1967 SC 868	**relied on**	**Para 35**
1997 (1) SCR 993	**relied on**	**Para 45**
AIR 1952 Mad 389	**referred to**	**Para 45**
1992 (3) Suppl. SCR 798	**followed**	**Para 46**
1979 (2) SCR 1147	**referred to**	**Para 46**
(1959) 2 Q.B. 384	**referred to**	**Para 55**
2007 (5) SCR 904	**relied on**	**Para 56**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6437 of 2011.

From the Judgment & Order dated 02.09.2008 of the High Court of Judicature at Madras in O.S.A. No. 332 of 2007.

WITH

Civil Appeal No. 6438 of 2011.

Abhishek Manu Singhvi, Prashant Mehta, R. Venkatverdhan, Rishi Agrawala, Amit Kumar Sharma, E.C. Agrawala for the Appellant.

Jayanth Muth Raj, Sundaresan for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave is granted in both the special leave petitions.

2. These appeals have been preferred from the judgment and final order dated 2nd September, 2008 passed in O.S.A. No.332/2007 and C.M.P. No.1/2007 by the Division Bench of the Madras High Court.

3. The controversy arose out of a suit of specific performance. M/s. Citadel Fine Pharmaceuticals (defendant No.1), a partnership firm, owned 66 cents of agricultural land (hereinafter 'the suit property'), forming a part of total of 2.87 acres of agricultural land in survey nos. 363, 364, 366/1 of Velachery village, Mamblam, Guindy Taluk, Registration District of Madras, and entered into an agreement for sale of the suit property (hereinafter 'the agreement') for a consideration of Rs.1,00,00,000/- with M/s. Ramaniyam Real Estates Private Limited (plaintiff), which was a company incorporated under the Companies Act, 1956 and engaged in the business of constructing buildings.

4. The agreement dated 7th July, 1995 was the subject matter of suit between the above parties. As per the agreement, Rs.10,00,000/- of the sale consideration was to be paid upfront as earnest money, and the remainder of Rs.90,00,000/- was to be paid at the time of the registration of the sale deed. At the time of agreement, the suit property was encumbered by way of security with M/s. State Bank of India, Guindy Branch (defendant No.2) and therefore one of the conditions of the agreement was that defendant No. 1 would get the suit property released from such encumbrance before

the final payment of Rs.90,00,000/- was to be made. Apart from this encumbrance, it was stated in the agreement, the suit property was to be without any other encumbrance; vide clauses 2 and 6 of the agreement.

5. Of the said 66 cents, however, 19 cents were considered excess urban vacant land under the Tamil Nadu Urban Land (Ceiling and Regulations) Act (24 of 1978), (hereinafter 'the Tamil Nadu Act'). As per clause 7 of the agreement, it was for the plaintiff to have the land cleared for sale from the urban land ceiling authorities. Under clauses 8, 10 and 11 of the agreement, the sale was made time bound. Clause 10 stated that time was the essence of this contract. Clause 8 mandated that under all circumstances, the sale had to materialize within a year from the date of the agreement. In terms of clause 9, if the sale failed on account of lapses on plaintiff's part, the sale was to stand completely cancelled, and the earnest money of Rs.10,00,000/- was to be returned. As per clause 11, however, if the sale failed because of defendant No. 1, the plaintiff was at liberty to sue for specific performance of the contract.

6. In pursuance to the agreement, the earnest money was paid by the plaintiff and received by defendant No. 1. The plaintiff then preferred an application in Form 37-I prescribed under Rule 48-L of the Income Tax Rules, 1962, before the Appropriate Authority for the clearance of the suit property for sale vide section 269UC in Chapter XX of the Income Tax Act, 1961.

7. However, the Income Tax Authority refused such clearance on the ground that as per section 6 of the Tamil Nadu Act, agreement to sell a piece of urban land declared excess vacant land, or a piece of land, part of which had been declared excess vacant urban land, was deemed as null and void.

8. From the Statement and Objects and Reasons of the Tamil Nadu Act it appears that it was enacted to impose a

ceiling on the quantum of land that could be held or owned within an urban agglomeration. The object of the Act was to prevent concentration of ownership of urban land in the hands of a few, and to regulate the construction of buildings on such lands, speculative trading of urban land and illegal profiteering. Under the Act, the ceiling limit had been fixed by Section 5. Section 6 of the Act prevented transfer of such excess vacant urban land by its owner to any other person. Section 6 is set out:

> 6. **Transfer of vacant land**. – No person holding in excess of the ceiling limit immediately before the commencement of this Act, vacant land, shall transfer any such land or part thereof by way of sale, mortgage, gift, lease or otherwise until he has furnished a statement under section 7 and a notification regarding the excess vacant land held by him has been published under sub section (1) of section 11; and any such transfer made in contravention of this provision shall be deemed to be null and void.

9. The section thus enjoined that landowners holding excess vacant land are to furnish a statement under Section 7. In this case, 19 cents were considered excess urban vacant land vide case no. R.C.6160/86 and defendant No. 1 filed its statement under Section 7.

10. Section 9 provided for preparation of a draft statement as regards the excess vacant land. Under clause (5) of Section 9, the Competent Authority, so designated under the Tamil Nadu Act, was to consider objections preferred by a land owner, and then pass orders with respect to the question of excess land. Defendant no. 1 preferred its objections before the Competent Authority. The objections however were dismissed. The defendant no. 1 then preferred an appeal before the Special Commissioner (Land Reforms), Madras and the appeal was kept pending.

11. In accordance with Section 11 (1), a notification

regarding the 19 cents being excess vacant land was published and any transfer made in contravention of this provision was deemed to be null and void. Section 11 provided for acquisition of such vacant urban land by the State Government.

12. Defendant no. 1 also preferred an application for exemption of that 19 cents of land under the provisions of Section 21. Section 21 empowered the State Government to exempt a piece of vacant excess land from acquisition mentioned above.

13. That application was also dismissed. Defendant no. 1 then preferred Writ Petition No. 13906/2008 before the High Court challenging the declaration in R. C. 6160/86. In the writ petition, defendant no. 1 prayed for a stay of the proceedings and which was allowed. However, during the pendency of this writ petition the Tamil Nadu Act was repealed on 16th June, 1999 by the Tamil Nadu Urban Land (Ceiling and Regulation) Repeal Act, 1999 (20 of 1999) (hereinafter 'the Repealing Act'). Under Section 4 of the repealing Act, all proceedings relating to any order made or purported to be made under the Principal Act, that is the Tamil Nadu Act, shall abate. Section 4 of the Repealing Act is as follows:-

> "**4. Abatement of legal proceedings**. - All proceedings relating to any order made or purported to be made under the Principal Act pending immediately before the commencement of this Act before any court, tribunal or any authority shall abate.
>
> Provided that this section shall not apply to the proceedings relating to Sections 12, 13, 14, l5, 15-B and 16 of the Principal Act in so far as such proceedings are relatable to the land, possession of which has been taken over by the State Government of any person duly authorised by the State Government in this behalf or by the competent authority."

14. Admittedly, possession of 19 cents of land, in respect of which proceeding was pending, was not taken over by the Government. So the pending proceeding in respect of that land under the Principal Act, that is the Tamil Nadu Act, shall abate in view of Section 4 of the Repealing Act.

15. However, Income Tax authorities, as noted above, had refused to process Form 37-I in view of the proceedings initiated under the Tamil Nadu Act. Having referred to section 6 of the Act, the appropriate authority, while rejecting form 37-I stated:

> "…In column 8, it has been mentioned that an extent of 19 cents has been declared as excess vacant land under section 9 (5) of Tamil Nadu Urban Land (Ceiling and Regulations) Act, 1978 that an appeal is pending before the Special Commissioner (Land Reforms), Madras and that the transferor has also applied to the State Government for exemption under Section 21 of the said Act but the same has been rejected and the matter is pending in W. P. No. 13906/1988, before the High Court, Madras.
>
> 2. It transpires, therefore, that the transferor intends to transfer the entire extent of 66 cents, inclusive of the 19 cents of land which is declared as excess vacant land by the Competent Authority under the Urban Land Ceiling Act, which is prohibited by section 6 of the Tamil Nadu Urban Land (Ceiling and Regulations) Act, 1978. ….
>
> In view of the prohibition contained in section 6, quoted above, the agreement entered into between the parties on 7.7.95 to transfer the entire land, including the excess vacant land of 19 cents, shall be deemed to be null and void. In view of this legal prohibition, we are unable to process the 37-I statement filed by you and therefore, the same is lodged in this office. If you are so advised, you may file a fresh 37-I statement for transfer of the balance land only."

16. As per clause (7) of the agreement, it was the plaintiff's responsibility to have the suit property cleared for sale by the urban land ceiling authorities. Since Form 37–I was not cleared, the plaintiff sent two letters dated 10th June, 1996 and 3rd July, 1996 to the defendant requesting that the sale be split up and two separate agreements be entered into. The first for the unencumbered 47 cents and the second for 19 cents termed as the excess land by the urban land ceiling authority. This proposal was rejected by the defendant no. 1 on the grounds that the agreement is not divisible. According to defendant No.1, the splitting up of the agreement into two in effect meant the writing of an entirely new contract. The bar under section 6 of the Tamil Nadu Act, as pointed out by the Appropriate Authority was applicable not only in respect of the 19 cents of land termed as excess, but in fact the entire 66 cents for the reason that the said 19 cents could not be severed from the 66 cents. The defendant No.1 urged that the contract was hit by illegality and was thus frustrated.

17. The plaintiff, the proposed purchaser, under these circumstances instituted on 9th September, 1998 the suit for specific performance of the contract, viz. C. S. 589/1996 for the entire 66 cents of land.

18. The plaint case is that at the time the agreement for sale was entered into, it was known to both the parties that 19 cents of the suit property had been declared excess land under the Tamil Nadu Act, and that an appeal to the Special Commissioner (Land Reforms), Madras was pending. It also submitted that the parties knew that a writ petition challenging the State Government's refusal to exempt the property under section 21 of the Tamil Nadu Act was also pending. With knowledge the parties entered into the agreement to sell. The plaintiff submitted that this meeting of minds was reflected in clause 7 of the agreement. There was thus no new and unforeseen development leading to the frustration of contract as such the relief for specific performance of the contract was prayed or in the alternative, it was prayed the plaintiff be

allowed a refund of the earnest money with an interest of 25% per annum and liquidated damages to the tune of Rs.75,00,000/- along with costs.

19. The defendant, the proposed vendor, resisted the suit by submitting that the agreement to sell was with respect to the entire suit property, i.e. 66 cents, and thus could not have been split into separate agreements to sell for 47 cents and 19 cents. It submitted that in view of the bar placed because of section 6 of the Tamil Nadu Act and the consequential refusal by the appropriate authority under the income tax department to allow the execution of the sale, the contract itself had become frustrated and thus unenforceable in law.

20. It was further urged that time was the essence of the contract and it was for the plaintiff purchaser to seek exemption for the said 19 cents land from the urban land ceiling department, which however it failed to do. As a result of this failure, the sale could not be affected within a year's time. This clearly rendered the contract void in terms of clauses 8 and 10 insofar as the contract was not performed within a year's time. Hence, clause 9 was attracted and the contract stood cancelled for default of the plaintiff. It submitted that in terms of clause 9, the proposed vendor (defendant no.1) refunded the earnest money to the plaintiff-purchaser. However the cheque sent under registered post came back to the defendant no. 1 'refused'. It appears that the same refused by the plaintiff-purchaser either by 6th or 7th September, 1996.

21. As such the defendant no. 1 prayed for dismissal of the suit in view of impossibility of performance of the contract and non-performance by the plaintiff of its obligation under the contract within the stipulated time.

22. However, the learned Single Judge held that the suit property was in respect of agricultural land and not about an urban land as contemplated under the Tamil Nadu Act. It was further noted by the learned Judge that as the Tamil Nadu Act

had been repealed in 1999, its application itself would be limited to only those instances where possession of the excess vacant land had been taken over by the State Government.

23. The learned Judge noted that the suit property in the instant case did not attract any of the provisions mentioned in Section 3 of the Repealing Act. According to the learned Judge, there were two reasons for which the provisions of Tamil Nadu Act would not apply to the instant agreement: firstly, the suit property was agricultural in nature and thus the same was outside the purview of the Act. Secondly, after the repeal of the Tamil Nadu Act in 1999, none of its provisions affected the agreement. The Judge held that clause (7) in itself, however, was not a condition precedent to the contract. It merely stated that clearance of the said 19 cents from the urban land ceiling authorities was upon the plaintiff, and that in the event the plaintiff was unable to have it cleared, the defendant no. 1 shall not be provided with any alternative piece of land or any compensation. Thus, the learned Judge held that the plaintiff was entitled to specific performance of the contract and decreed the suit.

24. Aggrieved, the defendant no. 1 preferred an appeal. The learned Division Bench partly allowed it holding that the respondents could be given the relief of specific performance only to the extent of 47 cents of the lands that were not part of the proceedings under the Tamil Nadu Act.

25. Apart from upholding the judgment of the learned Judge with respect to the agricultural nature of the suit property, the Division Bench noted that in none of the letters exchanged between the parties it had come on record that the agreement had become illegal in view of the provisions of Section 6 of the Tamil Nadu Act. On the contrary, in all these communications, the only position that the defendant no. 1 had insisted upon was the satisfaction of the conditions mentioned in clause (7) of the agreement, viz., permission for the sale of 19 cents by the urban land ceiling authorities. The learned Division Bench noted that

if this was the stance of the defendant no. 1, it could not be allowed to resist the suit on the grounds of illegality of contract.

26. However, it disagreed with the decision of the learned Judge to the extent the repeal of the Tamil Nadu Act did not in itself released 19 cents of the excess vacant land from the proceedings initiated under that Act. It held that Section 3 of the Repeal Act provided that repealing of the Tamil Nadu Act would not affect the vesting of any vacant land under sub section (3) of Section 11 of the Tamil Nadu Act in cases where the possession of such vacant land had been taken over by the State Government. Relying upon and following decision of a Full Bench of the High Court in *P. Gopirathnam and 4 Others v. Ferrodous Estate (Private) Limited, represented by its Power of Attorney Holder Sri G. John Arthur*, 1999 (2) Current Tamil Nadu Cases 181, the learned Bench held that the proceedings with respect to the said 19 cents had been initiated and that the same were pending. The Division Bench held that decree for specific performance as given by the learned Judge had to be modified to the extent that the same was possible only to the extent of the unencumbered portion of the land.

27. One of the main questions which arise for consideration in the facts of this Court is whether in the said agreement time is of the essence of the contract. In order to appreciate this question, the Court has to consider several clauses in the said agreement. The relevant clauses are clauses 7, 8, 9 & 10, which are set out below:

> "7. The vendor states that an extent of 770 sq.mts. in S.No.363/1B & 363/1C forming part of the property described below and agreed to be sold has been declared as excess vacant land under Sec 9(5) of the Tamil Nadu Urban Land Ceiling (C&R) Act, 1978. An appeal is pending before the Special Commissioner (Land Reforms), Madras. The Vendor also applied to the State Government for exemption under Sec 21 of the Act but the same has been rejected and the matter is pending in

> W.P.13906/1988 before the High Court, Madras. It shall be the sole responsibility of the Purchaser to get clearance from the Urban Land Ceiling Authorities by negotiation or getting exemption under the Act or permission to sell, at his own cost and the Vendor shall not be responsible for the same. But, the Vendor shall sign all applications or petitions necessary for this purpose. While, getting permission to sell or exemption under the Act in respect of the property agreed to be sold, the Purchaser shall ensure that no compensatory claim or alternate land is claimed by the Urban Land Ceiling authorities in the rest of the land to be retained by the Vendor.
>
> 8. The time for completion of the purchase shall be one year from the date of this agreement.
>
> 9. If the purchaser fails to complete the transaction within the time stipulated, this agreement shall stand cancelled and a sum of Rs.10,00,000/- (Rupees Ten Lakhs only) paid as earnest money will be returned without interest to the Purchaser and the Vendor shall be at liberty to sell the property to whomsoever he likes.
>
> 10. Time shall be the essence of the contract."

28. Admittedly, the agreement was entered into on 7th July, 1995 and the period of one year expired by 6th July, 1996. Within that period the plaintiff-purchaser could not get clearance from the Urban Land Ceiling Authorities nor could they obtain the exemption under the Act for permission to sell a part of the property in respect of which the suit for specific performance was filed.

29. It is not the case of the plaintiff-purchaser that the vendor in any way delayed the signing of application or petition necessary for getting such permission for clearance. From some correspondence exchanged between the parties it is clear that purchaser took a few steps but could not get the

clearance within the time agreed by it. The Vendor, however, by a letter dated 4th September, 1996 cancelled the agreement in terms of clause 9 of the agreement and returned the advance money of Rs.10,00,000/- vide a cheque in terms of clause 9. The said letter written by the vendor is set out below:-

"CITADEL FINE PHARMACEUTICALS

Ref: 3852/96

4th September 1996

M/s. Ramaniyam Real Estates Pvt. Ltd.,
Rep. by Mr. V. Jagannathan,
Managing Director,
'Sruthi'. No.11, 2nd Main Raod,
Gandhi Nagar,
Madras 600 020.

Dear Sir,

Re: 1. Our letter dated 11.7.96

2. Your letter dated 19.7.96.

As would be appreciated by you, at the meeting had with you, by ourself through our Mr. Rajiv and further by telephone on 30.8.1996 as you have expressed your reluctance in accepting our terms put to you on the sale of the property, we are returning the advance money of Rs.10,00,000/- vide SBI, Guindy, Cheque No.904014 dt.4.9.1996 in terms of Clause 9 of the Agreement dated 7th July, 1995.

Kindly acknowledge the receipt of this.

Thanking you,

Yours faithfully,

For CITADEL FINE PHARMACEUTICALS
Sd/-
Partner

Encl: as above"

30. Under these circumstances, the question is whether from the facts of this case vendor can raise a defence to the suit for specific performance of the contract that time being of the essence of this contract, the Court cannot order its specific performance when plaintiff failed to discharge its part of the contract within time and when after expiry of time, the contract was cancelled by the vendor in terms of clause 9 of the Contract.

31. The settled law seems to be that in a case for specific performance of contract relating to immovable property time is not normally of the essence. However, this is not an absolute proposition and it has several exceptions.

32. Reference in this connection may be made to the decision of Privy Council in *Jamshed Khodaram Irani v. Burjorji Dhunjibhai* reported in (1915-16) 43 I.A. 26. Viscount Haldane delivering the judgment for the Judicial Committee of the Privy Council held that the law applicable to this question is contained in Section 55 of the Indian Contract Act and the learned Law Lord was of the opinion that Section 55 of the Indian Contract Act does not lay down any principle which is different from those which obtain under the law of England with regard to contracts for sale of land. It was further held that in cases relating to specific performance, equity, which governs the rights of the parties, does not look always at the express term of the agreement but at the substance of it in order to ascertain whether the parties named a specific time within which completion was to take place and whether the parties in substance intended that the completion should take place within a reasonable time. The legal position was as follows:-

"…A Court of Equity will indeed relieve against and enforce specific performance, notwithstanding a failure to

keep the dates assigned by the contract; either for completion or for the steps towards completion, *if it can do justice between the parties*, and if (as Lord Justice Turner said in Roberts v. Berry [3 D.M.& G. 284 at 289] there is nothing in the 'express stipulation between the parties, the nature of the property, or the surrounding circumstances', which would make it inequitable to interfere with and modify the legal right…." (page 32 of the report)

33. The learned Law Lord made it clear that equity can operate in the construction of a contract "unless excluded by any clearly expressed stipulation". However, it was made clear that equity will not assist where there has been undue delay on the part of one party to the contract and one party has given notice to the other party that the defaulting party must complete the contract within a definite time. A further caution was added by saying that equity will not assist when other circumstances will result in injustice on application of equitable principle. In the words of Lord Haldane the principles have been formulated as follows:-

"…Nor will it (equity) exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction. Equity will further infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract…." (Page 33 of the report)

34. In this case, prior to the signing of the agreement, the terms were discussed between the parties and the plaintiff purchaser willingly took upon itself the burden of obtaining the clearance within the time stipulated in the agreement.

35. The aforesaid principles in *Jamshed Khodaram*

(supra) were accepted by a three-Judge Bench of this Court in the case of *Gomathinayagam Pillai and others v. Palaniswami Nadar* reported in AIR 1967 SC 868.

36. From the terms of agreement in this case which have been set out in the earlier part of the judgment it is clear that the time is of the essence and this is clearly stipulated and understood by the parties having regard to the previous correspondence and also having regard to the laid down terms of the contract and especially when the consequence of non-completion of the terms by purchaser within the stipulated time was spelt out in clause 9.

37. In a case where time is of the essence of the contract, the consequence of non-performance of such term has been very succinctly explained by *Chitty on Contracts, (Volume 1, Thirteenth Edition, Sweet & Maxwell in paragraph 21-015)* and the same is set out:

"Consequences of time being "of the essence". In determining the consequences of a stipulation that time is to be "of the essence" of an obligation, it is vital to distinguish between the case where both parties agree that time is to be of the essence of the obligation and the case where, following a breach of a non-essential term of the contract, the innocent party serves a notice on the other stating that time is to be of the essence. In the former case the effect of declaring time to be of the essence is to elevate the term to the status of a "condition" with the consequences that a failure to perform by the stipulated time will entitle the innocent party to: (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (b) claim damages from the contract-breaker on the basis that he has committed a fundamental breach of the contract ("a breach going to the root of the contract") depriving the innocent party of the benefit of the

contract ("damages for loss of the whole transaction". (page 1410)

38. *Fry* in his *Treaties on the Specific Performance* of *Contracts (Sixth Edition)* has dealt with this aspect in paragraph 1075:-

> "Time is originally of the essence of the contract, in the view of a Court of Equity, whenever it appears to have been part of the real intention of the parties that it should be so, and not to have been inserted as a merely formal part of the contract. As this intention may either be separately expressed, or may be implied from the nature or structure of the contract, it follows that time may be originally of the essence of a contract, as to any one or more of its terms, either by virtue of an express condition in the contract itself making it so, or by reason of its being implied…." (page 502)

39. In paragraph 1079, the learned author has explained the position further by saying the time may be implied as essential in a contract from the nature of the subject matter with which the parties are dealing. The learned author explained this by saying:-

> "1079. Time may be implied as essential in a contract, from the nature of the subject-matter with which the parties are dealing. "If, therefore," said Alderson B., "the thing sold be of greater or less value according to the effluxion of time, it is manifest that time is of the essence of the contract: and a stipulation as to time must then be literally complied with in Equity as well as in Law…." (page 504)

40. At paragraph 1081 page 505, the learned author made it very clear that in a contract relating to commercial enterprise the Court is strongly inclined to hold time to be essential, whether the contract is for the purchase of land or for such

purposes or more 'directly for the prosecution of trade'. The elaboration of this point by the learned author is as follows:-

> "1081. And so, again, where the object of the contract is a commercial enterprise, the Court is strongly inclined to hold time to be essential, whether the contract be for the purchaser of land for such purposes, or more directly for the prosecution of trade. This principle has been acted on in the matter of a contract respecting land which had been purchased for the erection of mills, also in relation to a sale of pasture lands, required by the purchaser, as the vendor new, for stocking, and in several cases of contracts for the sale of public-houses as going concerns…." (page 505)

41. The aforesaid principles squarely apply to the facts of the present case. Here the purchaser is admittedly in the business of building construction and is entering with agreement for purchasing the plot on commercial basis.

42. *Gareth Jones and William Goodhart* in their *Treaties on Specific Performance (Second Edition, Butterworths)* expressed similar views by saying:

> "If the parties have expressly agreed that time is to be of the essence, the courts will generally if not always give effect to that stipulation. An intention that a stipulation as to time should be of the essence may be implied from the circumstances. In the absence of agreement to the contrary, time will generally be considered of the essence in mercantile contracts and in contracts for the sale of a business or of property which has a fluctuating or speculative value…." (page 74)

43. The instant case obviously relates to a contract in commercial transaction and the Court can take judicial notice of the fact that in the city of Chennai the price of real estate is constantly escalating and the clear intention of the parties, as

it appears from the stipulations of the agreement, was to treat time as the essence of the contract.

44. Having regard to the aforesaid principles the court cannot attribute a different intention to the parties and cannot specifically enforce the contract at the instance of the plaintiff-purchaser who has failed to perform his part of the obligation within the time stipulated.

45. In *K.S. Vidyanadam and others v. Vairavan* reported in (1997) 3 SCC 1 this Court explained how discretion is to be exercised by the Court before granting specific performance. This Court held that in cases of urban properties in India it is well known that prices are going up sharply over the last few decades particularly after 1973. In *Vidyanadam* (supra) the court was dealing with a property in Madurai in the State of Tamil Nadu and it was argued before this Court by referring to the Madras High Court judgment in *S.V. Sankaralinga Nadar v. P.T.S. Ratnaswami Nadar* (AIR 1952 Mad 389) that mere rise in price is no ground for denying the specific performance. This Court did not agree with the decision of the Madras High Court and held that the Court cannot be oblivious of the reality of constant and continuous rise in the value of urban properties. In that context the time limit set in the contract has to be strictly construed. In the case of *Vidyanadam* (supra) there is no such strict stipulation as time being of the essence of the contract as is in the instant case even then the Court refused to grant the relief of specific performance.

46. In *Vidyanadam* (supra) reference was made to a Constitution Bench judgment of this Court in *Chand Rani (Smt.) (Dead) by LRs. v. Kamal Rani (Smt.) (Dead) by LRs.* reported in (1993) 1 SCC 519. The same question, whether time was of essence of the contract was discussed in *Chand Rani* (supra). The Constitution Bench of this Court while dealing with this question referred to another decision of this Court in the case of *M/s. Hind Construction Contractors by its sole*

proprietor Bhikamchand Mulchand Jain (Dead) by LRs. v. State of Maharashtra reported in (1979) 2 SCC 70. By referring to various judgments, the Constitution Bench in *Chand Rani* (supra) formulated the proposition that even where parties have expressly provided time to be of the essence of the contract, such a stipulation will have to be read along with other terms of the contract. Such other terms, on a proper construction, may exclude the inference that the completion of work by a particular date was meant to be fundamental. The learned Judges indicated the following circumstances which may indicate a contrary inference; (a) if a contract includes clauses providing for extension of time in certain contingencies, or (b) if there are clauses for payment of fine or penalty for every day or week the work undertaken remains unfinished after the expiry of time. The Constitution Bench held that such clauses would be construed as rendering ineffective the express provision relating to time being of the essence of contract (see para 22 at page 528 of the report).

47. In the instant case, in the said agreement no such clause, as aforesaid, exists. Rather the stipulation as time being of the essence of the contract was specifically mentioned in clause 10 and the consequences of non-completion are mentioned in clause 9. So from the express terms of the contract and the commercial nature of the transaction and the surrounding circumstances make it clear that the parties intended time in this case was intended to be of the essence of the contract.

48. Keeping the above principle if we look at the portion of Law in India, it is clear that under Section 9 of the Specific Relief Act, 1963 it is provided as follows:-

> "9. Defences respecting suits for relief based on contract.- Except as otherwise provided herein, where any relief is claimed under this Chapter in respect of a contract, the person against whom the relief is claimed may plead by

way of defence any ground which is available to him under any law relating to contracts."

49. It is clear from Section 9 of the Specific Relief Act, 1963 that Section 55 of The Indian Contract Act, 1872 enables a defendant against whom suit for the specific performance has been filed to raise the defence under Section 55 of the Indian Contract Act.

50. Section 55 of the Indian Contract Act which deals with a contract, in which time is of essence is as follows:-

"Section 55 - Effect of failure to perform at a fixed time, in contract in which time is essential. - When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract."

51. On a combined reading of Section 9 of the Specific Relief Act and Section 55 of The Indian Contracts Act it is clear that in this case the vendor as a promisee, was within its right to terminate the contract by sending the letter dated 4th September, 1996 in terms of Clause 9 of the Contract while returning the advance money of Rs.10,00,000/-. It is clear that the plaintiff has not discharged its burden within the time specified and is not entitled to a specific performance of the contract.

52. Therefore, the approach of the High Court both by the Single Judge and the Appellate Bench cannot be sustained.

53. There is another aspect of the matter also. In the instant case by asking for specific performance of the contract, the plaintiff-purchaser is praying for a discretionary remedy. It is

axiomatic that when discretionary remedy is prayed for by a party, such party must come to court on proper disclosure of facts. The plaint which it filed before the Court in such cases must state all facts with sufficient candour and clarity. In the instant case the plaintiff-purchaser made an averment in the plaint that the defendant-vendor be directed to return the advance amount of Rs.10,00,000/- at the rate of 24% interest from the date of payment of the said amount till the realization and an alternative prayer to that effect was also made in the prayer clause (c).

54. However, the fact remains that prior to the filing of the suit the defendant-vendor returned the said amount of Rs.10,00,000/- by its letter dated 4th September, 1996 by an account payee cheque in favour of the plaintiff and the same was sent to the plaintiff under registered post which was refused by the plaintiff on 6.9.1996. The plaintiff suppressed this fact in the plaint and filed the suit on 9.9.1996 with a totally contrary representation before the court as if the amount has not been returned to it by the vendor. This is suppression of a material fact, and disentitles the plaintiff-purchaser from getting any discretionary relief of specific performance by Court.

55. In this connection we may refer to the Principle of Equitable Remedies by I.C.F. SPRY, Fourth Edition (Sweet & Maxwell, 1990). Dealing with the question of 'Clean Hands' the learned author opined that where the plaintiff is shown to have materially misled the court or to have abused its process, or to have attempted to do so, the discretionary relief of specific performance can be denied to him. In laying down this principle, the learned author relied on a decision of the English Court in the case of *Armstrong v. Sheppard & Short Ltd.* (1959) 2 Q.B. 384 at page 397. (See SPRY Equitable Remedies page 243).

56. This Court has also taken the same view in the case of *Arunima Baruah v. Union of India and others* reported in (2007) 6 SCC 120. At paragraph 12, page 125 of the report,

this Court held that it is trite law that to enable the court to refuse to exercise its discretionary jurisdiction suppression must be of a material fact. This Court, of course, held what is a material fact, suppression whereof would disentitle the suitor to obtain a discretionary relief, would depend upon the facts and circumstances of each case. However, by way of guidance this Court held that material fact would mean that fact which is material for the purpose of determination of the lis.

57. Following the aforesaid tests, this Court is of the opinion that the suppression of the fact that the plaintiff refused to accept the cheque of Rs.10 lac sent to it by the defendant under registered post with A.D. in terms of Clause 9 of the Contract is a material fact. So on that ground the plaintiff-purchaser is not entitled to any relief in its suit of specific performance.

58. For the reasons aforesaid, this Court allows the appeal filed by M/s. Citadel Fine Pharmaceuticals [SLP(C) No.28251/2008] and dismisses the appeal filed by the M/s Ramaniyam Real Estates P. Ltd., [SLP(C) No.31269/2008].

59. The Court directs M/s. Citadel Fine Pharmaceuticals to return the amount of Rs.10,00,000/- by an account payee cheque to M/s. Ramaniyam Real Estates P. Ltd., if not already returned, within 4 weeks from date. In default M/s. Citadel Fine Pharmaceuticals will have to pay interest at the rate of 12% per annum on the same from the expiry of the period of 4 weeks from date till actual payment.

60. Having regard to the facts and circumstances of this case there will be no order as to costs.

B.B.B. Appleas disposed of.

K.T. PLANTATION PVT. LTD. & ANR.
v.
STATE OF KARNATAKA
(Civil Appeal No. 6520 of 2003)

AUGUST 9, 2011

[S.H. KAPADIA CJI, DR. MUKUNDAKAM SHARMA, K.S. RADHAKRISHNAN, SWATANTER KUMAR AND ANIL R. DAVE, JJ.]

Karnataka Land Reforms Act, 1961 – ss.110 and 140 – Exemption provisions – Exemption under s.107 for lands used for cultivation of Linaloe – Power to withdraw the exemption u/s.110 – Constitutional validity of s.110 – Withdrawal of exemption vide notification dated 08.03.1994 issued under s.110 – Notification in question not laid before the Legislature – Validity of the Notification – Held: Power to withdraw exemption has not been conferred on the State Government, but evidently retained by the Legislature – The Legislature's apathy in granting is discernible from the language used in sub-section (2) of s.107, which says that no person shall after the commencement of the Amendment Act acquire in any manner for the cultivation of Linaloe, land of an extent which together with the land cultivated by Linaloe, if any, already held by him exceeds ten units – Legislature, therefore, as matter of policy, wanted to give only a conditional exemption for lands used for Linaloe cultivation and the policy was to empower the State Government to withdraw the same especially when the law is that no person can claim exemption as a matter of right – The legislative will was to make s.107 subject to s.110 and not the will of the delegate, hence, overriding effect has to be given to s.110 – The contention that s.110 is void due to excessive delegation of legislative powers, is not acceptable – Further, the Act including s.110 was placed in IXth Schedule in the year 1965 and, hence,

immune from challenge in a court of law – Land used for linaloe cultivation would be governed by the provisions of the Act which is protected under Article 31B of the Constitution having been included in the IXth Schedule – The appellant-company could not have held the land used for the cultivation of Linaloe on the date of the commencement of the Act – Further on withdrawal of exemption vide notification dated 08.03.94 the appellant-company became disentitled to hold the land – Non-laying of the notification dt.8.3.94 under s.140 of the Act before the State Legislature was a curable defect and did not affect the validity of the notification or action taken thereunder – No force in the contention that opportunity of hearing is a pre-condition for exercising powers under s.110 of the Act – No such requirement has been provided under s.107 or s.110 – Constitution of India, 1950 – Article 31B – Administrative Law – Delegated legislation.

The Roerich and Devika Rani Roerich Estate (Acquisition & Transfer) Act, 1996 – Constitutional validity of – Plea of repugnancy between the provisions of the Land Acquisition Act, 1894 and the Roerich and Devika Rani Roerich Estate (Acquisition & Transfer) Act– Tenability of – Held: Plea is not acceptable – Under Article 254 of the Constitution, a State law passed in respect of a subject matter comprised in List III would be invalid if its provisions are repugnant to a law passed on the same subject by Parliament and that too only if both the laws cannot exist together – If the dominant intention of two legislations is different, they cover different subject matter then merely because the two legislations refer to some allied or cognate subjects, they do not cover the same field – The Roerich and Devika Rani Roerich Estate (Acquisition & Transfer) Act, 1996, primarily falls under Entry 18 List II, since the dominant intention of the legislature was to preserve and protect Roerichs' Estate covered by the provisions of the Karnataka Land Reforms Act, on the State Government withdrawing the exemption in respect of the land used for linaloe cultivation – The said

Acquisition Act, though primarily falls under Entry 18 List II incidentally also deals with the acquisition of paintings, artefacts and other valuable belongings of Roerichs' and, hence, the Act partly falls under Entry 42 List III as well – Since the dominant purpose of the Act was to preserve and protect Roerichs' Estate as part of agrarian reforms, the inclusion of ancillary measures would not throw the law out of the protection of Article 31A(1)(a) – On the other hand, the Land Acquisition Act, 1894 is an Act which fell exclusively under Entry 42 List III and enacted for the purpose of acquisition of land needed for public purposes for companies and for determining the amount of compensation to be made on account of such acquisition, which is substantially and materially different from the Acquisition Act whose dominant purpose is to preserve and protect "estate" governed by Art.31A(a) read with Art.31A(2)(a)(iii) of the Constitution – Therefore, no assent of the President was required under Article 254(2) of the Constitution to sustain the impugned Acquisition Act, which falls under Article 31A(1)(a) of the Constitution – Constitution of India, 1950 – Articles 31A and 254(2) – Land Acquisition Act, 1894.

Constitution of India, 1950 – Art. 300A – Exercise of the power of eminent domain – Scope – Held: Article 300A proclaims that no person can be deprived of his property save by authority of law, meaning thereby that a person cannot be deprived of his property merely by an executive fiat, without any specific legal authority or without the support of law made by a competent legislature – Principles of eminent domain, as such, is not seen incorporated in Article 300A – Doctrines – Doctrine of Eminent Domain.

Constitution of India, 1950 – Art.300A – Requirement of public purpose for depriving a person of his property – Payment of compensation to a person who is deprived of his property – Held: Deprivation of property within the meaning of Art.300A, generally speaking, must take place for public

purpose or public interest – Any law, which deprives a person of his private property for private interest, will be unlawful and unfair and undermines the rule of law and can be subjected to judicial review – Public purpose is a pre-condition for deprivation of a person from his property under Article 300A and the right to claim compensation is also inbuilt in that Article and when a person is deprived of his property the State has to justify both the grounds which may depend on scheme of the statute, legislative policy, object and purpose of the legislature and other related factors – Article 300A does not prohibit the payment of just compensation when a person is deprived of his property – Requirement of public purpose, for deprivation of a person of his property under Article 300A, is a pre-condition, but no compensation or nil compensation or its illusiveness has to be justified by the State on judicially justiciable standards.

Interpretation of Statute – Statute depriving a person of his property – Scope for judicial review – Held: Statutes are many which though deprives a person of his property, have the protection of Article 30(1A), Article 31A, 31B, 31C and hence immune from challenge under Article 19 or Article 14 – On deletion of Article 19(1)(f), the available grounds of challenge are Article 14, the basic structure and the rule of law, apart from the ground of legislative competence – Though the Impugned Act was not included in the IXth Schedule but since the Act was protected by Article 31A, it was immune from challenge on the ground of violation of Article 14 – Constitution of India, 1950 –Articles 14 and 31A – The Roerich and Devika Rani Roerich Estate (Acquisition & Transfer) Act, 1996.

Rule of law – Held: Rule of law as a concept finds no place in Indian Constitution, but has been characterized as a basic feature of Indian Constitution which cannot be abrogated or destroyed even by the Parliament and in fact binds the Parliament – Rule of law as an overarching principle can be

applied by the constitutional courts, in rarest of rare cases, and can undo laws which are tyrannical, violate the basic structure of the Indian Constitution, and the cherished norms of law and justice.

Dr. Svetoslav Roerich, a Russia born internationally acclaimed painter and artist, and his wife Mrs. Devika Rani Roerich owned an Estate in Bangalore covering 470.19 acres, out of which 100 acres were granted to them by the State Government of Karnataka in the year 1954 for Linaloe cultivation. When the Karnataka Land Reforms Act, 1961 came into force, they filed declarations under Section 66 of the Act before the Land Tribunal stating that they had no surplus lands to surrender to the State since the entire area held by them had been used for the cultivation of Linaloe which was exempted under Section 107(1)(vi) of the Land Reforms Act. Consequently, the Land Tribunal vide order dated 15.03.82 dropped the proceedings instituted under the Act against them holding that the land used for cultivation of Linaloe did not attract the provisions of the Land Reforms Act.

Dr. Roerich and Mrs. Devika Rani had no issue and allegedly some persons associated with the couple, who had an eye on their properties, including the land used for linaloe cultivation, valuable paintings, jewellery, artefacts etc., began to create documents to grab those properties. The Chief Secretary of the State of Karnataka noticing the above facts and circumstances convened a meeting in the presence of the Director of Archaeology to take effective and proper steps to preserve the paintings, artefacts and other valuables. For that purpose, they met Smt. Devika Rani and Dr. Roerich and a letter was handed over to Dr. Roerich on behalf of the State Government expressing the Government's willingness to purchase the paintings and other valuables so as to set

up a Roerich Gallery. The State Cabinet also discussed about the desirability of acquiring the landed properties of Roerichs and also for setting up an Art Gallery-cum-Museum, in public interest. Initially the State issued an ordinance, namely, the Roerich and Devika Rani Roerich Estate (Acquisition and Transfer) Ordinance 1992, which was sent for the approval of the President of India. In the meanwhile Roerich couple passed away and the ordinance was returned to make sufficient amendments. After necessary amendments ordinance of 1995 was issued. The ordinance was returned by the Government of India informing that it had no objection to introduce legislation as a bill and hence the same with requisite amendments was placed before the Legislative Assembly and the Legislative Council. The Roerich and Devika Rani Roerich Estate (Acquisition & Transfer) Act, 1996 was then passed and subsequently got the assent of the President on 15.11.96 and was brought into force on 21.11.1996.

Meanwhile, the Deputy Commissioner of the District had reported that Roerichs had owned 470.19 acres of land, out of which they had raised Linaloe cultivation to the extent of 356.15 acres and the remaining extent of 114.04 acres was agricultural land; that as per the ceiling provisions of the Land Reforms Act they were entitled to hold an extent of 54 acres of agricultural land and as such, the excess of 60.04 acres ought to have been surrendered by them to the Government. The view of the Law Department was sought for in that respect and the Law Department stated that the earlier order dated 15.03.82 of the Land Tribunal be re-opened and action under Section 67(1) be initiated for resumption of the excess land. The Deputy Commissioner was requested to issue suitable instructions to the Tahsildar to place the matter before the Land Tribunal, for review of the earlier order dated 15.03.82 by invoking the provisions of

Section 122A of the Land Reforms Act. The Deputy Commissioner had further reported that Dr. Roerich had sold an extent of 137.33 acres of land on 23.3.1991 to the first appellant-company 'KTP'; but request for mutation in respect of those lands had been declined by the local officers and the lands stood in the name of late Dr. Roerich in the Record of Rights.

The Commissioner and Secretary to the Government, Revenue Department taking note of the said facts sought the legal opinion of the Department of Law and Parliamentary Affairs as to whether valuable lands held by the late Roerichs could be resumed by the State before lands changed hands, by withdrawing the exemption given to the lands used for Linaloe cultivation. The Department of Law and Parliamentary Affairs opined that the exemption given under Section 107 of the Land Reforms Act, 1961 can be withdrawn by the Government by issuing a notification as per Section 110 of the Land Reforms Act and consequently the Commissioner and Secretary to the government proposed to issue a notification to that effect for which approval of the Cabinet was sought for. The Cabinet accorded sanction in its meeting and the State Government issued notification Notification No. RD 217 LRA 93 dated 8th March, 1994 in exercise of powers conferred by Section 110 of the Land Reforms Act, withdrawing the exemption granted for the lands used for cultivation of Linaloe under clause (vi) of Sub-section 1 of Section 107 of the Act. Notification was published in the Government Gazette on 11.03.1994.

The Assistant Commissioner thereafter issued a notice to the first appellant-company 'KTP' to show cause why 137.33 acres of land be not forfeited to the Government.

The first appellant-company, through its Managing Director, filed a Writ Petition before the High Court challenging the constitutional validity of the Roerich and Devika Rani Roerich (Acquisition and Transfer) Act, 1996, Section 110 of the Karnataka Land Reforms Act, the notification dated 08.03.1994 issued thereunder and also sought other consequential reliefs. The writ petition was dismissed by the High Court upholding the validity of the Acquisition Act as well as Section 110 of the Land Reforms Act and the notification issued thereunder except in relation to the inclusion of certain members in the Board of Directors constituted under the Acquisition Act.

Aggrieved, the first appellant-company *inter alia* raised the following contentions before this Court under three major heads:-

(a) Legal validity of Section 110 of the Karnataka Land Reforms Act, 1961, the Notification No. RD 217 LRA 93 dated 8th March, 1994 issued by the State Government thereunder:

It was contended that the first appellant-Company had purchased the lands from Roerich couple when those lands stood exempted from the provisions of the Land Reforms Act by virtue of Section 107(1)(vi) of the Land Reforms Act; that the State Government could not, in exercise of its powers under Section 110 of the Act, issue notification dated 08.03.94 to withdraw the exemption granted by the Legislature which was essentially a legislative policy; that Section 110 gives unfettered and unguided power to the Executive to take away the exemption granted by the Legislature and hence that Section is void for excessive delegation of legislative powers on the State Government; that the respondent State did not follow the procedure laid down in Section

140 of the Act; that laying of notification under Section 140 is not a mere laying but is coupled with a negative/ affirmative resolution of the Legislature; the failure to lay the notification is an illegality which cannot be cured; that though the Land Reforms Act was placed in the 9th Schedule which saves its provisions from the challenge of Articles 14, 19 and 31, a challenge to a provision of the Act for excessive delegation of legislative power is still available and the Land Reforms Act cannot be protected by Article 31B.

(b) Constitutional validity of Roerich and Devika Rani Roerich Estate (Acquisition & Transfer) Act, 1996:

It was contended that the Roerich and Devika Rani Roerich Estate (Acquisition & Transfer) Act, 1996 does not contain any provision for protection of agrarian reforms and hence not protected by the provisions of Article 31A and hence not saved from challenges on the ground of violation of Articles 14 and 19 of the Constitution; that management and protection of land used for linaloe cultivation and the preservation of artefacts, paintings etc. are not part of agrarian reforms; that the said Act, a State Legislation, is *ex-facie* repugnant to the provisions of Land Acquisition Act, 1894, a Central Legislation and hence void under Article 254(1) due to want of Presidential assent; and that the procedure and the principle for the acquisition of land as well as determination of compensation, etc., under both the Acts are contrary to each other and hence the said Act can be saved only if Presidential assent is obtained under Article 254(2) of the constitution.

(c) Claim for enhanced compensation and scope and content of Article 300A of the Constitution:

It was contended that the Roerich and Devika Rani

Roerich Estate (Acquisition & Transfer) Act, 1996 does not provide for any principle or guidelines for the fixation of the compensation amount and the amount fixed is illusory, compared to the value of the property taken away from the first appellant-company in exercise of the powers of eminent domain; that the inherent powers of public purpose and eminent domain are embodied in Article 300A, and Entry 42 List III, "Acquisition and Requisitioning of Property" which necessarily connotes that the acquisition and requisitioning of property will be for a public use and for compensation, as it is the legislative head for eminent domain; that the twin requirements of public purpose and compensation though seen omitted from Article 300A, but when a person is deprived of his property, those limitations are implied in Article 300A as well as Entry 42 List III and a Constitutional Court can always examine the validity of the statute on those grounds; and that the action depriving a person of just and fair compensation is also amenable to judicial review under Articles 32 and 226 of the Constitution, which is the quintessence of the rule of law, otherwise the Constitution would be conferring arbitrary and unbridled powers on the Legislature, to deprive a person of his property.

One 'M' too had filed a writ petition before the High Court claiming rights over some of the articles belonging to Roerichs' couple on the strength of a will. The writ petition was dismissed by the High Court holding that the articles claimed by the company 'KTP' stood vested in the State in view of the Roerich and Devika Rani Roerich (Acquisition and Transfer) Act, 1996. Against that judgment, 'M' filed a separate appeal before this Court. 'M' and others had also challenged the constitutional validity of the said Acquisition Act by filing Writ Petitions before the High Court, which too were dismissed.

Aggrieved by the same, they filed another set of civil Appeals before this Court.

The following questions therefore came up for consideration before this Court:

(1) Whether Section 110 of the Karnataka Land Reforms Act, 1961, as amended by the Karnataka Land Reforms amendment Act, 1973, (Act 1 of 1974), which came into effect from 01.03.1974, read with Section 79 B of the said Act, introduced by amending Act 1 of 1974, violates the basic structure of the Constitution, in so far as it confers power on the Executive Government, a delegatee of the Legislature, of withdrawal of exemption of Linaloe plantation, without hearing and without reasons;

(2) Whether the Roerich and Devika Rani Roerich (Acquisition and Transfer) Act, 1996 is constitutionally valid;

(3) Whether on true interpretation of Article 300A of the Constitution, the Roerich and Devika Rani Roerich (Acquisition and Transfer) Act, 1996, is violative of the said Article in so far as no specific compensation prescribed for the acquisition of land for Linaloe plantation, and, after deduction of liabilities and payment of compensation for the artefacts, no balance may and/or is likely to exist for payment of such compensation, as a result of which, whether the Act really is expropriatory in nature;

(4) Whether on true interpretation of Article 300A of the Constitution, the said Act is violative of Article 300A as the said Article is not, by itself, a source of Legislative power, but such power of the State Legislature being traceable only to Entry 42 of List III of Schedule VII to the

Constitution viz., "Acquisition and Requisition of Property", which topic excludes expropriation and confiscation of property and

(5) If Article 300A of the Constitution is construed as providing for deprivation of property without any compensation at all, or illusory compensation, and hence providing for expropriation and confiscation of property, whether the said Article would violate the rule of law and would be an arbitrary and unconscionable violation of Article 14 of the Constitution, thus violating the basic structure of the Constitution.

Dismissing the appeals, the Court

HELD:

Validity of Section 110 of the Karnataka Land Reforms Act, 1961 and of the notification dated 8.3.1994 issued by the State Government thereunder

1.1. The Karnataka Land Reforms Act, 1961 was enacted by the Karnataka State Legislature to have a uniform law relating to land reforms in the State of Karnataka, relating to agrarian relations, conferment of ownership on tenants, ceiling on land holdings etc. Section 79B(1) of the Land Reforms Act prohibits holding of agricultural land by certain persons which says that with effect on and from the date of commencement of the Amendment Act (Act 1/74) w.e.f. 1.3.1974, no person other than a person cultivating land personally shall be entitled to hold land; and that it shall not be lawful for, a company *inter alia* to hold 'any land'. The first appellant being a company was prohibited from holding any agricultural land after the commencement of the Act. If the company was holding any land with Linaloe cultivation on the date of the commencement of the Act, the same would have vested in the State Government under Section 79B(3) of

the Act and an amount as specified in Section 72 would have been paid. [Paras 28, 30, 31] [685-F-G; 686-B-C; 687-B-C]

1.2. Chapter VIII of the Land Reforms Act deals with exemption provisions. The power to withdraw the exemption in respect of the plantations, has not been conferred on the State Government, but evidently retained by the Legislature. Legislative policy is clearly discernible from the provision of the Statute itself, that, whenever the Legislature wanted to confer the power to withdraw the exemption to the State Government it has done so, otherwise it has retained the power to itself. [Para 38] [690-F-H]

1.3. Section 110 of the Land Reforms Act empowers the State Government to withdraw the exemption granted to any land referred to in Sections 107 and 108. Section 107 itself has been made "subject to" Section 110 of the Act. The words 'subject to' conveys the idea of a provision yielding place to another provision or other provisions to which it is made subject. Since Section 107 is made subject to Section 110, the former section conveys the idea of yielding to the provision to which it is made subject that is Section 110 which is the will of legislature. [Para 39] [691-A-B-D]

1.4. The Legislature's apathy in granting exemption for lands used for cultivation of Linaloe is discernible from the language used in sub-section (2) of Section 107, which says that no person shall after the commencement of the Amendment Act acquire in any manner for the cultivation of Linaloe, land of an extent which together with the land cultivated by Linaloe, if any, already held by him exceeds ten units. Legislature, therefore, as matter of policy, wanted to give only a conditional exemption for lands used for Linaloe cultivation and the policy was to empower the State Government to withdraw the same

especially when the law is that no person can claim exemption as a matter of right. The legislative will was to make Section 107 subject to Section 110 and not the will of the delegate, hence, overriding effect has to be given to Section 110. Further, the Land Reforms Act including Section 110 was placed in IXth Schedule in the year 1965 and, hence, immune from challenge in a court of law. [Para 40] [691-H; 692-A-C]

1.5. Dr. Roerich and Mrs. Devika had got only the conditional exemption from the provisions of the Land Reforms Act for the lands used for Linaloe cultivation and, hence, they also would have lost ownership and possession of the lands once the exemption had been withdrawn and the land would have vested in the State. The land was purchased by the Company with that statutory condition from Roerichs and, hence, was bound by that condition. The contention that Section 110 is void due to excessive delegation of legislative powers, is rejected. [Para 41] [692-D-E]

1.6. The State Government issued the notification dated 8.3.1994 in exercise of the powers conferred by Section 110 of the Land Reforms Act which was published in the official gazette on 11.3.94. 1.9. The facts would indicate that, in the instant case, the notification has not been laid before the Legislature, but looking at the language of Section 140 of the Act, it has not affected the validity or the effect of the notification. [Paras 44, 47] [693-C; 694-B-C]

1.7. Following is the procedure generally followed when an order or notification is laid before the Legislature:-

(1) Laying which requires no further procedure;

(2) Laying allied with the affirmative procedure; and

(3) Laying allied with negative procedure.

The object of requirement of laying provided in enabling Acts is to subject the subordinate law making authority to the vigilance and control of the Legislature. The degree of control the Legislature wants can be noticed on the language used in such laying clause. [Para 46] [693-F-H; 694-A]

1.8. Section 140 of the Act does not require the State Legislature to give its approval for bringing into effect the notification, but a positive act by the Legislature has been contemplated in Section 140 to make the notification effective, that does not mean that failure to lay the notification has affected the legal validity, its effect or the action taken precedent to that notification. Non-laying of the notification dated 08.03.1994 before the State Legislature has not affected its validity or the action taken precedent to that notification. This Court now, *vide* its' order dated 24.02.2011, has directed the State Government to place the notification before both the Houses of the State Legislature. Therefore, the defect, if any, of not placing the notification has been cured. [Para 50] [695-H; 696-A-C]

1.9. Section 80 of the Land Reforms Act prohibits transfer of any land to non-agriculturalist. Section 80(1)(iv), states that it shall not be lawful to sell, gift, exchange or lease of any land, in favour of a person, who is disentitled under Section 79-B, to acquire or hold any land. The expression "land" has been defined under Section 2(18) which is all comprehensive and takes in agricultural lands, that is land which is used or capable of being used for agriculture, but for the exemption granted under Section 107(1)(vi) lands used for the cultivation of linaloe would have fallen under Section 2(18). But, so far the company is concerned, the prohibition was total and complete since Section 79-B

states that it would not be lawful for a company to hold "any land", with effect and from the date of the commencement of the amending Act. The Company, therefore, could not have held the land used for the cultivation of Linaloe on the date of the commencement of the Act. Further on withdrawal of exemption *vide* notification dated 08.03.94 the Company was disentitled to hold the land belonging to Roerichs' since the same would be governed by the provisions of the Land Reforms Act. [Para 51] [696-D-G]

1.10. There is no force in the contention that opportunity of hearing is a pre-condition for exercising powers under Section 110 of the Act. No such requirement has been provided under Section 107 or Section 110. When the exemption was granted to Roerichs' no hearing was afforded so also when the exemption was withdrawn by the delegate. It is trite law that exemption cannot be claimed as a matter of right so also its withdrawal, especially when the same is done through a legislative action. Delegated legislation which is a legislation in character, cannot be questioned on the ground of violation of the principles of natural justice, especially in the absence of any such statutory requirement. Legislature or its delegate is also not legally obliged to give any reasons for its action while discharging its legislative function. [Para 52] [696-H; 697-A-C]

1.11. The challenge on the validity of Section 110 of the Karnataka Land Reforms Act as well as the notification dt.8.3.1994 is repelled and it is held that the land used for linaloe cultivation would be governed by the provisions of the Land Reforms Act which is protected under Article 31B of the Constitution having been included in the IXth Schedule. [Para 53] [697-E]

In re: The Delhi Laws Act, 1912, the Ajmer-Merwara

*(Extension of Laws) Act, 1947; Part C States (Laws) Act, **1950*** **(1951) 2 SCR 747;** *Bhatnagars & Co. Ltd.* v. *Union of India* **AIR 1957 SC 478: 1957 SCR 701;** *Maharashtra State Board of Secondary and Higher Secondary Education and Anr*. v. *Paritosh Bhupeshkumar Sheth and Others* **(1984) 4 SCC 27;** *Mohmedalli and Ors.* v. *Union of India and Ors.* **AIR 1964 SC 980: 1963 Suppl. SCR 993;** *Brij Sunder Kapoor* v. *I Additional District Judge and Ors.* **(1989) 1 SCC 561: 1988 (3) Suppl. SCR 558;** *Punjab Sikh Regular Motor Service, Moudhapara, Raipur v. Regional Transport Authority & Another* **AIR 1966 SC 1318: 1966 SCR 221;** *Joginder Singh & Others v. Deputy Custodian-General of Evacuee Property & Others* **AIR 1967 SC 145: 1962 SCR 738;** *Bharat Hari Singhania & Others v. Commissioner of Wealth Tax (Central) & Others* **(1994) Supp. 3 SCC 46;** *Ashok Leyland Ltd. v. State of T.N. & Another* **(2004) 3 SCC 1: 2004 (1) SCR 306;** *Printers (Mysore) Ltd. v. M. A. Rasheed & Others* **(2004) 4 SCC 460: 2004 (3) SCR 799;** *South India Corporation (P) Ltd. v. Secretary, Board of Revenue, Trivendrum & Another* **AIR 1964 SC 207: 1964 SCR 280;** *Commissioner of Wealth Tax, Andhra Pradesh, Hyderabad v. Trustees of H.E.H. Nizam's Family (Remainder Wealth Trust), Hyderabad* **(1977) 3 SCC 362: 1977 (3) SCR 735;** *Chandavarkar Sita Ratna Rao v. Ashalata S. Guram* **(1986) 4 SCC 447: 1986 (3) SCR 866;** *B.K. Srinivasan and Ors.* v. *State of Karnataka and Ors.* **(1987) 1 SCC 658: 1987 (1) SCR 1054;** *Jan Mohammad Noor Mohammad Bagban* v. *State of Gujarat and Anr.* **AIR 1966 SC 385: 1966 SCR 505;** *Atlas Cycle Industries Ltd. & Others* v. *State of Haryana* **(1979) 2 SCC 196: 1979 (1) SCR 1070;** *Quarry Owners' Association* v. *State of Bihar & Others* **(2000) 8 SCC 655: 2000 (2) Suppl. SCR 211;** *State of Punjab v. Tehal Singh and Ors.* **(2002) 2 SCC 7: 2002 (1) SCR 27;** *West Bengal Electricity Regulatory Commission* v. *CESC Ltd. etc. etc.* **(2002) 8 SCC 715;** *Pune Municipal Corporation and Anr. v. Promoters and Builders Association and Anr*. **(2004) 10 SCC 796: 2004 (2) Suppl. SCR 207;**

Bihar State Electricity Board v. Pulak Enterprises and Ors. **(2009) 5 SCC 641 – referred to**

Rajnarain Singh v. The Chairman, Patna Admnistration Committee, Patna& Another **AIR 1954 SC 569: 1955 SCR 290;** *Vasantlal Maganbhai Sanjanwala* v. *State of Bombay and Ors.* **AIR 1961 SC 4: 1961 SCR 341;** *Hamdard Dawakhana (Wakf) Lal Kuan, Delhi & Another v. Union of India & Others* **(1960) 2 SCR 671;** *Bakul Cashew Co. and Ors*. v. *Sales Tax Officer, Quilon and Anr.* **(1986) 2 SCC 365: 1986 (1) SCR 610;** *Income Tax Officer, Alleppy* v. *M.C. Ponnoose and Ors.* **(1969) 2 SCC 351: 1970 (1) SCR 678;** *Regional Transport Officer, Chittoor and Ors*. v. *Associated Transport Madras (P) Ltd. and Ors*. **(1980) 4 SCC 597: 1981 (1) SCR 627;** *Cannanore Spinning and Weaving Mills Ltd*. v. *Collector of Customs and Central Excise, Cochin and Ors*. **(1969) 3 SCC 112: 1970 (2) SCR 830;** *Hukam Chand etc.* v. *Union of India (UOI) and Ors*. **(1972) 2 SCC 601: 1973 (1) SCR 896;** *H.S. Srinivasa Raghavachar and Ors.* v. *State of Karnataka and Ors.* **(1987) 2 SCC 692: 1987 (2) SCR 1189;** *Municipal Corporation of Delhi* v. *Birla Cotton, Spinning and Weaving Mills, Delhi and Another* **AIR 1968 SC 1232: 1968 SCR 251;** *Delhi Cloth & General Mills Ltd. v. Union of India & Others*. **(1983) 4 SCC 166: 1983 (3) SCR 438;** *Premium Granites and Anr*. v. *State of Tamilnadu and Ors*. **(1994) 2 SCC 691: 1994 (1) SCR 579;** *Registrar of Co-operative Societies, Trivandrum and Anr.* v. *Kunjabmu and Ors.* **(1980) 1 SCC 340: 1980 (2) SCR 260;** *Shri Sitaram Sugar Co. Ltd. and Another* v. *Union of India and Others* **(1990) 3 SCC 223: 1990 (1) SCR 909;** *Union of India and Another* v. *Cynamide India Ltd. and Another Etc*. **(1987) 2 SCC 720: 1987 (2) SCR 841;** *H.S.S.K. Niyami & Another v. Union of India & Another* **(1990) 4 SCC 516: 1990 (3) SCR 862;** *Laxmi Khandsari and Ors.* v. *State of U.P. and Ors.* **(1981) 2 SCC 600: 1981 (3) SCR 92;** *J. K. Industries & Another v. Union of India & Others* **(2007) 13 SCC 673: 2007 (12) SCR 136;** *Balmadies*

Plantations Ltd. & Others v. State of Tamil Nadu **(1972) 2 SCC 133: 1973 (1) SCR 258;** *Deputy Commissioner and Collector, Kamrup & Ors. v. Durga Nath Sharma* **(1968) 1 SCR 561;** *Reliance Energy Limited & Anr. v. Maharashtra State Road Development Corporation Ltd. & Ors.* **(2007) 8 SCC 1: 2007 (9) SCR 853;** *Gram Panchayat of Village Jamalpur* v. *Malwinder Singh & Others* **(1985) 3 SCC 661: 1985 (2) Suppl. SCR 28;** *Kaiser-I-Hind Pvt. Ltd. & Another* v. *National Textile Corporation (Maharashtra North) Ltd. & Others* **(2002) 8 SCC 182: 2002 (2) Suppl. SCR 555;** *Engineering Kamgar Union* v. *Electro Steels Castings Ltd. and Another* **(2004) 6 SCC 36: 2004 (1) Suppl. SCR 301;** *Bhuwalka Steel Industries Ltd*. v. *Bombay Iron and Steel Labour Board and Another* **(2010) 2 SCC 273: 2009 (16) SCR 618;** *P.N. Krishnan Lal & others vs. Govt. of Kerala & Another* **(1995) Suppl. (2) SCC 187: 1994 (5) Suppl. SCR 526;** *Offshore Holdings Pvt. Ltd.* vs. *Bangalore Development Authority and Ors.* **(2011) 3 SCC 139: 2011 (1) SCR 453;** *E.P Royappa* v. *State of Tamil Nadu & Another* **(1974) 4 SCR 3;** *Ramana Dayaram Shetty* v. *International Airport Authority of India & Others* **(1979) 3 SCC 489: 1979 (3) SCR 1014;** *Kasturi Lal Lakshmi Reddy, represented by its Partner Kasturi Lal, Jammu & Others* v. *State of Jammu & Kashmir & Another* **(1980) 4 SCC 1: 1980 (3) SCR 1338;** *Chhotabhai Jethabhai Patel & Co.* v. *Union of India & Another* **(1962) Supp (2) SCR 1;** *State of West Bengal* v. *Union of India* **(1964) 1 SCR 371;** *Sub-Committee of Judicial Accountability* v. *Union of India & Others* **(1991) 4 SCC 699;** *D.C. Wadhwa & Others* v. *State of Bihar & Others* **(1987) 1 SCC 378: 1987 (1) SCR 798;** *Glanrock Estate Private Limited.* v. *State of Tamil Nadu* **(2010) 10 SCC 96: 2010 (12) SCR 597 and** *Dwarakadas Shrinivas* **(1954) 1 SCR 674 – cited.**

Black Law Dictionary, 5th Edition, **at p.1278 – referred to.**

Constitutional validity of the Roerich and Devika Rani Roerich Estate (Acquisition & Transfer) Act, 1996 – Plea of repugnancy

2.1. The contention that the Roerich and Devika Rani Roerich Estate (Acquisition & Transfer) Act, 1996 is invalid due to repugnancy is rejected. [Para 68] [705-C]

2.2. The plea of repugnancy can be urged only if both the legislations fall under the Concurrent List. Under Article 254 of the Constitution, a State law passed in respect of a subject matter comprised in List III would be invalid if its provisions are repugnant to a law passed on the same subject by Parliament and that too only if both the laws cannot exist together. The question of repugnancy under Article 254 of the Constitution arises when the provisions of both laws are fully inconsistent or are absolutely irreconcilable and it is impossible without disturbing the other, or conflicting results are produced, when both the statutes covering the same field are applied to a given set of facts. Repugnancy between the two statutes would arise if there is a direct conflict between the two provisions and the law made by the Parliament and the law made by the State Legislature occupies the same filed. [Para 65] [703-C-F]

2.3. When the repugnancy between the Central and State Legislations is pleaded one has to first examine whether the two legislations cover or relate to the same subject matter. The test for determining the same is to find out the dominant intention of the two legislations and if the dominant intention of the two legislations is different, they cover different subject matter then merely because the two legislations refer to some allied or cognate subjects, they do not cover the same field. A provision in one legislation to give effect to its dominant purpose may incidentally be on the same subject as covered by the provision of the other legislation, but

such partial coverage of the same area in a different context and to achieve a different purpose does not bring about the repugnancy which is intended to be covered by Article 254(2). In other words, both the legislations must be substantially on the same subject to attract Article 254. [Para 66] [703-H; 704-A-D]

2.4. The Roerich and Devika Rani Roerich Estate (Acquisition & Transfer) Act, 1996, as rightly contended by the State, primarily falls under Entry 18 List II, since the dominant intention of the legislature was to preserve and protect Roerichs' Estate covered by the provisions of the Land Reforms Act, on the State Government withdrawing the exemption in respect of the land used for linaloe cultivation. The Acquisition Act, though primarily falls under Entry 18 List II incidentally also deals with the acquisition of paintings, artefacts and other valuable belongings of Roerichs' and, hence, the Act partly falls under Entry 42 List III as well. Since the dominant purpose of the Act was to preserve and protect Roerichs' Estate as part of agrarian reforms, the inclusion of ancillary measures would not throw the law out of the protection of Article 31A(1)(a). On the other hand, the Land Acquisition Act, 1894 is an act which fell exclusively under Entry 42 List III and enacted for the purpose of acquisition of land needed for public purposes for companies and for determining the amount of compensation to be made on account of such acquisition, which is substantially and materially different from the impugned Act whose dominant purpose is to preserve and protect "estate" governed by Art.31A(a) read with Art.31A(2)(a)(iii) of the Constitution. Therefore, no assent of the President was required under Article 254(2) of the Constitution to sustain the impugned Act, which falls under Article 31A(1)(a) of the Constitution. [Paras 67, 68] [704-F-H; 705-A-C]

2.5. The the Constitution (17th Amendment) Act, 1964 extended the scope of the expression "estate" in Art.31A(a) as to protect all legislations on agrarian reforms and the expression "estate" was given a wider meaning so as to bring within its scope lands in respect of which provisions are normally made in land reforms enactments. Art.31A(2)(a)(iii) brings in any land held or let for the purpose of agriculture or for purpose ancillary thereto, including waste or vacant land, forest land, land for pasture or sites of buildings and other structure occupied by the cultivators of land etc. [Para 69] [705-D-E]

2.6. The concept of agrarian reform is a complex and dynamic one promoting wider interests than conventional reorganisation of the land system or distribution of land, which is intended to realise the social function of the land and includes various other proposals of agrarian reforms. Any provision for promotion of agriculture or agricultural population is an agrarian reform, which term is wider than land reforms. A law for the acquisition of an estate etc. does not lose the protection of Article 31A(1) merely because ancillary provisions are included in such law. [Para 70] [705-F-H; 706-A-B]

2.7. The Acquisition Act was enacted in public interest, to preserve and protect the land used for the linaloe cultivation and its tree growth as part of agrarian reforms which is its dominant purpose. Proposal to preserve the paintings, artefacts, carvings and other valuables and to establish an Art-Gallery-cum-Museum are merely ancillary to the main purpose. The dominant purpose of the Act is to protect and preserve the land used for Linaloe cultivation, a part of agrarian reforms. The Act is, therefore, saved by the provisions of Art.31A(1)(a). [Para 71] [706-C]

2.8. The Roerich's estate falls within the expression "estate" under clause (2) of Article 31A of the Constitution and the Act has obtained the assent of the President, hence, is protected from the challenge under Articles 14 and 19 of the Constitution of India. [Para 72] [706-E]

Deep Chand v. State of U.P. & Others **AIR 1959 SC 648: 1959 Suppl. SCR 8;** *Prem Nath Kaul v. State of Jammu & Kashmir,* **AIR 1959 SC 749:(1959) Supp. (2) SCR 270;** *Ukha Kolhe v. State of Maharashtra* **AIR 1963 SC 1531: 1964 SCR 926;** *Bar Council of Uttar Pradesh v. State of U.P & Another* **(1973) 1 SCC 261: 1973 (2) SCR 1073;** *T. Barai v. Henry Ah Hoe & Another* **(1983) 1 SCC 177: 1983 (1) SCR 905;** *Hoechst Pharmaceuticals v. State of Bihar* **(1983) 4 SCC 45: 1983 (3) SCR 130;** *Lingappa Pochanna Appelwar v. State of Maharashtra & Another* **(1985) 1 SCC 479: 1985 (2) SCR 224;** *Vijay Kumar Sharma & Others v. State of Karnataka & Others* **(1990) 2 SCC 562: 1990 (1) SCR 614;** *Municipal Council Palai v. T. J. Joseph* **(1964) 2 SCR 87;** *Ch. Tika Ramji v. State of U.P.* 1956 SCR 393; *State of Karnataka v. Shri Ranganatha Reddy* **(1977) 4 SCC 471: 1978 (1) SCR 641;** *M. Karunanidhi v. Union of India & Another* **(1979) 3 SCC 431: 1979 (3) SCR 254;** *State of Kerala v. Gwalior Rayon Silk Manufacturing (Wvg.) Co. Limited* **(1993) 2 SCC 713;** *Kunjukutty Sahib v. State of Kerala & Another* **(1972) 2 SCC 364: 1973 (1) SCR 326;** *Mahant Sankarshan Ramanuja Das Goswami etc., etc. v. State of Orissa & Another* **(1962) 3 SCR 250 – referred to.**

Validity of the Acquisition Act on the touchstone of Article 300A of the Constitution – Claim for enhanced compensation – Concept of eminent domain – Public purpose.

3.1. Right to life, liberty and property were once considered to be inalienable rights under the Indian Constitution, each one of these rights was considered to be inextricably bound to the other and none would exist

without the other. Of late, right to property parted company with the other two rights under the Indian Constitution and took the position of a statutory right. [Para 82] [709-G-H]

3.2. Eminent thinkers like *Hugo Grotius, Pufendorf, John Locke, Rousseau and William Blackstone* had expressed their own views on the right to property. Lockean rhetoric of property as a natural and absolute right but conventional in civil society has, its roots in Aristotle and Aquinas, for Grotius and Pufendorf property was both natural and conventional. Pufendrof, like Grotius, never recognised that the rights of property on its owners are absolute but involve definite social responsibilities, and also held the view that the private property was not established merely for the purpose "allowing a man to avoid using it in the service of others, and to brood in solitude over his hoard or riches." Like Grotius, Pufendorf recognised that those in extreme need may have a right to the property of others. For Rousseau, property was a conventional civil right and not a natural right and private property right was subordinate to the public interest, but Rousseau insisted that it would never be in the public interest to violate them. With the emergence of modern written constitutions in the late eighteenth century and thereafter, the right to property was enshrined as a fundamental constitutional right in many of the Constitutions in the world and India was not an exception. Blackstone declared that so great is the regime of the law for private property that it will not authorise the land violation if it – no, not even for the general good of the whole community. Writings of the above mentioned political philosophers had also its influence on Indian Constitution as well. [Para 83] [710-C-G]

3.3. *Hugo Grotius* is credited with the invention of the

term *"eminent domain" (jus or dominium eminens)* which implies that public rights always overlap with private rights to property, and in the case of public utility, public rights take precedence. Grotius sets two conditions on the exercise of the power of eminent domain: the first requisite is public advantage and then compensation from the public funds be made, if possible, to the one who has lost his right. Application of the above principle varies from countries to countries. Germany, America and Australian Constitutions bar uncompensated takings. Canada's constitution, however, does not contain the equivalent of the taking clause, and eminent domain is solely a matter of statute law, the same is the situation in United Kingdom which does not have a written constitution as also now in India after the 44th Constitutional Amendment. [Para 84] [710-H; 711-A-C]

3.4. Eminent domain is distinguishable alike from the police power, by which restrictions are imposed on private property in the public interest, e.g. in connection with health, sanitation, zoning regulation, urban planning and so on from the power of taxation, by which the owner of private property is compelled to contribute a portion of it for the public purposes and from the war-power, involving the destruction of private property in the course of military operations. The police power fetters rights of property while eminent domain takes them away. Power of taxation does not necessarily involve a taking of specific property for public purposes, though analogous to eminent domain as regards the purposes to which the contribution of the taxpayer is to be applied. Further, there are several significant differences between regulatory exercises of the police powers and eminent domain of deprivation of property. Regulation does not acquire or appropriate the property for the State, which appropriation does and regulation is imposed severally and individually, while expropriation applies to an

individual or a group of owners of properties. [Para 90] [712-G-H; 713-A]

3.5. The Forty Fourth Amendment Act, 1978 inserted in Part XII of the Constitution, a new chapter: "Chapter IV – Right to Property and inserted Article 300A. Article 300A proclaims that no person can be deprived of his property save by authority of law, meaning thereby that a person cannot be deprived of his property merely by an executive fiat, without any specific legal authority or without the support of law made by a competent legislature. The expression 'Property' in Art.300A confined not to land alone, it includes intangibles like copyrights and other intellectual property and embraces every possible interest recognised by law. [Paras 105, 110] [718-H; 719-A; 721-B-C]

3.6. Principles of eminent domain, as such, is not seen incorporated in Article 300A. Looking at the history of the various constitutional amendments, judicial pronouncements and the statement of objects and reasons contained in the 44th Amendment Bill which led to the 44th Amendment Act there is no doubt that the intention of the Parliament was to do away with the fundamental right to acquire, hold and dispose of the property. [Paras 115, 116] [723-G-H; 724-E]

3.7. Deprivation of property within the meaning of Art.300A, generally speaking, must take place for public purpose or public interest. The concept of eminent domain which applies when a person is deprived of his property postulates that the purpose must be primarily public and not primarily of private interest and merely incidentally beneficial to the public. Any law, which deprives a person of his private property for private interest, will be unlawful and unfair and undermines the rule of law and can be subjected to judicial review. The concept of public purpose has been given fairly

expansive meaning which has to be justified upon the purpose and object of statute and the policy of the legislation. Public purpose is, therefore, a condition precedent, for invoking Article 300A. [Para 117] [724-G-H; 725-A-B]

3.8. The requirement of public purpose is invariably the rule for depriving a person of his property, violation of which is amenable to judicial review. After the 44th Amendment Act, 1978, the constitutional obligation to pay compensation to a person who is deprived of his property primarily depends upon the terms of the statute and the legislative policy. Article 300A, however, does not prohibit the payment of just compensation when a person is deprived of his property. [Para 118] [725-C-F]

3.9. Entry 42 List III, Schedule VII of the Constitution has used the words "acquisition" and "requisitioning". Right to claim compensation cannot be read into the legislative Entry 42 List III. Requirement of public purpose, for deprivation of a person of his property under Article 300A, is a pre-condition, but no compensation or nil compensation or its illusiveness has to be justified by the state on judicially justiciable standards. The right to claim compensation or the obligation to pay, though not expressly included in Article 300A, it can be inferred in that Article and it is for the State to justify its stand on justifiable grounds which may depend upon the legislative policy, object and purpose of the statute and host of other factors. [Paras 119, 121] [725-G-H; 727-B-D]

3.10. While enacting Article 300A Parliament has only borrowed Article 31(1) [the "Rule of law" doctrine] and not Article 31(2) [which had embodied the doctrine of Eminent Domain]. Article 300A enables the State to put restrictions on the right to property by law. That law has to be reasonable. It must comply with other provisions

of the Constitution. The limitation or restriction should not be arbitrary or excessive or what is beyond what is required in public interest. The limitation or restriction must not be disproportionate to the situation or excessive. The legislation providing for deprivation of property under Article 300A must be "just, fair and reasonable" as understood in terms of Articles 14, 19(1)(g), 26(b), 301, etc. Thus in each case, courts will have to examine the scheme of the impugned Act, its object, purpose as also the question whether payment of nil compensation or nominal compensation would make the impugned law unjust, unfair or unreasonable in terms of other provisions of the Constitution as indicated above. There is a difference between "no" compensation and "nil" compensation. A law seeking to acquire private property for public purpose cannot say that "no compensation shall be paid". However, there could be a law awarding "nil" compensation in cases where the State undertakes to discharge the liabilities charged on the property under acquisition and onus is on the government to establish validity of such law. In the latter case, the court in exercise of judicial review will test such a law keeping in mind the above parameters. [Para 122] [727-E-H; 728-A-C]

3.11. Right to property no more remains an overarching guarantee in our Constitution. Article 300A, unlike Articles 31A(1) and 31C, has not made the legislation depriving a person of his property immune from challenge on the ground of violation of Article 14 or Article 21 of the Constitution. [Paras 123, 125] [728-D-E; 729-D]

3.12. Acquisition of property for a public purpose may meet with lot of contingencies, like deprivation of livelihood, leading to violation of Art.21, but that *per se* is not a ground to strike down a statute or its provisions. Plea of unreasonableness, arbitrariness, proportionality,

etc. always raises an element of subjectivity on which a court cannot strike down a statute or a statutory provision, especially when the right to property is no more a fundamental right. Otherwise the court will be substituting its wisdom to that of the legislature, which is impermissible in our constitutional democracy. [Paras 128, 130] [730-G-H; 732-A-C]

3.13. On facts as well as on law, the impugned Act got the assent of the President as required under the proviso to Article 31A(1), hence, was immune from challenge on the ground of arbitrariness, unreasonableness under Article 14 of the Constitution. [Para 133] [733-F]

3.14. Statutes are many which though deprives a person of his property, have the protection of Article 30(1A), Article 31A, 31B, 31C and hence immune from challenge under Article 19 or Article 14. On deletion of Article 19(1(f) the available grounds of challenge are Article 14, the basic structure and the rule of law, apart from the ground of legislative competence. [Para 134] [733-G-H]

3.15. The Acquisition Act has not been included in the IXth Schedule but since the Act is protected by Article 31A, it is immune from the challenge on the ground of violation of Article 14. Rule of law as a concept finds no place in our Constitution, but has been characterized as a basic feature of our Constitution which cannot be abrogated or destroyed even by the Parliament and in fact binds the Parliament. Rule of law affirms parliament's supremacy while at the same time denying it sovereignty over the Constitution. [Paras 135, 136] [734-C-E]

3.16. Rule of law can be traced back to Aristotle and has been championed by Roman jurists; medieval natural law thinkers; Enlightenment philosophers such as

Hobbes, Locke, Rousseau, Montesquieu, Dicey etc. Rule of law has also been accepted as the basic principle of Canadian Constitution order. The Canadian Constitution and Courts have considered the rule of law as one of the "basic structural imperatives" of the Constitution. Courts in Canada have exclusively rejected the notion that only "provisions" of the Constitution can be used to strike down legislation and comes down squarely in favour of the proposition that the rule of law binds legislatures as well as governments. [Paras 137, 139] [734-F-G; 736-D]

3.17. Rule of law as a principle contains no explicit substantive component like eminent domain but has many shades and colours. Violation of principle of natural justice may undermine rule of law resulting in arbitrariness, unreasonableness etc., but such violations may not undermine rule of law so as to invalidate a statute. But once the Court finds, a Statute, undermines the rule of law which has the status of a constitutional principle like the basic structure, the above grounds are also available and not *vice versa.* Rule of law as a principle, is not an absolute means of achieving the equality, human rights, justice, freedom and even democracy and it all depends upon the nature of the legislation and the seriousness of the violation. Rule of law as an overarching principle can be applied by the constitutional courts, in rarest of rare cases, and can undo laws which are tyrannical, violate the basic structure of our Constitution, and our cherished norms of law and justice. One of the fundamental principles of a democratic society inherent in all the provisions of the Constitution is that any interference with the peaceful enjoyment of possession should be lawful. [Paras 140, 141] [736-E-H; 737-A-B]

3.18. Let the message, therefore, be loud and clear, that rule of law exists in this country even when one

interprets a statute, which has the blessings of Article 300A. Deprivation of property may also cause serious concern in the area of foreign investment, especially in the context of International Law and international investment agreements. Whenever, a foreign investor operates within the territory of a host country the investor and its properties are subject to the legislative control of the host country, along with the international treaties or agreements. Even, if the foreign investor has no fundamental right, let them know, that the rule of law prevails in this country. [Para 142] [737-D-E]

4. The reference is therefore answered as follows: (a) Section 110 of the Land Reforms Act and the notification dated 8.3.94 are valid, and there is no excessive delegation of legislative power on the State Government; (b) Non-laying of the notification dt.8.3.94 under Section 140 of the Land Reforms Act before the State Legislature is a curable defect and it will not affect the validity of the notification or action taken thereunder; (c) The Acquisition Act is protected by Article 31A of the Constitution after having obtained the assent of the President and hence immune from challenge under Article 14 or 19 of the Constitution; (d) There is no repugnancy between the provisions of the Land Acquisition Act, 1894 and the Roerich and Devika Rani Roerich Estate (Acquisition & Transfer) Act, 1996, and hence no assent of the President is warranted under Article 254(2) of the Constitution; (e) Public purpose is a pre-condition for deprivation of a person from his property under Article 300A and the right to claim compensation is also inbuilt in that Article and when a person is deprived of his property the State has to justify both the grounds which may depend on scheme of the statute, legislative policy, object and purpose of the legislature and other related factors and (f) Statute,

depriving a person of his property is, therefore, amenable to judicial review. [Para 143] [737-F-H; 738-A-D]

5. The notified authority under the Acquisition Act is accordingly directed to disburse the amount of compensation fixed by the Act to the legitimate claimants in accordance with law, which will depend upon the outcome of the pending litigations between the parties. Further, it is also ordered that the land acquired be utilized only for the purpose for which it was acquired. [Para 144] [738-D-E]

State of Bihar v. *Maharajadhiraja Sir Kameshwar Singh of Darbhanga and Ors.* **(1952) 1 SCR 889;** *State of West Bengal v. Bella Banerjee & Others* **AIR 1954 SC 170: 1954 SCR 558;** *State of West Bengal v. Subodh Gopal Bose* **AIR 1954 SC 92: 1954 SCR 587;** *Kavalappara Kottarathil Kochuni & Others v. State of Madras & Others* **(1960) 3 SCR 887;** *P. Vajravelu Mudaliar v. Special Deputy Collector, Madras and Another* **(1965) 1 SCR 614;** *Union of India v. Metal Corporation of India Ltd. & Another* **AIR 1967 SC 637: 1967 SCR 255;** *State of Gujarat v. Shantilal Mangaldas & Others* **(1969) 1 SCC 509: 1969 (3) SCR 341;** *Rustom Cowasjee Cooper v. Union of India* **(1970) 2 SCC 298: 1971 (1) SCR 512;** *I.C. Golaknath and Others v. State of Punjab,* **AIR 1967 SC 1643: 1967 SCR 762;** *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala & Another* **(1973) 4 SCC 225;** *Indira Nehru Gandhi v. Raj Narain* **(1975) Supp. SCC 1;** *Jilubhai Nanbhai Khachar & Others v. State of Gujarat & Another* **(1995) Supp. 1 SC 596: 1994 (1) Suppl. SCR 807;**

State of W. B. & Others v. Vishnunarayan & Associates (P) Ltd & Another **(2002) 4 SCC 134: 2002 (2) SCR 557;** *State of Madras v. Gannon Dunkerley & Co.* ***(Madras) Ltd.*** **(1959) SCR 379;** *Hoechst Pharmaceuticals v. State of Bihar* **(1983) 4 SCC 45: 1983 (3) SCR 130;** *State of West Bengal*

& Another v. Kesoram Industries Ltd. & Others **AIR 2005 SC 1646: 2004 (1) SCR 564;** *I.R. Coelho(Dead) by LRs.* v. *State of Tamil Nadu* **(2007) 2 SCC 1: 2007 (1) SCR 706;** *Kunnathat Thathunni Moopil Nair v. State of Kerala & Another* **AIR 1961 SC 552: 1961 SCR 77;** *Ambika Prasad Mishra v. State of U.P. & Others* **(1980) 3 SCC 719: 1980 (3) SCR 1159;** *Maneka Gandhi* v. *Union of India & Another* **1978 (1) SCC 248: 1978 (2) SCR 621;** *State of Maharashtra & Another v. Basantibai Mohanlal Khetan & Others* **(1986) 2 SCC 516: 1986 (1) SCR 70;** *State of A.P. & Others v. Mcdowell & Co. & Others* **(1996) 3 SCC 709: 1996 (3) SCR 721;** *Union of India & Another v. G. Ganayutham* **(1997) 7 SCC 463: 1997 (3) Suppl. SCR 549;** *Dr. Subramanian Swamy v. Director, CBI & Others* **(2005) 2 SCC 317;** *Khoday Distilleries Ltd. & Others v. State of Karnataka & Others* **(1996) 10 SCC 304: 1995 (6) Suppl. SCR 759;** *Ajay Hasia & Others v. Khalid Mujib Sehravardi & Others* **(1981) 1 SCC 722: 1981 (2) SCR 79;** *Mardia Chemicals Ltd. & Others v. Union of India & Others* **(2004) 4 SCC 311: 2004 (3) SCR 982;** *Malpe Vishwanath Achraya & Others v. State of Maharashtra & Another* **(1998) 2 SCC 1: 1997 (6) Suppl. SCR 717 and** *Ashok Kumar Thakur v. Union of India & Others* **(2008) 6 SCC 1: 2008 (4) SCR 1 – referred to**

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1981 (3) SCR 92	**cited**	**Para 26**
2007 (12) SCR 136	**cited**	**Para 26**
1966 SCR 505	**referred to**	**Para 27, 48**
(1984) 4 SCC 27	**referred to**	**Para 34**
1957 SCR 701	**referred to**	**Para 35**
1963 Suppl. SCR 993	**referred to**	**Para 35**
1988 (3) Suppl. SCR 558	**referred to**	**Para 37**
1966 SCR 221	**referred to**	**Para 39**

1962 SCR 738	**referred to**	**Para 39**
(1994) Supp. 3 SCC 46	**referred to**	**Para 39**
2004 (1) SCR 306	**referred to**	**Para 39**
2004 (3) SCR 799	**referred to**	**Para 39**
1964 SCR 280	**referred to**	**Para 39**
1977 (3) SCR 735	**referred to**	**Para 39**
1986 (3) SCR 866	**referred to**	**Para 39**
1987 (1) SCR 1054	**referred to**	**Para 43**
1979 (1) SCR 1070	**referred to**	**Para 49**
2000 (2) Suppl. SCR 211	**referred to**	**Para 49, 50**
2002 (1) SCR 27	**referred to**	**Para 52**
(2002) 8 SCC 715	**referred to**	**Para 52**
2004 (2) Suppl. SCR 207	**referred to**	**Para 52**
(2009) 5 SCC 641	**referred to**	**Para 52**
(1993) 2 SCC 713	**referred to**	**Para 56**
(1960) 3 SCR 887	**referred to**	**Para 56,58, 74,97**
(1965) 1 SCR 614	**referred to**	**Para 56,58, 79,99**
1973 (1) SCR 258	**cited**	**Para 56**
1972 (3) SCR 518	**referred to**	**Para 56**
1970 (3) SCR 530	**referred to**	**Para 59**
(1968) 1 SCR 561	**cited**	**Para 59**
2007 (9) SCR 853	**cited**	**Para 59**

1985 (2) Suppl. SCR 28	**cited**	**Para 60**
2002 (2) Suppl. SCR 555	**cited**	**Para 60**
2004 (1) Suppl. SCR 301	**cited**	**Para 62**
2009 (16) SCR 618	**cited**	**Para 62**
1994 (5) Suppl. SCR 526	**cited**	**Para 63**
2011 (1) SCR 453	**cited**	**Para 63**
1959 Suppl. SCR 8	**referred to**	**Para 65**
(1959) Supp. (2) SCR 270	**referred to**	**Para 65**
1964 SCR 926	**referred to**	**Para 65**
1973 (2) SCR 1073	**referred to**	**Para 65**
1983 (1) SCR 905	**referred to**	**Para 65**
1983 (3) SCR 130	**referred to**	**Para 65,120**
1985 (2) SCR 224	**referred to**	**Para 65**
1990 (1) SCR 614	**referred to**	**Para 65**
1973 (1) SCR 326	**referred to**	**Para 65**
(1964) 2 SCR 87	**referred to**	**Para 66**
1956 SCR 393	**referred to**	**Para 66**
1978 (1) SCR 641	**referred to**	**Para 66**
1979 (3) SCR 254	**referred to**	**Para 66**
(1962) 3 SCR 250	**referred to**	**Para 70**
(1974) 4 SCR 3	**cited**	**Para 74**
1978 (2) SCR 621	**referred to**	**Para 74**
1979 (3) SCR 1014	**cited**	**Para 74**

1980 (3) SCR 1338	**cited**	**Para 74**
(1962) Supp (2) SCR 1	**cited**	**Para 74**
1961 SCR 77	**referred to**	**Para 74**
(1952) 1 SCR 889	**referred to**	**Para 76, 79, 93**
(1964) 1 SCR 371	**cited**	**Para 76**
(1991) 4 SCC 699	**cited**	**Para 76**
2007 (1) SCR 706	**referred to**	**Para 76**
1987 (1) SCR 798	**cited**	**Para 76**
2010 (12) SCR 597	**cited**	**Para 76**
(1954) 1 SCR 674	**cited**	**Para 79**
1969 (3) SCR 341	**referred to**	**Para 79**
467 US 229 (1984)	**referred to**	**Para 89**
(545 US 469 (2005)	**referred to**	**Para 89**
AIR 1954 SC 170	**referred to**	**Para 95,112**
1954 SCR 587	**referred to**	**Para 95**
1967 SCR 255	**referred to**	**Para 99**
1971 (1) SCR 512	**referred to**	**Para 100**
1967 SCR 762	**referred to**	**Para 101**
1973 (4) SCC 225	**referred to**	**Para 104**
(1975) Supp. SCC 1	**referred to**	**Para 104**
1994 (1) Suppl. SCR 807	**referred to**	**Para 107**
2002 (2) SCR 557	**referred to**	**Para 109**
(1959) SCR 379	**referred to**	**Para 119**

2004 (1) SCR 564	**referred to**	**Para 120**
1980 (3) SCR 1159	**referred to**	**Para 126**
1986 (1) SCR 70	**referred to**	**Para 127**
1996 (3) SCR 721	**referred to**	**Para 128**
1997 (3) Suppl. SCR 549	**referred to**	**Para 129**
(2005) 2 SCC 317	**referred to**	**Para 131**
1995 (6) Suppl. SCR 759	**referred to**	**Para 131**
1981 (2) SCR 79	**referred to**	**Para 131**
2004 (3) SCR 982	**referred to**	**Para 131**
1997 (6) Suppl. SCR 717	**referred to**	**Para 131**
2008 (4) SCR 1	**referred to**	**Para 132**
(1985) 1 SCR 721	**referred to**	**Para 137**
(1981) 1 SCR 753	**referred to**	**Para 138**
(1987) 2 SCR 2	**referred to**	**Para 138**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6520 of 2003.

From the Judgment and Order dated 16.07.2002 of the Division Bench of the High Court of Karnataka in W.P. No. 32560 of 1996.

WITH

Civil Appeal Nos. 6521-6537 and 6538 of 2003.

T.R. Andhyarujina, D.A. Dave, K.N. Bhat and Basava Prabhu S. Patil, Gurukrishna Kumar, S. Sukumar, S. Sukumaran, Anand Sukumar, Soumik Ghoshal, Akshat Hansaria, Bhupesh Kumar Pathak, Yashovardhan Roy, Meera Mathur, P.R. Ramesesh, S.K. Kulkarni, Ankur S. Kulkarni, Vijay

Kumar, V.N. Raghupathy, B. Subramanya Prasad, Nikhil Majithia, Anand Sanjay M. Nuli and Ajay Kumar, M., for the appearing parties.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. The constitutional validity of Roerich and Devika Rani Roerich Estate (Acquisition & Transfer) Act, 1996 (in short the "Acquisition Act"), the legal validity of Section 110 of the Karnataka Land Reforms Act, 1961 (in short "Land Reforms Act"), the Notification No. RD 217 LRA 93 dated 8th March, 1994 issued by the State Government thereunder and the scope and content of Article 300A of the Constitution of India, are the issues that have come up for consideration in these civil appeals.

2. We propose to deal with the above issues in three parts. In Part-I, we will deal with the validity of Section 110 of the Land Reforms Act and the validity of the notification dated 8.3.1994 and in Part-II, we will deal with the constitutional validity of the Acquisition Act and in Part-III, we will deal with the claim for enhanced compensation and the scope of Article 300A of the Constitution.

PREFACE

3. Dr. Svetoslav Roerich, a Russian born, was an internationally acclaimed painter, artist and recipient of many national and international awards including Padma Bhushan from the President of India in the year 1961. Smt. Devika Rani Roerich, grand niece of Rabindranath Tagore had made valuable contributions and outstanding services to the Indian Motion Pictures and Film Industry, was known to be the "First Lady of the Indian Screen". She was awarded Padmashri by the President of India in the year 1958 and was the recipient of the first Dada Saheb Phalke Award and the Soviet Land Nehru Award in the year 1989.

4. Dr. Roerich and Mrs. Devika Rani Roerich had owned an Estate called Tatgunni Estate covering 470.19 acres at B.M. Kaval Village of Kengeri Hobli and Manvarthe Kaval Village of Uttarhalli Hobli, Bangalore South Taluk, out of which 100 acres were granted to them by the State Government in the year 1954 for Linaloe cultivation vide G.O. dated 16.3.1954 read with Decree dated 19.4.1954. When the Land Reforms Act came into force, they filed declarations under Section 66 of the Act before the Land Tribunal, Bangalore South Taluk-II stating that they had no surplus lands to surrender to the State since the entire area held by them had been used for the cultivation of Linaloe which was exempted under Section 107(1)(vi) of the Land Reforms Act. The Land Tribunal, Bangalore vide order dated 15.3.82 dropped the proceedings instituted under the Act against them holding that the land used for cultivation of Linaloe did not attract the provisions of the Land Reforms Act.

5. Dr. Roerich, it was stated, had sold 141.25 acres (which included 100 acres granted by the Government for Linaloe cultivation) to M/s K.T. Plantations Pvt. Ltd. (the first appellant herein, in short 'the Company') by way of a registered Sale Deed dated 23.3.91 for a sale consideration of Rs.56,65,000/-. It was stated that Mrs. Devika Rani Roerich had also sold an extent of 223 acres 30 guntas to the Company on 16.2.1992 for a sale consideration of Rs.89,25,000/- by way of an unregistered sale deed, a transaction disputed by Mrs. Devika Rani. The Company, however, preferred a suit OS 122/92 for a declaration of title and injunction in respect of that land before the District and Civil Judge, Bangalore which is pending consideration.

6. The Company sought registration of the sale deed dated 16.02.92 before the Sub Registrar, Kingeri, who refused to register the sale deed. The Company then preferred an appeal before the District Registrar, but when the appeal was about to be taken up for hearing, one Mary Joyce Poonacha who claimed rights over the property on the strength of an

alleged *will* preferred a Writ Petition No.2267 of 1993 before the Karnataka High Court and a learned Single Judge of the High Court dismissed the writ petition. On appeal, the Division Bench confirmed the order, against which she had approached this Court vide C.A.No.3094 of 1995 and this Court *vide* its judgment dated 18th April, 1995 directed the District Registrar not to proceed with the matter till the suit is disposed of by the Civil Court. The judgment is reported in (1995) Suppl. 2 SCC 459.

7. Dr. Roerich and Mrs. Devika Rani had no issue and due to old age and other ailments it was reported that they were staying at Hotel Ashok, Bangalore for a couple of years before their death. It was alleged that some of the persons who were associated with the couple, had an eye on their properties, including the land used for linaloe cultivation, valuable paintings, jewellery, artefacts etc., and began to create documents to grab those properties.

8. The Chief Secretary of the State of Karnataka noticing the above facts and circumstances convened a meeting on 1.4.92 in the presence of the Director of Archaeology to take effective and proper steps to preserve the paintings, artefacts and other valuables. For that purpose, they met Smt. Devika Rani and Dr. Roerich on 03.04.92 and a letter was handed over to Dr. Roerich on behalf of the State Government expressing the Government's willingness to purchase the paintings and other valuables so as to set up a Roerich Gallery. The State Cabinet in its meeting held on 09.04.92 also discussed about the desirability of acquiring the landed properties of Roerichs and also for setting up an Art Gallery-cum-Museum, in public interest. Following that meeting, the Roerich and Devika Rani Roerich Estate (Acquisition and Transfer) Ordinance, 1992 was drafted, but could not be issued.

9. The Deputy Commissioner, Bangalore Rural District had reported on 26.6.1993 that though Roerichs had owned 470.19 acres of land including the land used for Linaloe

cultivation they had filed declarations only to the extent of 429.26 acres. Out of the extent of 470.19 acres of land owned by them, they had raised Linaloe cultivation to the extent of 356.15 acres and the remaining extent of 114.04 acres was agricultural land. As per the ceiling provisions of the Land Reforms Act they were entitled to hold an extent of 54 acres of agricultural land. As such, the excess of 60.04 acres ought to have been surrendered by them to the Government. The view of the Law Department was sought for in that respect and the Law Department on 18.11.93 stated that the earlier order dated 15.03.82 of the Land Tribunal, Bangalore be re-opened and the action under Section 67(1) be initiated for resumption of the excess land. The Deputy Commissioner was requested to issue suitable instructions to the Tahsildar, Bangalore South Taluk to place the matter before the Land Tribunal, for review of the earlier order dated 15.03.82 by invoking the provisions of Section 122A of the Land Reforms Act.

10. The Deputy Commissioner reported that Dr. Roerich had sold an extent of 137.33 acres of land comprising of survey nos. 124, 126 of B.M. Kaval and survey No. 12 of Manavarth Kaval of Bangalore South Taluk on 23.3.1991 to M/s K.T. Plantations Private Limited and it was reported that the request for mutation in respect of those lands was declined by the local officers and the lands stood in the name of late Dr. Roerich in the Record of Rights.

11. The Commissioner and Secretary to the Government, Revenue Department taking note of the above mentioned facts sought the legal opinion of the Department of Law and Parliamentary Affairs as to whether valuable lands held by the late Roerichs could be resumed by the State before lands changed hands, by withdrawing the exemption given to the lands used for Linaloe cultivation. The Department of Law and Parliamentary Affairs in their note No.108:/L/11/94 dated 1.3.1994 opined that the exemption given under Section 107 of the Land Reforms Act, 1961 can be withdrawn by the

Government by issuing a notification as per Section 110 of the Land Reforms Act. Consequently the Commissioner and Secretary to the government proposed to issue a notification to that effect for which approval of the Cabinet was sought for. The Cabinet accorded sanction in its meeting held on 04.03.1994 and the Government issued a notification dated 08.03.1994 in exercise of powers conferred by Section 110 of the Land Reforms Act, withdrawing the exemption granted for the lands used for cultivation of Linaloe under clause (vi) of Sub-section 1 of Section 107 of the Act. Notification was published in the Government Gazette on 11.03.1994.

12. The Assistant Commissioner, Bangalore sub-division later issued a notice no.LRF:CR 17:93-94 dated 28.03.94 to the company to show cause why 137.33 acres of land be not forfeited to the Government, since it had purchased the above mentioned lands in violation of Section 80 and 107 of the Land Reforms (Amendment) Act, 1973. An enquiry under Section 83 of the Land Reforms Act was ordered for violation of the provisions of the Act. The Company, aggrieved by the above mentioned notice, filed Writ Petition No.12806/94 before the High Court of Karnataka, which was allowed to be withdrawn giving liberty to the petitioner to take recourse to the remedies under law. Due to the *status quo* order passed, by this Court in these appeals the proceedings pending before the Asst. Commissioner, Bangalore following the show-cause notice dated 28.03.1994 was kept in abeyance.

13. Mary Joyce Poonacha, the appellant in Civil Appeal No. 6538 of 2003 had, in the meanwhile, filed W.P. No. 11149 of 1994 before the Karnataka High Court claiming rights over some of the articles belonging to Roerichs' couple on the strength of a will dated 4.3.1994. The writ petition was dismissed by the High Court holding that the articles claimed by the appellant stood vested in the State in view of the Acquisition Act. Against that judgment, Mary Joyce Poonacha has approached this Court and filed Civil Appeal No. 6538 of 2003.

14. The Company, through its Managing Director, filed Writ Petition No. 32560 of 1996 before the Karnataka High Court challenging the constitutional validity of the Acquisition Act, Section 110 of the Land Reforms Act, the notification dated 08.03.1994 issued thereunder and also sought other consequential reliefs. The writ petition was dismissed by the High Court upholding the validity of the Acquisition Act as well as Section 110 of the Land Reforms Act and the notification issued thereunder except in relation to the inclusion of certain members in the Board of Directors constituted under the Acquisition Act. Aggrieved by the same the Company has come up before this Court in Civil Appeal No.6520 of 2003.

15. Mary Joyce Poonacha and others had also challenged the constitutional validity of the Acquisition Act by filing Writ Petition Nos. 32630-32646 of 1996 before the Karnataka High Court, which were also dismissed in view of the judgment in Writ Petition No. 32560 of 1996. Aggrieved by the same, they have preferred Civil Appeal Nos. 6521-6537 of 2003.

16. When the Civil Appeals came up before a bench of this Court on 28.07.04 and this Court passed an order framing the following substantive questions of law:-

1. Whether Section 110 of the Karnataka Land Reforms Act, 1961, as amended by the Karnataka Land Reforms amendment Act, 1973, (Act 1 of 1974), which came into effect from 01.03.1974, read with Section 79 B of the said Act, introduced by amending Act 1 of 1974, violates the basic structure of the Constitution, in so far as it confers power on the Executive Government, a delegatee of the Legislature, of withdrawal of exemption of Linaloe plantation, without hearing and without reasons?

2. Whether the Roerich and Devika Rani Roerich (Acquisition and Transfer) Act, 1996, (the Acquisition Act), is protected by Article 31C of the Constitution?

3. Whether the true interpretation of Article 300A of the Constitution, the said Act is violative of the said Article in so far as no specific compensation prescribed for the acquisition of 468 acres of Linaloe plantation, and, after deduction of liabilities and payment of compensation for the artefacts, no balance may and/or is likely to exist for payment of such compensation, as a result of which, whether the Act really is expropriatory in nature?

4. Whether on true interpretation of Article 300A of the Constitution, the said Act is violative of Article 300A as the said Article is not, by itself, a source of Legislative power, but such power of the State Legislature being traceable only to Entry 42 of List III of Schedule VII to the Constitution viz., "Acquisition and Requisition of Property", which topic excludes expropriation and confiscation of property?

5. If Article 300A of the Constitution is construed as providing for deprivation of property without any compensation at all, or illusory compensation, and hence providing for expropriation and confiscation of property, whether the said Article would violate the rule of law and would be an arbitrary and unconscionable violation of Article 14 of the Constitution, thus violating the basic structure of the Constitution?

Part-I

We will first examine the validity of Section 110 of the Land Reforms Act and the notification dated 08.03.94, issued thereunder.

17. Mr. T.R. Andhyarujina, Senior Advocate appearing for the Company submitted that it had purchased the lands from Roerich couple when those lands stood exempted from the provisions of the Land Reforms Act by virtue of Section 107(1)(vi) of the Act. Learned senior counsel submitted that the State Government cannot, in exercise of its powers under

Section 110 of the Act, issue notification dated 08.03.94 to withdraw the exemption granted by the Legislature which is essentially a legislative policy. Learned senior counsel also submitted that Section 110 gave unfettered and unguided power to the Executive to take away the exemption granted by the Legislature and hence that Section is void for excessive delegation of legislative powers on the State Government. In support of his contention, reliance was placed on the judgments of this court *In Re: The Delhi Laws Act, 1912, the Ajmer-Merwara (Extension of Laws) Act, 1947 and the Part C States (Laws) Act, 1950* (1951) 2 SCR 747, *Rajnarain Singh v. The Chairman, Patna Admnistration Committee, Patna& Another,* AIR 1954 SC 569, *Vasantlal Maganbhai Sanjanwala v. State of Bombay and Ors.* AIR 1961 SC 4, *Hamdard Dawakhana (Wakf) Lal Kuan, Delhi & Another v. Union of India & Others* (1960) 2 SCR 671.

18. Learned senior counsel also submitted that the State Government cannot take away retrospectively the vested rights of persons to hold lands used for Linaloe cultivation from 01.03.1974 onwards, without assigning any reasons. Further, it was also submitted that the exemption under Section 107(1)(vi) was granted with respect to the lands used for the cultivation of Linaloe, and not for any specific individual, and there is no bar in alienating the land to third parties. In support of the above contention, learned counsel placed reliance on the decisions of this Court in *Bakul Cashew Co. and Ors. v. Sales Tax Officer, Quilon and Anr.* (1986) 2 SCC 365, *Income Tax Officer, Alleppy v. M.C. Ponnoose and Ors.* (1969) 2 SCC 351, *Regional Transport Officer, Chittoor and Ors. v. Associated Transport Madras (P) Ltd. and Ors.* (1980) 4 SCC 597, *Cannanore Spinning and Weaving Mills Ltd. v. Collector of Customs and Central Excise, Cochin and Ors.* (1969) 3 SCC 112, *Hukam Chand etc. v. Union of India (UOI) and Ors.* (1972) 2 SCC 601.

19. Shri Andhyarujina also submitted that the show cause

notice dated 28.03.1994 was *ex facie* illegal and that the prohibition of transfer of land under Section 80 of the Act cannot act retrospectively in respect of lands already stood exempted under Section 107(1)(vi) of the Act.

20. Learned senior counsel also refuted the contention of the State that, under Section 107(2) of the Land Reforms Act, there can be only 10 units of land used for Linaloe cultivation exempted under Section 107(1)(vii) of the Act. Learned senior counsel submitted that it would be anomalous for the Legislature, by amending the Act, on the one hand, to exempt the lands for cultivation of Linaloe from operation of the Land Reforms Act, without any limit of holding and, at the same time, deprive the existing cultivators of Linaloe, except to the extent of 10 units on 1.3.74. Learned counsel submitted that Section 107(1)(vi) does not put a limit of 10 units of Linaloe lands.

21. Learned senior counsel also submitted that the State Government has also not followed the procedure laid down in Section 140 of the Land Reforms Act and, in any view, the mere laying of the notification before the State Legislature would not cure the infirmity of excessive delegation. Learned counsel also submitted that though the Land Reforms Act was placed in the 9th Schedule which saves its provisions from the challenge of Articles 14, 19 and 31, a challenge to a provision of the Act for excessive delegation of legislative power is still available and the Land Reforms Act cannot be protected by Article 31B. Shri Andhyarujina also submitted that the State Govt. was led to deprive the appellants of their property even by-passing the Act when it resorted to withdrawing the exemption available under Section 107(1)(vi) of the Land Reforms Act, by issuing its notification dated 08.03.1994 by withdrawing the exemption and making the Company ineligible to hold the agricultural land under Section 79B of the Land Reforms Act which also provided inadequate compensation.

22. Mr. Basavaprabhu S. Patil, senior counsel for the State of Karnataka submitted that the validity of Section 110 of the

Act was never questioned before the High Court on the ground of excessive delegation and hence, the appellants are precluded from raising that contention before this Court. Learned senior counsel submitted that the validity of Section 110 was challenged on the ground of violation of the fundamental rights which was rightly negatived by the High Court since the Land Reforms Act was placed in the IXth Schedule. Learned senior counsel also submitted that the Land Reforms Amendment Act (Act 1 of 1974) was also placed in the IXth Schedule and, hence immune from attack on the ground of violation of Articles 14 or 19 of the Constitution and, hence, the notification dated 8.03.1994 issued under Section 110 of the Act is also immune from challenge. Learned senior counsel submitted that the constitutional validity of the amended Act was also upheld by this Court in *H.S. Srinivasa Raghavachar and Ors. v. State of Karnataka and Ors.* (1987) 2 SCC 692.

23. Learned senior counsel also submitted that the appellants have no *locus standi* to maintain these writ petitions since they have not perfected their title over the properties in question. Further, Mrs. Devika Rani Roerich had also disputed the execution of the sale deed dated 16.02.92 and a suit disputing title is pending consideration before the Civil Court. Learned senior counsel also submitted that the company had illegally acquired 141 acres 25 guntas of land in excess of the ceiling prescribed under Section 107(2) of the Land Reforms Act and the Act mandates that no person shall, which includes a Company also, after the date of commencement of the Land Reforms Act, i.e., 01.03.74, acquire land in any manner for cultivation of Linaloe to an extent which together with the land cultivated by Linaloe, if any, already held by him exceed 10 units notwithstanding anything contained in sub-section (1) of Section 107.

24. Learned senior counsel further submitted that the provisions of Sections 66 to 76 also shall apply *mutatis mutandis*, in respect of every acquisition contrary to Section

107(2). Learned senior counsel also submitted that in any view Section 110 of the Land Reforms Act does not suffer from the vice of excessive delegation of legislative powers. Learned senior counsel submitted that Section 110 of the Land Reforms Act is guided by the policy laid down by the state legislature which is discernible from the scheme of the Land Reforms Act, its objective, provisions in Chapter-VIII, history of the amendment substituting Section 107 (1)(vi) etc. Learned counsel also submitted that exemption under Section 107(1)(vi) was granted to Roerichs' for cultivation of Linaloe, while the Company is statutorily disentitled to hold the land and, hence, the claim for exemption from the provisions of Land Reforms Act is opposed to the policy of the Act. Further nobody can claim the exemption from the provisions of the Land Reforms Act, as a matter of right, much less a Company which is statutorily barred from holding excess agricultural land. By withdrawing the exemption the State Govt. was only giving effect to the underlying legislative policy.

25. Learned senior counsel submitted, but for the exemption granted, Roerichs' would not have held the land used for the cultivation of Linaloe. Exemption was granted to Roerichs subject to Section 110 of the Land Reforms Act and it was with that statutory limitation the Company had purchased the land. Learned senior counsel cited the following judgments of this Court in *Municipal Corporation of Delhi v. Birla Cotton, Spinning and Weaving Mills, Delhi and Another* AIR 1968 SC 1232; *Delhi Cloth & General Mills Ltd. v. Union of India & Others.* (1983) 4 SCC 166; *Premium Granites and Anr. v. State of Tamilnadu and Ors.* (1994) 2 SCC 691; *Registrar of Co-operative Societies, Trivandrum and Anr. v. Kunjabmu and Ors.* (1980) 1 SCC 340.

26. Learned senior counsel also submitted that there is no provision for providing hearing or recording reasons before issuing the notification dated 08.03.1994, while exercising powers under Section 110 of the Act. Learned senior counsel

submitted that exercise of powers under Section 110 of the Act is in the nature of subordinate legislation and no opportunity of hearing or recording of reasons are warranted. In support of his contention learned counsel placed reliance on the decisions of this Court in *Shri Sitaram Sugar Co. Ltd. and Another v. Union of India and Others* (1990) 3 SCC 223; *Union of India and Another v. Cynamide India Ltd. and Another Etc.* (1987) 2 SCC 720; *H.S.S.K. Niyami & Another v. Union of India & Another* (1990) 4 SCC 516; *Laxmi Khandsari and Ors. v. State of U.P. and Ors.* (1981) 2 SCC 600; *J. K. Industries & Another v. Union of India & Others* (2007) 13 SCC 673.

27. Learned senior counsel also submitted that requirement of placing the notification dated 08.03.94 before the State Assembly is not a mandatory requirement once the State Government publishes the notification in the official gazette. Reference was made to the judgment in *Jan Mohammad Noor Mohammad Bagban v. State of Gujarat and Anr.,* AIR 1966 SC 385. Learned senior counsel submitted that in any view of the matter, as per the order of this Court dated 24.2.2011 the State Govt. have already taken steps for placing the notification before both the Houses of the State Legislature. Consequently, the defect, if any, of non-laying the notification, has been cured.

28. The Land Reforms Act was enacted by the Karnataka State Legislature to have a uniform law relating to land reforms in the State of Karnataka, relating to agrarian relations, conferment of ownership on tenants, ceiling on land holdings etc. Chapter II of the Act deals with general provisions relating to tenancies, Chapter III deals with conferment of ownership on tenants. Ceiling on land holdings is dealt with in Chapters IV and Chapter V deals with restrictions on holding or transfer of agricultural lands. Chapter VIII of the Act deals with exemptions and Chapter XI deals with the miscellaneous provisions.

29. Appellants in these appeals have challenged the validity of Section 110 of the Act primarily on the ground of

excessive delegation of legislative powers on the State Government. To examine that contention it is necessary to refer to certain provisions contained in various Chapters referred to above, the scheme of the Act, its object and purpose, legislative policy underlying in the provisions of the statute etc.

30. Chapter V of the Act, as we have already indicated, imposes certain restrictions on holding or transfer of agricultural lands. Section 79B(1) of the Act prohibits holding of agricultural land by certain persons which says that with effect on and from the date of commencement of the Amendment Act (Act 1/74) w.e.f. 1.3.1974, no person other than a person cultivating land personally shall be entitled to hold land; and that it shall not be lawful for, a company *inter alia* to hold 'any land'. Further sub-section (2) of Section 79B states that the company which holds lands on the date of the commencement of the Amendment Act and which is disentitled to hold lands under sub-section (1), shall within ninety days from the said date furnish to the Tahsildar within whose jurisdiction the greater part of such land is situated a declaration containing the particulars of such land and such other particulars as may be prescribed; and which acquires such land after the said date shall also furnish a similar declaration within the prescribed period. Sub-section (3) of Section 79B states that the Tahsildar shall, on receipt of the declaration under sub-section (2) and after such enquiry as may be prescribed, send a statement containing the prescribed particulars relating to such land to the Deputy Commissioner who shall, by notification, declare that such land shall vest in the State Government free from all encumbrances and take possession thereof in the prescribed manner. Sub-section (4) of Section 79B states that in respect of the land vesting in the State Government under that section an amount as specified in Section 72 shall be paid. Explanation to Section 79B states that for the purpose of that section it shall be presumed that a land is held by an institution, trust, company, association or body where it is held by an individual on its behalf. Section 80 bars transfer of any land to non-agriculturists, which says that

no sale, gift or exchange or lease of any land or interest therein etc. shall be lawful in favour of a person who is disentitled under Section 79A or 79B to acquire or hold any land.

31. The first appellant being a company was, therefore, prohibited from holding any agricultural land after the commencement of the Act. If the company was holding any land with Linaloe cultivation on the date of the commencement of the Act, the same would have vested in the State Government under Section 79B(3) of the Act and an amount as specified in Section 72 would have been paid. Section 104, however, states that the provisions of Section 38, Section 63 other than sub-section (9), thereof, Sections 64, 79-A, 79-B and 80 shall not apply to plantations and is not made subject to the provisions of Section 110.

32. Section 107 states that the provisions of the Act would not apply to certain lands mentioned therein, but made subject to the provisions of Section 110. Section 107, to the extent it is relevant for the purpose, is extracted below for easy reference:

"**107. Act not to apply to certain lands.-** (1) Subject to the provisions of Section 110, nothing in this Act, except Section 8, shall apply to lands,-

xxx xxx xxx

xxx xxx xxx

(vi) used for the cultivation of linaloe;

xxx xxx xxx

xxx xxx xxx

(2) Notwithstanding anything in sub-section (1), no person shall, after the date of commencement of the Amendment Act acquire in any manner for the cultivation of linaloe, land

of an extent which together with the land cultivated by linaloe, if any, already held by him exceeds ten units.

(3) In respect of every acquisition contrary to sub-section (2), the provisions of Section 66 to 76 shall mutatis mutandis apply."

Section 107, we have already indicated, is made subject to Section 110, which reads as follows:

"**110. Certain lands to be not exempt from certain provisions.-** The State Government may, by notification direct that any land referred to in [Section 107 and 108] shall not be exempt from such of the provisions of this Act from which they have been exempted under the said sections."

33. The question that is canvassed before us is whether Section 110 is invalid due to excessive delegation of legislative powers on the State Government. Before we examine the scope and ambit of the above quoted provision, reference may be made to few of the decided cases of this Court on the power of delegation of legislative functions.

34. *In re: The Delhi Laws Act, 1912* (supra), this Court held that legislatures in India have been held to possess wide powers of delegation but subject to one limitation that a legislature cannot delegate essential legislative functions which consists in the determination of the legislative policy and of formally enacting that policy into a binding rule of conduct. In *Maharashtra State Board of Secondary and Higher Secondary Education and Anr. v. Paritosh Bhupeshkumar Sheth and Others* (1984) 4 SCC 27, this Court declared that while examining whether a particular piece of delegated legislation - whether in the form of a rule or regulation or any other type of statutory instrument - was in excess of the power of subordinate legislation conferred on the delegate, has to be determined with reference only to the specific provisions

contained in the relevant statute conferring the power to make the rule, regulation etc. and the object and purpose of the Act as can be gathered from the various provisions of the enactment. It was held that the Court cannot substitute its own opinion for that of the legislature or its delegate as to what principle or policy would best serve the objects and purpose of the Act or sit in judgment over the wisdom and effectiveness or otherwise of the policy laid down by the regulation making body and declare a regulation to be *ultra vires* merely on the ground that, in the opinion of the Court, the impugned provisions will not help to serve the object and purpose of the Act. It is exclusively within the province of the legislature and its delegate to determine, as a matter of policy, how the provision of the Statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act. It is not for the Court to examine the merits or demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation-making power conferred on the delegate by the Statute.

35. Law is settled that the Court shall not invalidate a legislation on the ground of delegation of essential legislative functions or on the ground of conferring unguided, uncontrolled and vague powers upon the delegate without taking into account the preamble of the Act as also other provisions of the statute in the event they provide good means of finding out the meaning of the offending statute. The question whether any particular legislation suffered from excessive delegation, has to be determined by the court having regard to the subject-matter, the scheme, the provisions of the statute including its preamble and the facts and circumstances and the background on which the statute is enacted. See *Bhatnagars & Co. Ltd. v. Union of India* AIR 1957 SC 478**;** *Mohmedalli and Ors. v. Union of India and Ors.,* AIR 1964 SC 980.

36. Further, if the legislative policy is formulated by the legislature, the function of supplying details may be delegated to the executive for giving effect to the policy. Sometimes, the legislature passes an act and makes it applicable, in the first instance, to some areas and classes of persons, but empowers the government to extend the provisions thereof to different territories, persons or commodities, etc. So also there are some statutes which empower the government to exempt from their operation certain persons, commodities, etc. Some statutes authorise the government to suspend or relax the provisions contained therein. So also some statutes confer the power on the executive to adopt and apply statutes existing in other states without modifications to a new area.

37. In *Brij Sunder Kapoor v. I Additional District Judge and Ors.* (1989) 1 SCC 561 this Court held that the Parliament decided as a matter of policy that the cantonment areas in a State should be subject to the same legislation relating to control of rent and regulation of housing accommodation as in force in other areas of the State and this policy was given effect to by empowering the Central Government to extend to a cantonment area in a State the tenancy legislation as in force as in other areas of the State including future amendments and that there was no abdication of legislative functions by Parliament.

38. Chapter VIII of the Land Reforms Act deals with exemption provisions. Section 104 of the Act deals with plantations, which says, that the provisions of Section 38, Section 63, other than sub-section (9), thereof, Sections 64, 79-A, 79-B and 80 shall not apply to plantations, but the power to withdraw the exemption in respect of the plantations, has not been conferred on the State Government, but evidently retained by the Legislature. Legislative policy is therefore clearly discernible from the provision of the Statute itself, that, whenever the Legislature wanted to confer the power to withdraw the exemption to the State Government it has done so, otherwise it has retained the power to itself.

39. Section 110 of the Land Reforms Act empowers the State Government to withdraw the exemption granted to any land referred to in Sections 107 and 108. Section 107 itself has been made "subject to" Section 110 of the Act. The words 'subject to' conveys the idea of a provision yielding place to another provision or other provisions to which it is made subject. In *Black Law Dictionary, 5th Edn. At p.1278,* the expression "subject to" has been defined as under:

> "Liable, subordinate, subservient, inferior, obedient to; governed or effected by; provided that; provided; answerable for."

Since Section 107 is made subject to Section 110, the former section conveys the idea of yielding to the provision to which it is made subject that is Section 110 which is the will of legislature. Reference may be made to the decisions of this Court in *Punjab Sikh Regular Motor Service, Moudhapara, Raipur v. Regional Transport Authority & Another* AIR 1966 SC 1318, *Joginder Singh & Others v. Deputy Custodian-General of Evacuee Property & Others* AIR 1967 SC 145 and *Bharat Hari Singhania & Others v. Commissioner of Wealth Tax (Central) & Others* (1994) Supp. 3 SCC 46, *Ashok Leyland Ltd. v. State of T.N. & Another (2004) 3 SCC 1, Printers (Mysore) Ltd. v. M. A. Rasheed & Others* (2004) 4 SCC 460, *South India Corporation (P) Ltd. v. Secretary, Board of Revenue, Trivendrum & Another* AIR 1964 SC 207, *Commissioner of Wealth Tax, Andhra Pradesh, Hyderabad v. Trustees of H.E.H. Nizam's Family (Remainder Wealth Trust), Hyderabad* (1977) 3 SCC 362 and *Chandavarkar Sita Ratna Rao v. Ashalata S. Guram* (1986) 4 SCC 447.

40. The Legislature's apathy in granting exemption for lands used for cultivation of Linaloe is discernible from the language used in sub-section (2) of Section 107, which says that no person shall after the commencement of the Amendment

Act acquire in any manner for the cultivation of Linaloe, land of an extent which together with the land cultivated by Linaloe, if any, already held by him exceeds ten units. Legislature, therefore, as matter of policy, wanted to give only a conditional exemption for lands used for Linaloe cultivation and the policy was to empower the State Government to withdraw the same especially when the law is that no person can claim exemption as a matter of right. The legislative will was to make Section 107 subject to Section 110 and not the will of the delegate, hence, overriding effect has to be given to Section 110. Further, the Land Reforms Act including Section 110 was placed in IXth Schedule in the year 1965 and, hence, immune from challenge in a court of law.

41. Dr. Roerich and Mrs. Devika had got only the conditional exemption from the provisions of the Land Reforms Act for the lands used for Linaloe cultivation and, hence, they also would have lost ownership and possession of the lands once the exemption had been withdrawn and the land would have vested in the State. The land was purchased by the Company with that statutory condition from Roerichs and, hence, was bound by that condition. We, therefore, reject the contention that Section 110 is void due to excessive delegation of legislative powers.

42. The State Government issued the notification dated 8.3.1994 in exercise of the powers conferred by Section 110 of the Land Reforms Act which was published in the official gazette on 11.3.94. Section 2(22) of the Act defines 'Notification' to mean a notification published in the official gazette. Section 23 of the General Clauses Act 1897 also states that the publication in the official gazette of a rule or by-law purported to have been made in exercise of power to make rules or by-laws after previous publication shall be conclusive proof that the rule or by-law has been duly made.

43. This Court in *B.K. Srinivasan and Ors. v. State of Karnataka and Ors.* (1987) 1 SCC 658 held as follows:-

"Unlike Parliamentary legislation which is publicly made, delegated or subordinate legislation is often made unobtrusively in the chambers of a minister, a secretary to the Government or other official dignitary. It is, therefore, necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner, whether such publication or promulgation is prescribed by the parent statute or not. It will then take effect from the date of such publication or promulgation."

44. So far as this case is concerned, the State Government has already followed the legal requirement of publication of the notification dated 08.03.1994 which came into effect on 11.03.94.

45. Mr. T.R.Andhyarujina, learned counsel appearing for the appellants submitted that the respondent State has not followed the procedure laid down in Section 140 of the Act and that the approval of the notification by the State Legislature is an important circumstance to be taken into account in determining its validity. Learned counsel submitted that laying of notification under Section 140 is not a mere laying but is coupled with a negative/affirmative resolution of the Legislature; the failure to lay the notification is an illegality which cannot be cured.

46. Following is the procedure generally followed when an order or notification is laid before the Legislature:-

(1) Laying which requires no further procedure;

(2) Laying allied with the affirmative procedure; and

(3) Laying allied with negative procedure.

The object of requirement of laying provided in enabling Acts is to subject the subordinate law making authority to the vigilance and control of the Legislature. The degree of control

the Legislature wants can be noticed on the language used in such laying clause.

47. We have in this case already found that there has not been any excessive delegation of legislative powers on the State Government and we may now examine whether the failure to follow the procedure laid down under Section 140 of the Act has affected the legal validity of the notification. Facts would indicate that, in the instant case, the notification has not been laid before the Legislature, but looking at the language of Section 140, it has not affected the validity or the effect of the notification.

For easy reference Section 140 is extracted hereunder:

"Section 140. Rules and notifications to be laid before the State Legislature.- Every rule made under this Act and every notification issued under Sections 109, 110 and 139 shall be laid as soon as may be after it is made or issued before each House of the State Legislature while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and, if, before the expiry of the session in which it is so laid or the session immediately following both Houses agree in making any modification in the rule or notification or both Houses agree that the rule or notification should not be made, the rule or notification shall thereafter have effect only in such modified form or be of no effect, as the case may be; *so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or notification.*"

(Emphasis supplied)

48. The Constitution Bench of this Court in *Jan Mohammad Noor's case* (supra) examined the effect of sub-section 5 of Section 26 which provides that the rules shall be

laid before each House of the provisional Legislature, for giving effect. Interpreting that provision the Court held that Section 26(5) of Bombay Act 29 of 1939 does not prescribe that the Rules acquired validity only from the date on which they have been placed before the House of Legislature. The Court held that the Rules are valid from the date on which they are made under Section 26(1). The Court noted that the Legislature has prescribed that the Rules shall be placed before the House of the Legislature, but held that the failure to place the rules before the House of Legislature does not effect the validity of the rules and merely because they have not been placed before the House of the Legislature, the provision cannot be regarded as mandatory.

49. This Court in *Atlas Cycle Industries Ltd. & Others v. State of Haryana* (1979) 2 SCC 196 examined the question relating to the non-compliance with sub-section (6) of Section 3 of the Essential Commodities Act, 1955 which provides that every order made under the section shall be laid before both Houses of Parliament as soon as may be, after it is made. The Court held that non-compliance with the Laying Clause did not affect the validity of the order and make it void. In *Quarry Owners' Association v. State of Bihar & Others* (2000) 8 SCC 655, this court while examining the scope of Section 28(3) of the Mines and Minerals (Regulation and Development) Act 1957, stated that when a statue required the placement of a notification before the State Legislature it is the obligation of the state to place the same with the specific note before each House of State Legislature. Even if it had not been done, the State could place the same before the House at the earliest and the omission to comply with it would not affect the validity of the notifications and their coming into force. Direction was issued to the State Government to lay notifications at the earliest.

50. Section 140 does not require the State Legislature to give its approval for bringing into effect the notification, but a

positive act by the Legislature has been contemplated in Section 140 to make the notification effective, that does not mean that failure to lay the notification has affected the legal validity, its effect or the action taken precedent to that notification. We, therefore, hold that non-laying of the notification dated 08.03.1994 before the State Legislature has not affected its validity or the action taken precedent to that notification. We have now, *vide* our order dated 24.02.2011, directed the State Government to place the notification before both the Houses of the State Legislature following the judgment in *Quarry Owners'* case (supra). Therefore, the defect, if any, of not placing the notification has been cured.

51. We may also consider the effect of Section 80 of the Land Reforms Act on Section 79-B. Section 80 prohibits transfer of any land to non-agriculturalist. Section 80(1)(iv), states that it shall not be lawful to sell, gift, exchange or lease of any land, in favour of a person, who is disentitled under Section 79-B, to acquire or hold any land. The expression "land" has been defined under Section 2(18) which is all comprehensive and takes in agricultural lands, that is land which is used or capable of being used for agriculture, but for the exemption granted under Section 107(1)(vi) lands used for the cultivation of linaloe would have fallen under Section 2(18). But, so far the company is concerned, the prohibition was total and complete since Section 79-B states that it would not be lawful for a company to hold "any land", with effect and from the date of the commencement of the amending Act. The Company, therefore, could not have held the land used for the cultivation of Linaloe on the date of the commencement of the Act. Further on withdrawal of exemption *vide* notification dated 08.03.94 the Company was disentitled to hold the land belonging to Roerichs' since the same would be governed by the provisions of the Land Reforms Act.

52. We also find no force in the contention that opportunity of hearing is a pre-condition for exercising powers under

Section 110 of the Act. No such requirement has been provided under Section 107 or Section 110. When the exemption was granted to Roerichs' no hearing was afforded so also when the exemption was withdrawn by the delegate. It is trite law that exemption cannot be claimed as a matter of right so also its withdrawal, especially when the same is done through a legislative action. Delegated legislation which is a legislation in character, cannot be questioned on the ground of violation of the principles of natural justice, especially in the absence any such statutory requirement. Legislature or its delegate is also not legally obliged to give any reasons for its action while discharging its legislative function. See – *State of Punjab v. Tehal Singh and Ors.* (2002) 2 SCC 7**;** *West Bengal Electricity Regulatory Commission v. CESC Ltd. etc. etc.* (2002) 8 SCC 715**;** *Pune Municipal Corporation and Anr. v. Promoters and Builders Association and Anr.* (2004) 10 SCC 796; *Bihar State Electricity Board v. Pulak Enterprises and Ors.* (2009) 5 SCC 641.

53. We, therefore, repel the challenge on the validity of Section 110 of the Karnataka Land Reforms Act as well as the notification dt.8.3.1994 and we hold that the land used for linaloe cultivation would be governed by the provisions of the Land Reforms Act which is protected under Article 31B of the Constitution having been included in the IXth Schedule.

PART-II

Constitutional Validity of the Acquisition Act

54. The State Government after withdrawing the exemption granted to the lands used for Linaloe cultivation, felt the necessity to take effective and proper steps to manage the estate, its tree growth, preserve paintings, artefact and other valuables of Roerichs' and their transferees and to establish an Art Gallery-cum-Museum. For the said purpose initially the State issued an ordinance, namely, the Roerich and Devika Rani Roerich Estate (Acquisition and Transfer) Ordinance 1992,

which was sent for the approval of the President of India. In the meanwhile Roerich couple passed away and the ordinance was returned to make sufficient amendments. After necessary amendments ordinance of 1995 was issued. However, the ordinance was returned by the Government of India informing that it had no objection to introduce legislation as a bill and hence the same with requisite amendments was placed before the Legislative Assembly and the Legislative Council. The Acquisition Act was then passed and subsequently got the assent of the President on 15.11.96 and was brought into force on 21.11.1996.

55. The Act was questioned by filing a writ petition before the High Court of Karnataka on the ground that enactment providing for compulsory acquisition of Titgunni Estate was not for public purpose and the compensation provided thereunder was illusory. During the pendency of the writ petition the Act was amended by the Amendment Act 2001, w.e.f. 01.11.96 by inserting a new Section 19A to provide clarity for payment of amount to the owners / interested persons. The challenge against the validity of the Act and its provisions were repelled by the High Court except in relation to certain provisions, providing for the inclusion of certain members in the board of directors constituted under the Act.

56. Shri Andhyarujina, submitted that the impugned Act does not contain any provision for protection of agrarian reforms and hence not protected by the provisions of Article 31A and hence not saved from challenges on the ground of violation of Articles 14 and 19 of the Constitution. Learned counsel also pointed out that the management and protection of land used for linaloe cultivation and the preservation of artefacts, paintings etc. are not part of agrarian reforms. Learned senior counsel submitted that concept of agrarian reforms is a dynamic one and this Court in various decisions examined its meaning and content. Reference was made to the judgments of this Court in *State of Kerala v. Gwalior Rayon Silk Manufacturing (Wvg.)*

Co. Limited (1993) 2 SCC 713, *Kavalappara Kottarathil Kochuni & Others v. State of Madras & Others* (1960) 3 SCR 887, *P. Vajravelu Mudaliar v. Special Deputy Collector, Madras and Another* (1965) 1 SCR 614, *Balmadies Plantations Ltd. & Others v. State of Tamil Nadu* (1972) 2 SCC 133.

57. Shri Andhyarujina, also submitted that the impugned Act is *ex-facie* repugnant to the provisions of Land Acquisition Act, 1894 and hence void under Article 254(1) due to want of Presidential assent on repugnancy. Learned Counsel elaborately referred to the various provisions of the impugned Act and the Land Acquisition Act to bring home his point on repugnancy between both the Legislations, the former being a State Legislation and the latter being a Central Legislation. Learned Counsel specifically pointed out that the procedure and the principle for the acquisition of land as well as determination of compensation, etc., under both the Acts are contrary to each other and hence the impugned Act can be saved only if Presidential assent is obtained under Article 254(2) of the constitution. Learned Counsel submitted that the Acquisition Act is in pith and substance a law on acquisition and presidential assent under Article 254(2), was warranted to save that Legislation.

58. Shri K.N. Bhat, learned senior counsel appearing for the appellants in CA No.6521-6537 of 2003 submitted that Article 300A is almost a replica of Article 31(1), hence, all the judicial pronouncements rendered by this Court on Article 31(1) would equally apply when we interpret Article 300A. Learned counsel also referred to the view expressed by Justice Subba Rao in *P. Vajravelu Mudaliar's* case (supra) and also referred to *Subodh Gopal Bose v. Bejoy Kumar Addya and Others* **(**1973) 2 SCC 105 and few other decisions. Learned counsel submitted that the concept of eminent domain has to be read into Article 300A, which is an over-arching principle. Learned counsel also submitted that the concept of reasonableness,

could be the touchstone while interpreting a statute enacted to deprive a person of his property under Article 300A. Learned counsel also referred to the Judgment of this Court in *Kavalappara Kottarathil Kochuni's* case (supra) and submitted that a person can be deprived of his property only by a valid law which can be tested in the light of Articles 14 and 21.

59. Shri Dushyant R. Dave, learned senior counsel appearing for the appellants in CA No.6520 of 2003 also supported the arguments of Shri Andhyarujina and submitted that the concept of eminent domain be read into Article 300A of the Constitution and the impugned Act is unconstitutional for not providing adequate compensation to the transferors. Reference was made to several decisions of this Court including the decisions in *P. Vajravelu Mudaliar v. Special Deputy Collector, Madras & Anr.* (1965) 1 SCR 614**;** *Rustom Cavasjee Cooper (Banks Nationalisation) v. Union of India* (1970) 1 SCC 248**;** *Deputy Commissioner and Collector, Kamrup & Ors. v. Durga Nath Sharma* (1968) 1 SCR 561 and *Reliance Energy Limited & Anr. v. Maharashtra State Road Development Corporation Ltd. & Ors.* (2007) 8 SCC 1 etc.

60. Shri Andhyarujina, referring to the letter dated 20.09.1996 submitted that the State of Karnataka had sought the assent of the President only for the specific purpose of Clause(a) of Clause (1) of Article 31-A of the Constitution and not for any other purpose and the assent was given only in response to the said proposal of the State Government and there had never been any proposal pointing out the repugnancy between the impugned Act and the Land Acquisition Act and hence the impugned Act is void of *ex-facie* repugnancy between provisions of the existing Land Acquisition Act 1894 and the impugned Act. In support of his contentions learned counsel placed reliance on judgments of this Court in *Gram Panchayat of Village Jamalpur v. Malwinder Singh & Others* (1985) 3 SCC 661; *Kaiser-I-Hind Pvt. Ltd. & Another v. National Textile Corporation (Maharashtra North) Ltd. & Others* (2002) 8 SCC 182.

61. Shri Patil, learned senior counsel appearing for the Respondent-State submitted that Acquisition Act is not open to challenge on the ground of violation of Article 14 or 19 since the same is protected under Article 31A and the assent of the President was obtained. Learned counsel submitted that the impugned Act was enacted in public interest to provide for acquisition of Roerich's Estate, to secure its proper management and to preserve the valuable tree growth, paintings, art objects, carvings and for the establishment of an art gallery-cum-museum. Learned counsel submitted that general scheme of the Acquisition Act is for the preservation of Linaloe cultivation and other tree growth hence constitutes a measure of agrarian reforms and in any view Act does not violate Article 14 or 19 of the Constitution of India.

62. Learned senior counsel also submitted that Acquisition Act was never challenged by the appellants before the High Court on the ground of repugnancy or on the ground of absence of Presidential assent under Article 254(2) of the Constitution. Learned counsel submitted that such a plea cannot be raised for the first time before this Court since the same raises questions of facts. Reference was made to the decisions of this Court in *Engineering Kamgar Union v. Electro Steels Castings Ltd. and Another* (2004) 6 SCC 36; *Bhuwalka Steel Industries Ltd. v. Bombay Iron and Steel Labour Board and Another* (2010) 2 SCC 273. Learned counsel submitted that in any view assent of the President was sought for and obtained which satisfies the requirements of Article 254(2) as well as the proviso to Article 31A of the Constitution.

63. Learned counsel submitted that the Bill was referred for the assent of the President with a specific note that subject matter of the bill falls under Entry 18 of List II and Entry 42 of List III of the VIIth Schedule of the Constitution of India. Learned counsel submitted that the main object of the Acquisition Act is not being "Acquisition and Requisition of Property" and the Legislation in pith and substance is in respect of "land" under

Entry 18 of List II of the Constitution and there is no repugnancy between State and Central Legislation and hence no assent of the President under Article 254(2) was warranted. In support of his contention learned counsel also relied on the judgments of this Court in *P.N. Krishnan Lal & others vs. Govt. of Kerala & Another* (1995) Suppl. (2) SCC 187 and *Offshore Holdings Pvt. Ltd. vs. Bangalore Development Authority and Ors.* (2011) 3 SCC 139.

64. After passing the Roerich and Devika Rani Roerich Estate (Acquisition and Transfer) Bill 1996 by the Legislative Assembly and Legislative Council, on 10.09.1996, a request was put up in file No. Law 28 LGN 92 stating that subject matter of the Bill would fall under Entry 18 of List II and Entry 42 of List III of the VIIth Schedule of the Constitution pointing out that the State Legislative would be competent to enact such a legislation. Note also indicated that the provisions of draft bill would attract sub-clause (a) of Clause (1) of Article 31A of the Constitution inasmuch as rights of the land owners were proposed to be extinguished, and hence required the assent of the President in accordance with the proviso to Article 31A of the Constitution to make it free from attack and to protect it from being declared as void on the ground of inconsistency or violation of Articles 14 and 19 of the Constitution of India. Further, it was also proposed to place the Bill before the Governor as provided under Article 200 of the Constitution of India for consideration of the President under Clause 2 of Article 254 of the Constitution. Later, a letter dated 20.09.1996 was addressed by the State of Karnataka to the Secretary to the Government of India, Ministry of Home Affairs requesting to obtain the assent of the President. No reference to Article 254(2) was, however, made in that letter but the operative portion of the letter reads as follows :-

> "The subject matter of the Bill falls under Entry 18 of List II and Entry 42 of List III of the 7th Schedule to the Constitution of India. Therefore, the State Legislature is competent to enact the measure.

Since the provisions of the Bill would attract sub-clause (a) of Clause (1) of Article 31A of the Constitution, the Bill has to be reserved for the assent of the President in accordance with the proviso to Clause (1) thereof in order to get the protection of that Article. Accordingly, the Governor has reserved the Bill under Article 200 of the Constitution of India for the consideration of the President."

Later, the assent of the President was obtained on 15.11.96.

65. The plea of repugnancy can be urged only if both the legislations fall under the Concurrent List. Under Article 254 of the Constitution, a State law passed in respect of a subject matter comprised in List III would be invalid if its provisions are repugnant to a law passed on the same subject by Parliament and that too only if both the laws cannot exist together. The question of repugnancy under Article 254 of the Constitution arises when the provisions of both laws are fully inconsistent or are absolutely irreconcilable and it is impossible without disturbing the other, or conflicting results are produced, when both the statutes covering the same field are applied to a given set of facts. Repugnancy between the two statutes would arise if there is a direct conflict between the two provisions and the law made by the Parliament and the law made by the State Legislature occupies the same filed. Reference may be made to the decisions of this Court in *Deep Chand v. State of U.P. & Others* AIR 1959 SC 648; *Prem Nath Kaul v. State of Jammu & Kashmir,* AIR 1959 SC 749; (1959) Supp. (2) SCR 270, *Ukha Kolhe v. State of Maharashtra* AIR 1963 SC 1531; *Bar Council of Uttar Pradesh v. State of U.P & Another* (1973) 1 SCC 261; *T. Barai v. Henry Ah Hoe & Another (1983) 1 SCC 177; Hoechst Pharmaceuticals v. State of Bihar* (1983) 4 SCC 45; *Lingappa Pochanna Appelwar v. State of Maharashtra & Another* (1985) 1 SCC 479; and *Vijay Kumar Sharma & Others v. State of Karnataka & Others* (1990) 2 SCC 562.

66. When the repugnancy between the Central and State

Legislations is pleaded we have to first examine whether the two legislations cover or relate to the same subject matter. The test for determining the same is to find out the dominant intention of the two legislations and if the dominant intention of the two legislations is different, they cover different subject matter then merely because the two legislations refer to some allied or cognate subjects, they do not cover the same field. A provision in one legislation to give effect to its dominant purpose may incidentally be on the same subject as covered by the provision of the other legislation, but such partial coverage of the same area in a different context and to achieve a different purpose does not bring about the repugnancy which is intended to be covered by Article 254(2). In other words, both the legislations must be substantially on the same subject to attract Article 254. In this connection, reference may be made to the decisions of this Court in *Municipal Council Palai v. T. J. Joseph* (1964) 2 SCR 87; *Ch. Tika Ramji v. State of U.P.* 1956 SCR 393; *State of Karnataka v. Shri Ranganatha Reddy* (1977) 4 SCC 471; *M. Karunanidhi v. Union of India & Another* (1979) 3 SCC 431; and *Vijay Kumar Sharma& Others v. State of Karnataka & Others* (1990) 2 SCC 562.

67. We are of the considered view that the Acquisition Act, in this case, as rightly contended by the State, primarily falls under Entry 18 List II, since the dominant intention of the legislature was to preserve and protect Roerichs' Estate covered by the provisions of the Land Reforms Act, on the State Government withdrawing the exemption in respect of the land used for linaloe cultivation. The Acquisition Act, though primarily falls under Entry 18 List II incidentally also deals with the acquisition of paintings, artefacts and other valuable belongings of Roerichs' and, hence, the Act partly falls under Entry 42 List III as well. Since the dominant purpose of the Act was to preserve and protect Roerichs' Estate as part of agrarian reforms, the inclusion of ancillary measures would not throw the law out of the protection of Article 31A(1)(a). On the other hand, the Land Acquisition Act, 1894 is an act which fell

exclusively under Entry 42 List III and enacted for the purpose of acquisition of land needed for public purposes for companies and for determining the amount of compensation to be made on account of such acquisition, which is substantially and materially different from the impugned Act whose dominant purpose is to preserve and protect "estate" governed by Art.31A(a) read with Art.31A(2)(a)(iii) of the Constitution.

68. We are, therefore, of the considered view that no assent of the President was required under Article 254(2) of the Constitution to sustain the impugned Act, which falls under Article 31A(1)(a) of the Constitution, for which the assent of the President was obtained. The contention of the counsel that the Acquisition Act was invalid due to repugnancy is, therefore, rejected.

69. We may also state that the Constitution (17th Amendment) Act, 1964 extended the scope of the expression "estate" in Art.31A(a) as to protect all legislations on agrarian reforms and the expression "estate" was given a wider meaning so as to bring within its scope lands in respect of which provisions are normally made in land reforms enactments. Art.31A(2)(a)(iii) brings in any land held or let for the purpose of agriculture or for purpose ancillary thereto, including waste or vacant land, forest land, land for pasture or sites of buildings and other structure occupied by the cultivators of land etc.

70. In *Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd's* case (supra), this Court held that the concept of agrarian reform is a complex and dynamic one promoting wider interests than conventional reorganisation of the land system or distribution of land, which is intended to realise the social function of the land and includes various other proposals of agrarian reforms. To test whether the law was intended for agrarian reforms, the court is required to look to the substance of the Act and not its mere outward form. In *Kunjukutty Sahib v. State of Kerala & Another* (1972) 2 SCC 364, this Court held that any provision for promotion of agriculture or agricultural population is an

agrarian reform, which term is wider than land reforms. In *Mahant Sankarshan Ramanuja Das Goswami etc., etc. v. State of Orissa & Another* (1962) 3 SCR 250, this Court held that a law for the acquisition of an estate etc. does not lose the protection of Article 31A(1) merely because ancillary provisions are included in such law.

71. The Acquisition Act was enacted in public interest, to preserve and protect the land used for the linaloe cultivation and its tree growth as part of agrarian reforms which is its dominant purpose. Proposal to preserve the paintings, artefacts, carvings and other valuables and to establish an Art-Gallery-cum-Museum are merely ancillary to the main purpose. The dominant purpose of the Act is to protect and preserve the land used for Linaloe cultivation, a part of agrarian reforms. The Act is, therefore, saved by the provisions of Art.31A(1)(a).

72. We, therefore, hold that Roerich's estate falls within the expression "estate" under clause (2) of Article 31A of the Constitution and the Act has obtained the assent of the President, hence, is protected from the challenge under Articles 14 and 19 of the Constitution of India. No arguments have been raised on the applicability or otherwise of Article 31C and hence it is unnecessary to examine whether the Act is protected by Article 31C of the Constitution or not.

Part-III

Article 300A of the Constitution and the Acquisition Act

73. We will now examine the validity of the Acquisition Act on the touchstone of Article 300A of the Constitution and examine whether the concept of eminent domain be read into Art.300A and in the statute enacted to deprive a person of his property.

74. Shri Andhyarujina, learned senior counsel submitted that Art.300A and the statute framed should satisfy the twin principles of public purpose and adequate compensation.

Learned counsel submitted that whenever there is arbitrariness in State action whether it be of the legislature or of the executive or of an authority under Article 12, Article 14 springs into action and strikes down such State action as well as the legislative provisions, if it is found to be illegal or disproportionate. Reference was made to the judgments of this Court in *Kavalappara Kottarathil Kochuni's* case (supra), *E.P Royappa v. State of Tamil Nadu & Another* (1974) 4 SCR 3; *Maneka Gandhi v. Union of India & Another* 1978 (1) SCC 248; *Ramana Dayaram Shetty v. International Airport Authority of India & Others* (1979) 3 SCC 489; *Kasturi Lal Lakshmi Reddy, represented by its Partner Kasturi Lal, Jammu & Others v. State of Jammu & Kashmir & Another.* (1980) 4 SCC 1. Learned counsel submitted that even a tax law can be discriminatory and violative of Article 14 or confiscatory and hence can be subjected to judicial review. Learned counsel made reference to the decisions of this court in *Chhotabhai Jethabhai Patel & Co. v. Union of India & Another* (1962) Supp (2) SCR 1 and *Kunnathat Thathunni Moopil Nair v. State of Kerala & Another* AIR 1961 SC 552.

75. Shri Andhyarujina also submitted that the Act does not provide for any principle or guidelines for the fixation of the compensation amount and the amount fixed is illusory, compared to the value of the property taken away from the company in exercise of the powers of eminent domain. Learned senior counsel submitted that the inherent powers of public purpose and eminent domain are embodied in Article 300A, and Entry 42 List III, "Acquisition and Requisitioning of Property" which necessarily connotes that the acquisition and requisitioning of property will be for a public use and for compensation, as it is the legislative head for eminent domain. Learned senior counsel also submitted that the twin requirements of public purpose and compensation though seen omitted from Article 300A, but when a person is deprived of his property, those limitations are implied in Article 300A as

well as Entry 42 List III and a Constitutional Court can always examine the validity of the statute on those grounds.

76. Learned senior counsel traced the legislative history and various judicial pronouncements of this Court in respect of Articles 19(1)(f), 31(1) and 31(2) and submitted that those are useful guides while interpreting Article 300A and the impugned Act. Reference was made to the judgments of this Court in *State of Bihar v. Maharajadhiraja Sir Kameshwar Singh of Darbhanga and Ors.* (1952) 1 SCR 889; *State of West Bengal v. Union of India* (1964) 1 SCR 371; *Sub-Committee of Judicial Accountability v. Union of India & Others* (1991) 4 SCC 699; *I.R. Coelho(Dead) by LRs. v. State of Tamil Nadu* (2007) 2 SCC 1; *D.C. Wadhwa & Others v. State of Bihar & Others* (1987) 1 SCC 378 and *Glanrock Estate Private Limited. v. State of Tamil Nadu* (2010) 10 SCC 96.

77. Learned counsel further submitted that the action depriving a person of just and fair compensation is also amenable to judicial review under Articles 32 and 226 of the Constitution of India, which is the quintessence of the rule of law, otherwise the Constitution would be conferring arbitrary and unbridled powers on the Legislature, to deprive a person of his property. Reference was made to the provisions of the Constitutions of Australia and Republic of South Africa.

78. Mr. Patil, on the other hand, contended that, having regard to the express language of Article 300A, the common law limitations of eminent domain cannot be read into that Article especially when, the right to property is no more a Fundamental Right on deletion of Article 19(1)(f), Article 31(1) and (2). Learned senior counsel submitted that the history of Constitutional Amendments shows that the Legislature in its wisdom expressed its intention to do away with the requirement of public purpose and compensation. Further, the adequacy of the amount fixed by Legislature is also not amenable to judicial review.

79. Learned senior counsel also referred to the decisions of this Court reported in *Subodh Gopal Bose's* case (supra), *Dwarakadas Shrinivas* (1954) 1 SCR 674; *Sir Kameshwar Singh's* case (supra), *P. Vajravelu Mudaliar's* case (supra) and *State of Gujarat v. Shantilal Mangaldas & Others* (1969) 1 SCC 509.

80. Learned senior counsel submitted that the impugned Act has provided Rs.5 crore to meet various priorities, which cannot be said to be illusory, especially when the Government has withdrawn the exemption granted with respect to the land used for linaloe cultivation. Further, it was pointed out but for impugned Act the Roerich's or the transferors would have got only Rs.2 lakhs under Section 72 of the Land Reforms Act, if they were in possession and ownership of the land.

81. Learned counsel submitted, in any view, sale deeds dated 23.03.1991 and 16.02.1992 would show that the company had paid only a total sale consideration of Rs.1,46,10,000 for purchasing the lands from Roerichs' but the transferees/owners and other claimants, if any, would get more than what they had paid. Learned counsel also submitted that Section 19A also provides for principles/machinery for payment of amount to the owners/interested persons and the amount is to be apportioned among owners, transferees and interested persons having regard to value on the appointed day i.e. 18.11.1996. Further learned counsel also submitted that the company has not perfected their title or possession over the land and litigation is pending in the civil court between the company and the other claimants.

82. Right to life, liberty and property were once considered to be inalienable rights under the Indian Constitution, each one of these rights was considered to be inextricably bound to the other and none would exist without the other. Of late, right to property parted company with the other two rights under the Indian Constitution and took the position of a statutory right. Since ancient times, debates are going on as to whether the

right to property is a "natural" right or merely a creation of 'social convention' and 'positive law' which reflects the centrality and uniqueness of this right. Property rights at times compared to right to life which determine access to the basic means of sustenance and considered as prerequisite to the meaningful exercise of other rights guaranteed under Article 21.

83. Eminent thinkers like *Hugo Grotius, Pufendorf, John Locke, Rousseau and William Blackstone* had expressed their own views on the right to property. Lockean rhetoric of property as a natural and absolute right but conventional in civil society has, its roots in Aristotle and Aquinas, for Grotius and Pufendorf property was both natural and conventional. Pufendrof, like Grotius, never recognised that the rights of property on its owners are absolute but involve definite social responsibilities, and also held the view that the private property was not established merely for the purpose "allowing a man to avoid using it in the service of others, and to brood in solitude over his hoard or riches." Like Grotius, Pufendorf recognised that those in extreme need may have a right to the property of others. For Rousseau, property was a conventional civil right and not a natural right and private property right was subordinate to the public interest, but Rousseau insisted that it would never be in the public interest to violate them. With the emergence of modern written constitutions in the late eighteenth century and thereafter, the right to property was enshrined as a fundamental constitutional right in many of the Constitutions in the world and India was not an exception. Blackstone declared that so great is the regime of the law for private property that it will not authorise the land violation if it – no, not even for the general good of the whole community. Writings of the above mentioned political philosophers had also its influence on Indian Constitution as well.

EMINENT DOMAIN

84. *Hugo Grotius* is credited with the invention of the term *"eminent domain" (jus or dominium eminens)* which implies

that public rights always overlap with private rights to property, and in the case of public utility, public rights take precedence. Grotius sets two conditions on the exercise of the power of eminent domain: the first requisite is public advantage and then compensation from the public funds be made, if possible, to the one who has lost his right. Application of the above principle varies from countries to countries. Germany, America and Australian Constitutions bar uncompensated takings. Canada's constitution, however, does not contain the equivalent of the taking clause, and eminent domain is solely a matter of statute law, the same is the situation in United Kingdom which does not have a written constitution as also now in India after the 44th Constitutional Amendment.

85. Canada does not have an equivalent to the Fifth Amendment taking clause of the U.S. Constitution and the federal or provincial governments are not under any constitutional obligation to pay compensation for expropriated property. Section 1(a) of the Canadian Bill of Rights does state that, "The right of the individual to life, liberty, security of a person and enjoyment of property and the right not to be deprived thereof except by due process of law."

86. In Australia, Section 51 (xxxi) of the Constitution permits the federal government to make laws with respect to "the acquisition of property on just terms from any State or persons for any purpose in respect of which the Parliament has powers to make laws."

87. Protocol to the European Convention on Human Rights and Fundamental Freedom, Article 1 provides that every natural or legal person is entitled to the peaceful enjoyment of his possession and no one shall be deprived of his possessions except in public interest and subject to the conditions provided by law and by the several principles of International law.

88. Fifth Amendment of the U.S. Constitution says that the government shall not take private property for public use without

paying just compensation. This provision referred to as the eminent domain, or taking clause has generated an enormous amount of case laws in the United States of America.

89. The US Supreme Court in *Hawaii Housing Authority v. Midkiff,* 467 US 229 (1984) allowed the use of eminent domain to transfer land from lesser to lessees. In that ruling the court held the government does not itself have the use the property to legitimate taking, it is a takings purpose and not its mechanics that must pass the muster under the public use clause. The US Supreme Court later revisited the question on what constitute public use in *Kelo v. City of New London* (545 US 469 (2005). In that case the Court held that a plan of economic development, that would primarily benefit a major pharmaceutical company, which incidentally benefited the public in the nature of increased employment opportunities and increased tax benefits was a 'public use'. The Court rejected the arguments that takings of this kind, the Court should require a 'reasonable certainty' that the respective public benefits will actually accrue.

90. Eminent domain is distinguishable alike from the police power, by which restriction are imposed on private property in the public interest, e.g. in connection with health, sanitation, zoning regulation, urban planning and so on from the power of taxation, by which the owner of private property is compelled to contribute a portion of it for the public purposes and from the war-power, involving the destruction of private property in the course of military operations. The police power fetters rights of property while eminent domain takes them away. Power of taxation does not necessarily involve a taking of specific property for public purposes, though analogous to eminent domain as regards the purposes to which the contribution of the taxpayer is to be applied. Further, there are several significant differences between regulatory exercises of the police powers and eminent domain of deprivation of property. Regulation does not acquire or appropriate the property for the

State, which appropriation does and regulation is imposed severally and individually, while expropriation applies to an individual or a group of owners of properties.

91. The question whether the "element of compensation" is necessarily involved in the idea of eminent domain arouses much controversy. According to one school of thought (See Lewis, Eminent Domain, 3rd Edition, 1909) opined that this question must be answered in the negative, but another view (See Randolph Eminent Domain in the United States (Boston 1894 [AWR]), the claim for compensation is an inherent attribute of the concept of eminent domain. Professor Thayer (cases on Constitutional law Vol 1.953), however, took a middle view according to which the concept of eminent domain springs from the necessity of the state, while the obligation to reimburse rests upon the natural rights of individuals. Right to claim compensation, some eminent authors expressed the view, is thus not a component part of the powers to deprive a person of his property but may arise, but it is not as if, the former cannot exist without the other. Relationship between Public Purpose and Compensation is that of "substance and shadow". Above theoretical aspects of the doctrine have been highlighted only to show the reasons, for the inclusion of the principle of eminent domain in the deleted Article 31(2) and in the present Article 30(1A) and in the 2nd proviso of Article 31A of our Constitution and its apparent exclusion from Article 300A.

92. Our Constitution makers were greatly influenced by the Western doctrine of eminent domain when they drafted the Indian Constitution and incorporated the right to property as a Fundamental Right in Article 19(1)(f), and the element of public purpose and compensation in Articles 31(2). Of late, it was felt that some of the principles laid down in the Directive Principles of State Policy, which had its influence in the governance of the country, would not be achieved if those articles were literally interpreted and applied. The Directive Principles of the state policy lay down the fundamental principles for the governance

of the country, and through those principles, the state is directed to secure that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. Further, it was also noticed that the fundamental rights are not absolute but subject to law of reasonable restrictions in the interest of the general public to achieve the above objectives specially to eliminate Zamindari system.

93. While examining the scope of the Bihar Land Reforms Act, 1950 conflicting views were expressed by the Judges with regard to the meaning and content of Article 19(1)(f) and Article 31 as reflected in *Sir Kameshwar Singh's* case (supra). Suffice it to say that the Parliament felt that the views expressed by the judges on the scope of Articles 19(1)(f) and 31 might come as a stumbling block in implementing the various welfare legislations which led to the First Constitutional Amendment 1951 introducing Articles 31A and 31B in the Constitution.

94. Article 31A enabled the legislature to enact laws to acquire estates which also permitted the State in taking over of property for a limited period either in the 'public interest' or to 'secure the proper management of the property', amalgamate properties, and extinguish or modify the rights of managers, managing agents, directors, stockholders etc. Article provides that such laws cannot be declared void on the grounds that they are inconsistent with Articles 14 and 19. Article 31B protected the various lands reform laws enacted by both the Parliament and the State Legislatures by stating that none of these laws, which are to be listed in the Ninth Schedule, can become void on the ground that they violated any fundamental right.

95. This Court in a series of decisions viz. in *State of West Bengal v. Bella Banerjee & Others* AIR 1954 SC 170 and *State of West Bengal v. Subodh Gopal Bose* AIR 1954 SC

92 took the view that Article 31, clauses (1) and (2) provided for the doctrine of eminent domain and under clause (2) a person must be deemed to be deprived of his property if he was "substantially dispossessed" or his right to use and enjoy the property was "seriously impaired" by the impugned law. The Court held that under Article 31(1) the State could not make a law depriving a person of his property without complying with the provisions of Article 31(2). In *Bella Banerjee's* case (supra), this Court held that the legislature has the freedom to lay down principles which govern the determination of the amount to be given to the owners of the property appropriated, but the Court can always, while interpreting Article 31(1) and Article 31(2), examine whether the amount of compensation paid is just equivalent to what the owner had been deprived of.

96. The Parliament, following the above judgment, brought in the Fourth Amendment Act of 1955 and amended clause (2) of Article 31 and inserted clause (2-A) to Article 31. The effect of the amendment is that clause (2) deals with acquisition or requisition as defined in clause (2-A) and clause (1) covers deprivation of a person's property by the state otherwise than by acquisition or requisition. The amendment enabled the State to deprive a person of his property by law. Under amended clause (2), the property of a citizen could be acquired or requisitioned by law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of compensation or specifies the principles on which and the manner in which the compensation is to be determined. However, it was also provided that no such law could be called in question in any court on the ground that the compensation provided by that law was not adequate.

97. This Court in *Kavalappara Kottarathil Kochuni's* case (supra) held that Articles 31(1) and (2) are different fundamental rights and that the expression 'law" in Article 31(1) shall be a valid law and that it cannot be a valid law, unless it imposes a reasonable restriction in public interest within the meaning of Article 19(5) and therefore be justiciable.

98. The Constitution was again amended by the Seventeenth Amendment Act of 1964, by which the State extended the scope of Article 31A and Ninth Schedule to protect certain agrarian reforms enacted by the Kerala and Madras States and Jagir, Inam, muafi or any other grant, janmam, ryotwari etc. were included within the meaning of "estate". It also added the 2nd proviso to clause (1) to protect a person of being deprived of land less than the relevant land ceiling limits held by him for personal cultivation, except on payment of full market value thereof by way of compensation.

99. This Court in *P. Vajravelu Mudaliar's* case (supra) examined the scope of the Land Acquisition (Madras Amendment) Act 1961 by which the lands were acquired for the purpose of building houses which move was challenged under Articles 31 and 14. The Court held that if the compensation fixed was illusory or the principles prescribed were irrelevant to the value of the property at or about the time of acquisition, it could be said that the Legislature had committed a fraud on power and therefore the law was inadequate. Speaking for the Bench, Justice Subha Rao stated that "If the legislature, through its *ex facie* purports to provide for compensation or indicates the principles for ascertaining the same, but in effect and substance takes away a property without paying compensation for it, it will be exercising power it does not possess. If the Legislature makes a law for acquiring a property by providing for an illusory compensation or by indicating the principles for ascertaining the compensation which do not relate to the property acquired or to the value of such property at or within a reasonable proximity of the date of acquisition or the principles are so designed and so arbitrary that they do not provide for compensation at all, one can easily hold that the legislature made the law in fraud of its powers." Justice Subha Rao reiterated his view in *Union of India v. Metal Corporation of India Ltd. & Another* AIR 1967 SC 637.

100. In *Shantilal Mangaldas's case* (supra), the validity of

Bombay Town Planning Act 1958 was challenged before this Court on the ground that the owner was to be given market value of land at date of declaration of scheme, which was not the just equivalent of the property acquired, the Court held that after the Fourth Amendment resulting in the changes to Article 31(2) the question of 'adequacy of compensation' could not be entertained. Justice Hidayatullah stated that the stance taken in the previous case by Justice Subha Rao as *"obiter and not binding"*. The validity of the Banking Companies (Acquisition and Transfer of Undertakings) Act 1969 came up for consideration before the eleven judges Bench of this Court in *Rustom Cowasjee Cooper v. Union of India* (1970) 2 SCC 298. The Act, it was pointed out, did lay down principles for determination and payment of compensation to the banks, which was to be paid for in form of bonds, securities etc., and compensation would not fulfil the requirement of Article 31(2). A majority of the judges accepted that view and held that both before and after the amendment to Article 31(2) there was a right to compensation and by giving illusory compensation the constitutional guarantee to provide compensation for an acquisition was not complied with. The Court held that the Constitution guarantees a right to compensation – an equivalent in money of the property compulsorily acquired which is the basic guarantee and, therefore, the law must provide compensation, and for determining compensation relevant principles must be specified; if the principles are not relevant the ultimate value determined is not compensation.

101. The validity of Articles 19(1)(f) and (g) was also the subject matter of *I.C. Golaknath and Others v. State of Punjab,* AIR 1967 SC 1643. In that case, a large portion of the lands of Golak Nath family was declared surplus under the Punjab Security of Land Tenures Act 1953. They challenged the act on the grounds that it denied them their Constitutional Rights to acquire and hold property and practice any profession. Validity of Articles 19(1)(f) and (g), the 17th Amendment, the 1st Amendment and the 4th Amendment were also questioned.

Chief Justice Subha Rao speaking for the majority said that the Parliament could not take away or abridge the Fundamental Rights and opined that those rights form 'basic structure' of the Constitution and any amendment to the Constitution can be made to preserve them, not to annihilate.

102. The Parliament enacted the (24th Amendment) Act 1971, by which the Parliament restored the amending power of the Parliament and also extended the scope of Article 368 which authorised the Parliament to amend any part of the Constitution.

103. Parliament then brought in the 25th Amendment Act, 1971 by which Article 31(2) was amended by which private property could be acquired on payment of an "amount" instead of "compensation". A new Article 31(C) was also inserted stating that "no law giving effect to the policy of the State towards acquiring the principles specified in clause (b) or clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy.

104. The constitutionality of the above amendments was also the subject matter in *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala & Another* (1973) 4 SCC 225, which overruled the principles laid down in *Gokalnath's* case (supra) and held that a Constitutional amendment could not alter the basic structure of the Constitution, and hence Article 19(1)(f) was not considered to be a basic feature of the Constitution, as later explained in *Indira Nehru Gandhi v. Raj Narain* (1975) Supp. SCC 1.

105. We are in these cases, primarily concerned with the scope of the Forty Fourth Amendment 1978, which deleted Article 19(1)(f) and Article 31 from the Constitution of India and

introduced Article 300A, and its impact on the rights of persons, who are deprived of their properties. We have extensively dealt with the scope of Articles 19(1)(f) and Article 31 as interpreted in the various decisions of this Court so as to examine the scope and content of Article 300A and the circumstances which led to its introduction. The Forty Fourth Amendment Act, inserted in Part XII, a new chapter: "Chapter IV – Right to Property and inserted Article 300A, which reads as follows:-

> "No person shall be deprived of property save by authority of law."

106. Reference to the Statement of Objects and Reasons of the 44th Amendment in this connection may be apposite. Paragraphs 3, 4 and 5 of the Statement of Objects and Reasons reads as follows:

> "3. In view of the special position sought to be given to fundamental rights, the right to property, which has been the occasion for more than one Amendment of the Constitution, would cease to be a fundamental right and become only a legal right. Necessary amendments for this purpose are being made to Article 19 and Article 31 is being deleted. It would, however, be ensured that the removal of property from the list of fundamental rights would not affect the right of minorities to establish and administer educational institutions of their choice.
>
> 4. Similarly, the right of persons holding land for personal cultivation and within the ceiling limit to receive compensation at the market value would not be affected.
>
> 5. Property, while ceasing to be a fundamental right, would, however, be given express recognition as a legal right, provision being made that no person shall be deprived of his property save in accordance with law."

107. In *Jilubhai Nanbhai Khachar & Others v. State of*

Gujarat & Another (1995) Supp. 1 SC 596, this Court examined whether Section 69-A, introduced by the Gujarat Amendment Act 8 of 1982 in the Bombay Land Revenue Code which dealt with vesting mines, minerals and quarries in lands held by persons including *Girasdars* and *Barkhalidars* in the State violated Article 300A of the Constitution. The Court held that the 'property' in Article 300A includes mines, minerals and quarries and deprivation thereof having been made by authority of law was held to be valid and not violative of Article 300A.

108. Article 300A, when examined in the light of the circumstances under which it was inserted, would reveal the following changes:

1. Right to acquire, hold and dispose of property has ceased to be a fundamental right under the Constitution of India.

2. Legislature can deprive a person of his property only by authority of law.

3. Right to acquire, hold and dispose of property is not a basic feature of the Constitution, but only a Constitutional right.

4. Right to Property, since no more a fundamental right, the jurisdiction of the Supreme Court under Article 32 cannot be generally invoked, aggrieved person has to approach the High Court under Article 226 of the Constitution.

109. Arguments have been advanced before us stating that the concept of eminent domain and its key components be read into Article 300A and if a statute deprives a person of his property unauthorizedly, without adequate compensation, then the statute is liable to be challenged as violative of Articles 14, 19 and 21 and on the principle of rule of law, which is the basic structure of our Constitution. Further it was also contended that

the interpretation given by this Court on the scope of Article 31(1) and (2) in various judgments be not ignored while examining the meaning and content of Article 300A.

110. Article 300A proclaims that no person can be deprived of his property save by authority of law, meaning thereby that a person cannot be deprived of his property merely by an executive fiat, without any specific legal authority or without the support of law made by a competent legislature. The expression 'Property' in Art.300A confined not to land alone, it includes intangibles like copyrights and other intellectual property and embraces every possible interest recognised by law. This Court in *State of W. B. & Others v. Vishnunarayan & Associates (P) Ltd & Another* (2002) 4 SCC 134, while examining the provisions of the West Bengal Great Eastern Hotel (Acquisition of Undertaking) Act, 1980, held in the context of Article 300A that the State or executive offices cannot interfere with the right of others unless they can point out the specific provisions of law which authorises their rights. Article 300A, therefore, protects private property against executive action. But the question that looms large is as to what extent their rights will be protected when they are sought to be illegally deprived of their properties on the strength of a legislation. Further, it was also argued that the twin requirements of 'public purpose' and 'compensation' in case of deprivation of property are inherent and essential elements or ingredients, or "inseparable concomitants" of the power of eminent domain and, therefore, of entry 42, List III, as well and, hence, would apply when the validity of a statute is in question. On the other hand, it was the contention of the State that since the Constitution consciously omitted Article 19(1)(f), Articles 31(1) and 31(2), the intention of the Parliament was to do away the doctrine of eminent domain which highlights the principles of public purpose and compensation.

111. Seervai in his celebrated book 'Constitutional Law of India' (Edn. IV), spent a whole Chapter XIV on the 44th

Amendment, while dealing with Article 300A. In paragraph 15.2 (pages 1157-1158) the author opined that confiscation of property of innocent people for the benefit of private persons is a kind of confiscation unknown to our law and whatever meaning the word "acquisition" may have does not cover "confiscation" for, to confiscate means "to appropriate to the public treasury (by way of penalty)". Consequently, the law taking private property for a public purpose without compensation would fall outside Entry 42 List III and cannot be supported by another Entry in List III. Requirements of a public purpose and the payment of compensation according to the learned author be read into Entry 42 List III. Further the learned author has also opined that the repeal of Article 19(1)(f) and 31(2) could have repercussions on other fundamental rights or other provisions which are to be regarded as part of the basic structure and also stated that notwithstanding the repeal of Article 31(2), the word "compensation" or the concept thereof is still retained in Article 30(1A) and in the second *proviso* to Article 31A(1) meaning thereby that payment of compensation is a condition of legislative power in Entry 42 List III.

112. Learned senior counsel Shri T.R. Andhyarujina, also referred to the opinion expressed by another learned author Prof. P.K. Tripathi, in his article "Right to Property after 44th Amendment – Better Protected than Ever Before" (reported in AIR 1980 J pg. 49-52). Learned author expressed the opinion and the right of the individual to receive compensation when his property is acquired or requisitioned by the State, continues to be available in the form of an implied condition of the power of the State to legislate on "acquisition or requisition of property" while all the exceptions and limitations set up against and around it in Article 31, 31A and 31B have disappeared. Learned author opined that Article 300A will require obviously, that the law must be a valid law and no law of acquisition or requisitioning can be valid unless the acquisition or requisition is for a public purpose, unless there is provision in law for

paying compensation, will continue to have a meaning given to it, by *Bela Banerjee's* case (supra).

113. Learned author, Shri S.B. Sathe, in his article "Right to Property after the 44th Amendment" (AIR 1980 Journal 97), to some extent, endorsed the view of Prof. Tripathi and opined that the 44th amendment has increased the scope of judicial review in respect of right to property. Learned author has stated although Article 300A says that no one shall be deprived of his property save by authority of law, there is no reason to expect that this provision would protect private property only against executive action. Learned author also expresses the wish that Article 21 may provide viable check upon Article 300A.

114. Durga Das Basu in his book "Shorter Constitution of India", 13th Edition, dealt with Article 300A in Chapter IV wherein the learned author expressed some reservation about the views expressed by Seervai, as well as Prof. Tripathi Learned author expressed the view, that after the 44th amendment Act there is no express provision in the Constitution outside the two cases specified under Article 30(1A) and the second *proviso* to 31(1A) requiring the State to pay compensation to an expropriated owner. Learned author also expressed the opinion that no reliance could be placed on the legislative Entry 42 of List III so as to claim compensation on the touchstone of fundamental rights since the entry in a legislative list does not confer any legislative power but only enumerates fields of legislation. Learned counsel on the either side, apart from other contentions, highlighted the above views expressed by the learned authors to urge their respective contentions.

115. Principles of eminent domain, as such, is not seen incorporated in Article 300A, as we see, in Article 30(1A), as well as in the 2nd proviso to Article 31A(1) though we can infer those principles in Article 300A. Provision for payment of compensation has been specifically incorporated in Article 30(1A) as well as in the 2nd proviso to Article 31A(1) for

achieving specific objectives. Constitution's 44th Amendment Act, 1978 while omitting Article 31 brought in a substantive provision Clause (1A) to Article 30. Resultantly, though no individual or even educational institution belonging to majority community shall have any fundamental right to compensation in case of compulsory acquisition of his property by the State, an educational institution belonging to a minority community shall have such fundamental right to claim compensation in case State enacts a law providing for compulsory acquisition of any property of an educational institution established and administered by a minority community. Further, the second proviso to Article 31A(1) prohibits the Legislature from making a law which does not contain a provision for payment of compensation at a rate not less than the market value which follows that a law which does not contain such provision shall be invalid and the acquisition proceedings would be rendered void.

116. Looking at the history of the various constitutional amendments, judicial pronouncements and the statement of objects and reasons contained in the 44th Amendment Bill which led to the 44th Amendment Act we have no doubt that the intention of the Parliament was to do away with the fundamental right to acquire, hold and dispose of the property. But the question is whether the principles of eminent domain are completely obliterated when a person is deprived of his property by the authority of law under Article 300A of the Constitution.

PUBLIC PURPOSE

117. Deprivation of property within the meaning of Art.300A, generally speaking, must take place for public purpose or public interest. The concept of eminent domain which applies when a person is deprived of his property postulates that the purpose must be primarily public and not primarily of private interest and merely incidentally beneficial to the public. Any law, which deprives a person of his private

property for private interest, will be unlawful and unfair and undermines the rule of law and can be subjected to judicial review. But the question as to whether the purpose is primarily public or private, has to be decided by the legislature, which of course should be made known. The concept of public purpose has been given fairly expansive meaning which has to be justified upon the purpose and object of statute and the policy of the legislation. Public purpose is, therefore, a condition precedent, for invoking Article 300A.

COMPENSATION

118. We have found that the requirement of public purpose is invariably the rule for depriving a person of his property, violation of which is amenable to judicial review. Let us now examine whether the requirement of payment of compensation is the rule after the deletion of Article 31(2). Payment of compensation amount is a constitutional requirement under Article 30(1A) and under the 2nd *proviso* to Article 31A(1), unlike Article 300A. After the 44th Amendment Act, 1978, the constitutional obligation to pay compensation to a person who is deprived of his property primarily depends upon the terms of the statute and the legislative policy. Article 300A, however, does not prohibit the payment of just compensation when a person is deprived of his property, but the question is whether a person is entitled to get compensation, as a matter of right, in the absence of any stipulation in the statute, depriving him of his property.

119. Before answering those questions, let us examine whether the right to claim compensation on deprivation of one's property can be traced to Entry 42 List III. The 7th Constitutional Amendment Act, 1956 deleted Entry 33 List I, Entry 36 List II and reworded Entry 42 List III relating to "acquisition and requisitioning of property". It was urged that the above words be read with the requirements of public purpose and compensation. Reference was placed on the following judgment of this Court in support of that contention. In *State of Madras*

v. Gannon Dunkerley & Co. (Madras) Ltd. (1959) SCR 379 at 413), this Court considered Entry 48 List II of the Government of India Act, 1935, "tax on sales of goods", in accordance with the established legal sense of the word "sale", which had acquired a definite precise sense and held that the legislature must have intended the "sale", should be understood in that sense. But we fail to see why we trace the meaning of a constitutional provision when the only safe and correct way of construing the statute is to apply the plain meaning of the words. Entry 42 List III has used the words "acquisition" and "requisitioning", but Article 300A has used the expression "deprivation", though the word deprived or deprivation takes in its fold "acquisition" and "requisitioning", the initial presumption is in favour of the literal meaning since the Parliament is taken to mean as it says.

120. A Constitution Bench of this Court in *Hoechst Pharmaceuticals Ltd.'s case* (supra), held that the various entries in List III are not "powers" of Legislation but "fields" of Legislation. Later, a Constitution Bench of this Court in *State of West Bengal & Another v. Kesoram Industries Ltd. & Others* AIR 2005 SC 1646, held that Article 245 of the Constitution is the fountain source of legislative power. It provides that subject to the provisions of this Constitution, the Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State. The legislative field between the Parliament and the Legislature of any State is divided by Article 246 of the Constitution. Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in Seventh Schedule, called the Union List and subject to the said power of the Parliament, the Legislature of any State has power to make laws with respect to any of the matters enumerated in List III, called the Concurrent List. Subject to the above, the Legislature of any State has exclusive power to make laws with respect to any of the matters enumerated in List II, called the State List. Under Article 248, the exclusive

power of the Parliament to make laws extends to any matter not enumerated either in the Concurrent List or State List.

121. We find no apparent conflict with the words used in Entry 42 List III so as to infer that the payment of compensation is inbuilt or inherent either in the words "acquisition and requisitioning" under Entry 42 List III. Right to claim compensation is, therefore, cannot be read into the legislative Entry 42 List III. Requirement of public purpose, for deprivation of a person of his property under Article 300A, is a pre-condition, but no compensation or nil compensation or its illusiveness has to be justified by the state on judicially justiciable standards. Measures designed to achieve greater social justice, may call for lesser compensation and such a limitation by itself will not make legislation invalid or unconstitutional or confiscatory. In other words, the right to claim compensation or the obligation to pay, though not expressly included in Article 300A, it can be inferred in that Article and it is for the State to justify its stand on justifiable grounds which may depend upon the legislative policy, object and purpose of the statute and host of other factors.

122. Article 300A would be equally violated if the provisions of law authorizing deprivation of property have not been complied with. While enacting Article 300A Parliament has only borrowed Article 31(1) [the "Rule of law" doctrine] and not Article 31(2) [which had embodied the doctrine of Eminent Domain]. Article 300A enables the State to put restrictions on the right to property by *law*. That law has to be reasonable. It must comply with other provisions of the Constitution. The limitation or restriction should not be arbitrary or excessive or what is beyond what is required in public interest. The limitation or restriction must not be disproportionate to the situation or excessive. The legislation providing for deprivation of property under Article 300A must be "just, fair and reasonable" as understood in terms of Articles 14, 19(1)(g), 26(b), 301, etc. Thus in each case, courts will have to examine the scheme of

the impugned Act, its object, purpose as also the question whether payment of nil compensation or nominal compensation would make the impugned law unjust, unfair or unreasonable in terms of other provisions of the Constitution as indicated above. At this stage, we may clarify that there is a difference between "no" compensation and "nil" compensation. A law seeking to acquire private property for public purpose cannot say that "no compensation shall be paid". However, there could be a law awarding "nil" compensation in cases where the State undertakes to discharge the liabilities charged on the property under acquisition and onus is on the government to establish validity of such law. In the latter case, the court in exercise of judicial review will test such a law keeping in mind the above parameters.

123. Right to property no more remains an overarching guarantee in our Constitution, then is it the law, that such a legislation enacted under the authority of law as provided in Article 300A is immune from challenge before a Constitutional Court for violation of Articles 14, 21 or the overarching principle of Rule of Law, a basic feature of our Constitution, especially when such a right is not specifically incorporated in Article 300A, unlike Article 30(1A) and the 2nd proviso to Article 31A.

124. Article 31A was inserted by the 1st Amendment Act, 1951 to protect the Jamindari Abolition Laws and also the other types of social, welfare and regulatory legislations effecting private property. The right to challenge laws enacted in respect of subject matter enumerated under Article 31A(1)(a) to (g) on the ground of violation of Article 14 was also constitutionally excluded. Article 31B read with Ninth Schedule protects all laws even if they are violative of the fundamental rights, but in *I.R. Coelho's case* (supra), a Constitution Bench of this Court held that the laws added to the Ninth Schedule, by violating the constitutional amendments after 24.12.1973, if challenged, will be decided on the touchstone of right to freedom guaranteed by Part III of the Constitution and with reference to the basic

structure doctrine, which includes reference under Article 21 read with Articles 14, 15 etc. Article 14 as a ground would also be available to challenge a law if made in contravention of Article 30(1A).

125. Article 265 states that no tax shall be levied or collected except by authority of law, then the essential characteristics of tax is that it is imposed under statute power, without tax payer's consent and the payment is enforced by law. A Constitution Bench of this Court in *Kunnathat Thathunni Moopil Nair's case* (supra) held that Sections 4, 5-A and 7 of the Travancore-Cochin Land Tax Act are unconstitutional as being violative of Article 14 and was held to be in violation of Article 19(1)(f). Of course, this decision was rendered when the right to property was a fundamental right. Article 300A, unlike Articles 31A(1) and 31C, has not made the legislation depriving a person of his property immune from challenge on the ground of violation of Article 14 or Article 21 of the Constitution of India, but let us first examine whether Article 21 as such is available to challenge a statute providing for no or illusory compensation and, hence, expropriatory.

126. A Constitution Bench of this Court in *Ambika Prasad Mishra v. State of U.P. & Others* (1980) 3 SCC 719, while examining the constitutional validity of Article 31A, had occasion to consider the scope of Article 21 in the light of the judgment of this Court in *Maneka Gandhi's case* (supra). Dealing with the contention that deprivation of property amounts to violation of the right guaranteed under Article 21 of the Constitution of India, this Court held as follows:

> **"12.** Proprietary personality was integral to personal liberty and a mayhem inflicted on a man's property was an amputation of his personal liberty. Therefore, land reform law, if unreasonable, violates Article 21 as expansively construed in *Maneka Gandhi.* The dichotomy between personal liberty, in Article 21, and proprietary status, in Articles 31 and 19 is plain, whatever philosophical

> justification or pragmatic realisation it may possess in political or juristic theory. Maybe, a penniless proletarian, is unfree in his movements and has nothing to lose except his chains. But we are in another domain of constitutional jurisprudence. Of course, counsel's resort to Article 21 is prompted by the absence of mention of Article 21 in Article 31-A and the illusory hope of inflating *Maneka Gandhi* to impart a healing touch to those whose property is taken by feigning loss of personal liberty when the State takes only property, *Maneka Gandhi* is no universal nostrum or cure-all, when all other arguments fail!"

127. The question of applicability of Article 21 to the laws protected under Article 31C also came up for consideration before this Court in *State of Maharashtra & Another v. Basantibai Mohanlal Khetan & Others* (1986) 2 SCC 516, wherein this Court held that Article 21 essentially deals with personal liberty and has little to do with the right to own property as such. Of course, the Court in that case was not concerned with the question whether the deprivation of property would lead to deprivation of life or liberty or livelihood, but was dealing with a case, where land was acquired for improving living conditions of a large number of people. The Court held that the Land Ceiling Laws, laws providing for acquisition of land for providing housing accommodation, laws imposing ceiling on urban property etc. cannot be struck down by invoking Article 21 of the Constitution. This Court in *Jilubhai Nanbhai Khachar's case* (supra) took the view that the principle of unfairness of procedure attracting Article 21 does not apply to the acquisition or deprivation of property under Article 300A.

128. Acquisition of property for a public purpose may meet with lot of contingencies, like deprivation of livelihood, leading to violation of Art.21, but that *per se* is not a ground to strike down a statute or its provisions. But at the same time, is it the law that a Constitutional Court is powerless when it confronts with a situation where a person is deprived of his property, by

law, for a private purpose with or without providing compensation? For example, a political party in power with a massive mandate enact a law to acquire the property of the political party in opposition not for public purpose, with or without compensation, is it the law, that such a statute is immune from challenge in a Constitutional Court? Can such a challenge be rejected on the ground that statute does not violate the Fundamental Rights (due to deletion of Art.19(1)(f)) and that the legislation does not lack legislative competence? In such a situation, is non-availability of a third ground as propounded in *State of A.P. & Others v. Mcdowell & Co. & Others* (1996) 3 SCC 709, is an answer? Even in *Mcdowell's case* (supra), it was pointed out some other constitutional infirmity may be sufficient to invalidate the statute. A three judges Bench of this Court in *Mcdowell & Co. & Others case* (supra) held as follows:

> "43. …….The power of Parliament or for that matter, the State Legislature is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground…… No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom……"

129. A two judges Bench of this Court in *Union of India & Another v. G. Ganayutham* (1997) 7 SCC 463, after referring to *Mcdowell's* case (supra) stated as under:

> "that a statute can be struck down if the restrictions imposed by it are disproportionate or excessive having regard to the purpose of the statute and that the Court can go into the question whether there is a proper balancing of the fundamental right and the restriction imposed, is well settled."

130. Plea of unreasonableness, arbitrariness, proportionality, etc. always raises an element of subjectivity on which a court cannot strike down a statute or a statutory provision, especially when the right to property is no more a fundamental right. Otherwise the court will be substituting its wisdom to that of the legislature, which is impermissible in our constitutional democracy.

131. In *Dr. Subramanian Swamy v. Director, CBI & Others* (2005) 2 SCC 317, the validity of Section 6-A of the Delhi Special Police Establishment Act, 1946, was questioned as violative of Article 14 of the Constitution. This Court after referring to several decisions of this Court including *Mcdowell's case* (supra), *Khoday Distilleries Ltd. & Others v. State of Karnataka & Others* (1996) 10 SCC 304, *Ajay Hasia & Others v. Khalid Mujib Sehravardi & Others* (1981) 1 SCC 722, *Mardia Chemicals Ltd. & Others v. Union of India & Others* (2004) 4 SCC 311, *Malpe Vishwanath Achraya & Others v. State of Maharashtra & Another* (1998) 2 SCC 1 etc. felt that the question whether arbitrariness and unreasonableness or manifest arbitrariness and unreasonableness being facets of Article 14 of the Constitution are available or not as grounds to invalidate a legislation, is a matter requiring examination by a larger Bench and accordingly, referred the matter for consideration by a Larger Bench.

132. Later, it is pertinent to note that a five-judges Bench of this Court in *Ashok Kumar Thakur v. Union of India & Others* (2008) 6 SCC 1 while examining the validity of the Central Educational Institutions (Reservation in Admission) Act, 2006 held as follows:

219. A legislation passed by Parliament can be challenged only on constitutionally recognised grounds. Ordinarily, grounds of attack of a legislation is whether the legislature has legislative competence or whether the legislation is *ultra vires* the provisions of the Constitution. If any of the provisions of the legislation violates fundamental rights or any other provisions of the Constitution, it could certainly be a valid ground to set aside the legislation by invoking the power of judicial review. A legislation could also be challenged as unreasonable if it violates the principles of equality adumbrated in our Constitution or it unreasonably restricts the fundamental rights under Article 19 of the Constitution. A legislation cannot be challenged simply on the ground of unreasonableness because that by itself does not constitute a ground. The validity of a constitutional amendment and the validity of plenary legislation have to be decided purely as questions of constitutional law……."

Court also generally expressed the view that the doctrines of "strict scrutiny", "compelling evidence" and "suspect legislation" followed by the U.S. Courts have no application to the Indian Constitutional Law.

133. We have already found, on facts as well as on law, that the impugned Act has got the assent of the President as required under the proviso to Article 31A(1), hence, immune from challenge on the ground of arbitrariness, unreasonableness under Article 14 of the Constitution of India.

134. Statutes are many which though deprives a person of his property, have the protection of Article 30(1A), Article 31A, 31B, 31C and hence immune from challenge under Article 19 or Article 14. On deletion of Article 19(1(f) the available grounds of challenge are Article 14, the basic structure and the rule of law, apart from the ground of legislative competence. In *I.R. Coelho's case* (supra), basic structure was defined in terms

of fundamental rights as reflected under Articles 14, 15, 19, 20, 21 and 32. In that case the court held that statutes mentioned in the IXth Schedule are immune from challenge on the ground of violation of fundamental rights, but if such laws violate the basic structure, they no longer enjoy the immunity offered, by the IXth Schedule.

135. The Acquisition Act, it may be noted, has not been included in the IXth Schedule but since the Act is protected by Article 31A, it is immune from the challenge on the ground of violation of Article 14, but in a given case, if a statute violates the rule of law or the basic structure of the Constitution, is it the law that it is immune from challenge under Article 32 and Article 226 of the Constitution of India?

136. Rule of law as a concept finds no place in our Constitution, but has been characterized as a basic feature of our Constitution which cannot be abrogated or destroyed even by the Parliament and in fact binds the Parliament. In *Kesavanda Bharati's* case (supra), this Court enunciated rule of law as one of the most important aspects of the doctrine of basic structure. Rule of law affirms parliament's supremacy while at the same time denying it sovereignty over the Constitution.

137. Rule of law can be traced back to Aristotle and has been championed by Roman jurists; medieval natural law thinkers; Enlightenment philosophers such as Hobbes, Locke, Rousseau, Montesquieu, Dicey etc. Rule of law has also been accepted as the basic principle of Canadian Constitution order. Rule of law has been considered to be as an implied limitation on Parliament's powers to legislate. In *Reference Re Manitoba Language Rights* (1985) 1 SCR 721, the Supreme Court of Canada described the constitutional status of the rule of law as follows:

"The *Constitution Act, 1982* ... is explicit recognition that "the rule of law is a fundamental postulate of our

constitutional structure." The rule of law has always been understood as the very basis of the English Constitution characterising the political institutions of England from the time of the Norman Conquest. It becomes a postulate of our own constitutional order by way of the preamble to the *Constitution Act, 1982* and its implicit inclusion in the preamble to the *Constitution Act, 1867* by virtue of the words "with a Constitution similar in principle to that of the United Kingdom."

Additional to the inclusion of the rule of law in the preamble of the *Constitution Acts* of 1867 and 1982, the principle is clearly implicit in the very nature of a Constitution. The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by the rule of law. *While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution."*

138. In *Re: Resolution to Amend the Constitution* (1981) 1 SCR 753, the Supreme Court of Canada utilized the principle of rule of law to uphold legislation, rather than to strike it down. The Court held that the implied principles of the Constitution are limits on the sovereignty of Parliament and the provincial legislatures. The Court reaffirmed this conclusion later in *OPSEU v. Ontario (A.G.)* (1987) 2 SCR 2. This was a case involving a challenge to Ontario legislation restricting the political activities of civil servants in Ontario. Although the Court upheld the legislation, Beetz. J described the implied limitations in the following terms:

"There is no doubt in my mind that the basic structure of our Constitution, as established by the *Constitution Act, 1867*, contemplates the existence of certain political

institutions, including freely elected legislative bodies at the federal and provincial levels. In the words of Duff C.J. in *Reference re Alberta Statutes* "such institutions derive their efficacy from the free public discussion of affairs" and, in those of Abbott J. in *Switzman* v. *Elbling* ... neither a provincial legislature nor Parliament itself can "abrogate this right of discussion and debate." *Speaking more generally, I hold that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure."*

139. The Canadian Constitution and Courts have, therefore, considered the rule of law as one of the "basic structural imperatives" of the Constitution. Courts in Canada have exclusively rejected the notion that only "provisions" of the Constitution can be used to strike down legislation and comes down squarely in favour of the proposition that the rule of law binds legislatures as well as governments.

140. Rule of law as a principle contains no explicit substantive component like eminent domain but has many shades and colours. Violation of principle of natural justice may undermine rule of law resulting in arbitrariness, unreasonableness etc., but such violations may not undermine rule of law so as to invalidate a statute. Violation must be of such a serious nature which undermines the very basic structure of our Constitution and our democratic principles. But once the Court finds, a Statute, undermines the rule of law which has the status of a constitutional principle like the basic structure, the above grounds are also available and not *vice versa.* Any law which, in the opinion of the Court, is not just, fair and reasonable, is not a ground to strike down a Statute because such an approach would always be subjective, not the will of the people, because there is always a presumption of constitutionality for a statute.

141. Rule of law as a principle, it may be mentioned, is

not an absolute means of achieving the equality, human rights, justice, freedom and even democracy and it all depends upon the nature of the legislation and the seriousness of the violation. Rule of law as an overarching principle can be applied by the constitutional courts, in rarest of rare cases, in situations, we have referred to earlier and can undo laws which are tyrannical, violate the basic structure of our Constitution, and our cherished norms of law and justice. One of the fundamental principles of a democratic society inherent in all the provisions of the Constitution is that any interference with the peaceful enjoyment of possession should be lawful.

142. Let the message, therefore, be loud and clear, that rule of law exists in this country even when we interpret a statute, which has the blessings of Article 300A. Deprivation of property may also cause serious concern in the area of foreign investment, especially in the context of International Law and international investment agreements. Whenever, a foreign investor operates within the territory of a host country the investor and its properties are subject to the legislative control of the host country, along with the international treaties or agreements. Even, if the foreign investor has no fundamental right, let them know, that the rule of law prevails in this country.

143. We, therefore, answer the reference as follows:

(a) Section 110 of the Land Reforms Act and the notification dated 8.3.94 are valid, and there is no excessive delegation of legislative power on the State Government.

(b) Non-laying of the notification dt.8.3.94 under Section 140 of the Land Reforms Act before the State Legislature is a curable defect and it will not affect the validity of the notification or action taken thereunder.

(c) The Acquisition Act is protected by Article 31A of the Constitution after having obtained the assent of the President

and hence immune from challenge under Article 14 or 19 of the Constitution.

(d) There is no repugnancy between the provisions of the Land Acquisition Act, 1894 and the Roerich and Devika Rani Roerich Estate (Acquisition & Transfer) Act, 1996 (in short the "Acquisition Act") and hence no assent of the President is warranted under Article 254(2) of the Constitution.

(e) Public purpose is a pre-condition for deprivation of a person from his property under Article 300A and the right to claim compensation is also inbuilt in that Article and when a person is deprived of his property the State has to justify both the grounds which may depend on scheme of the statute, legislative policy, object and purpose of the legislature and other related factors.

(f) Statute, depriving a person of his property is, therefore, amenable to judicial review on grounds hereinbefore discussed.

144. We accordingly dismiss all the appeals and direct the notified authority under the Acquisition Act to disburse the amount of compensation fixed by the Act to the legitimate claimants in accordance with law, which will depend upon the outcome of the pending litigations between the parties. Further, we also order that the land acquired be utilized only for the purpose for which it was acquired. In the facts and circumstances of the case, there will be no order as to costs.

B.B.B. Appeals dismissed.

D.P. DAS
v.
UNION OF INDIA AND ORS.
(Civil Appeal Nos.7002 of 2004)

AUGUST 9, 2011

[G.S. SINGHVI AND ASOK KUMAR GANGULY, JJ.]

Service Law – Seniority – Inter-se seniority of direct recruits – Determination of – Held: Seniority is an incidence of service and where the service rules prescribe the method of its computation, it is squarely governed by such rules – In absence of a rule governing seniority, an executive order may be issued to fill up the gap – Only in the absence of a rule or executive instructions, the court may have to evolve a fair and just principle of seniority, which could be applied in the facts and circumstances of the case – In the instant case, no record has been brought before the Court to ascertain merit wise position of the persons who were directly recruited – Except the office memorandum of 1946, which is still in force, no other rule or executive instruction has been shown to apply to the facts of the case – The argument that the date of interview would have to be considered as a guide for determination of seniority cannot be accepted as such a date is wholly fortuitous – Accepting as guideline, something which is absolutely fortuitous and based on chance, is inherently unfair and unjust – As in this case there is no rule prescribed for the determination of seniority, this Court is left with only the guideline flowing from the executive instruction of 1946, in order to evolve a just policy, for determination of seniority – From the analysis of the executive instructions, it is clear that the 1946 instruction has not been superseded and the same refers to the acceptance of the age of the candidate as the determining factor for seniority – Such a basis is not fortuitous and is otherwise just and reasonable – In the premises aforesaid the seniority of the officers who were

recommended on the same date must be decided by their respective age – For determination of seniority of the officers who were recommended on the same date, age is the only valid and fair basis as such their seniority should be decided on the basis of age of the candidates who have been recommended.

Service Law – Seniority – Determination of – Held: Is a vital aspect in the service career of an employee – His future promotion is dependent on this – Therefore, the determination of seniority must be based on some principles, which are just and fair – This is the mandate of Articles 14 and 16 – Constitution of India, 1950 – Articles 14 and 16.

In the year 1983, Specialist Medical Officers (SMOs) were recruited in the Ordnance Factories Organization in the category of Obstetrics, Gynaecology, Medicine and Surgery. The appellant was one of the five recruited persons and he belonged to the category of Surgery. In the year 1991, on the recommendation of the Fourth Pay Commission, one post in the Indian Ordnance Factories Health Services (Group A) was sanctioned for filling up amongst the SMOs cadre. The specialists cadre was in different disciplines and hence, there was necessity of preparing a combined gradation list in the SMOs cadre. Respondent No.1 referred the matter to the UPSC for preparation of the common seniority list. The SMOs were recommended by the UPSC by three different lists, two of which were made on the same date and therefore the UPSC was requested to furnish the relative order of seniority of those SMOs who are recommended on the same date. The UPSC decided to fix the seniority, based on the date of interview i.e. candidates interviewed on an early date to be senior to those interviewed on a later date. In the seniority list, respondent Nos. 4, 5 and 6 were placed above the appellant. As appellant felt aggrieved by the publication of the said seniority list, he made representations before respondent No.1. However, no

reply was received by the appellant from respondent No.1. Being aggrieved, the appellant preferred an original application before the Administrative Tribunal and prayed to quash the said seniority list and also for maintenance of discipline wise seniority list initially prepared by the UPSC and for keeping Confidential Reports as criteria for selection to the next higher grade and also to rearrange the seniority of the candidates on the basis of age of candidates by placing the oldest candidate on top of the seniority list followed by juniors in age. The application was dismissed by the Tribunal. Aggrieved, the appellant filed writ petition before the High Court. The High Court dismissed the writ petition, affirming the methodology adopted by the UPSC for fixing the seniority of two different disciplines whose recommendations were made on the same date. Hence the present appeal.

Allowing the appeal, the Court

HELD:1. Seniority is an incidence of service and where the service rules prescribe the method of its computation, it is squarely governed by such rules. In the absence of a provision ordinarily the length of service is taken into account. [Para 22] [750-H; 751-A]

2. It is well settled principle of service jurisprudence then in the absence of any specific rule the seniority amongst persons holding similar posts in the same cadre has to be determined on the basis of the length of the service and not on any other fortuitous circumstances. [Para 23] [751-B]

M.B. Joshi & others. v. Satish Kumar Pandey & Ors. **AIR 1993 SC 267: 1992 (2) Suppl. SCR 1 – relied on.**

3. Determination of seniority is a vital aspect in the service career of an employee. His future promotion is dependent on this. Therefore, the determination of seniority must be based on some principles, which are

just and fair. This is the mandate of Articles 14 and 16. [Para 24] [751-C]

The Manager, Government, Branch Press and another v. D.B. Belliappa **AIR 1979 SC 429: 1979 (2) SCR 458 – relied on.**

4. In absence of a rule governing seniority, an executive order may be issued to fill up the gap. Only in the absence of a rule or executive instructions, the court may have to evolve a fair and just principle of seniority, which could be applied in the facts and circumstances of the case. In the instant case, no record has been brought before the Court to ascertain merit wise position of the persons who were directly recruited. On 28.8.1946, the Government of India, Department of Home had issued an Office Memorandum (O.M.) for determination of seniority of direct recruits. Except the office memorandum of 1946, which is still in force, no other rule or executive instruction has been shown to apply to the facts of the case. [Paras 13, 26, 27] [748-G; 751-F-H; 752-A]

Bimlesh Tanwar v. State of Haryana & other **(2003) 5 SCC 604: 2003 (2) SCR 757 – relied on.**

5. The argument that the date of interview would have to be considered as a guide for determination of seniority cannot be accepted as such a date is wholly fortuitous. Accepting as guideline, something which is absolutely fortuitous and based on chance, is inherently unfair and unjust. As in this case there is no rule prescribed for the determination of seniority, this Court is left with only the guideline flowing from the executive instruction of 1946, in order to evolve a just policy, for determination of seniority. [Paras 28, 29] [752-B-C]

6. From the analysis of the executive instructions, it

is clear that the 1946 instruction has not been superseded and the same refers to the acceptance of the age of the candidate as the determining factor for seniority. Such a basis is not fortuitous and is otherwise just and reasonable. In the premises aforesaid the seniority of the officers who were recommended on the same date must be decided by their respective age. The contrary view taken by the High Court of fixing seniority on the basis of date of interview, being wholly fortuitous, cannot be accepted. [Paras 30, 31, 32] [752-D-F]

7. In the instant case, there is no rule and thus this Court has to evolve a fair and just basis of seniority on the basis of the office memorandum of 1946. For determination of seniority of the officers who were recommended on the same date, age is the only valid and fair basis as such their seniority should be decided on the basis of age of the candidates who have been recommended. [Para 27 & 34] [751-H; 752-H; 753-A]

B. Premanand and others v. Mohan Koikal and others **(2011) 4 SCC 266 – distinguished.**

Case Law Reference*:*

1992 (2) Suppl. SCR 1	**relied on**	**Para 23**
1979 (2) SCR 458	**relied on**	**Para 25**
2003 (2) SCR 757	**relied on**	**Para 26**
(2011) 4 SCC 266	**distinguished**	**Para 33**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7002 of 2004.

From the Judgment and Order dated 30.06.2003 of the High Court of Madhya Pradesh at Jabalpur in W.P. No. 5238 of 2000.

Shashi B. Upadhyay, Y.K.S. Chauhan and Kumud Lara Das for the Appellant.

T.S. Doabia, Sunita Sharma and K.K. Sharma for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. This appeal has been preferred from the final judgment and order passed by the High Court of Madhya Pradesh at Jabalpur in Writ Petition No.5238 of 2000 dated 30th June, 2003.

2. The facts and circumstances giving rise to this appeal are that in the year 1983, the first batch of the Specialist Medical Officer (SMO) in the Ordnance Factories Organization was recruited in the category of Obstetrics, Gynecology, Medicine and Surgery. The appellant was one of the five recruited persons and he belonged to the category of Surgery.

3. In the year 1991, on the recommendation of the Fourth Pay Commission, one post in the Indian Ordnance Factories Health Services (Group A, grade of Rs.5900-6700) was sanctioned for filling up amongst the SMOs cadre. The specialists cadre was in different disciplines and hence, there was necessity of preparing a combined gradation list in the SMOs cadre. The respondent No.1 referred the matter to the UPSC for preparation of the common seniority list. Further, the SMOs were recommended by the UPSC by three different lists, two of which were made on the same date and therefore the UPSC was requested to furnish the relative order of seniority of those SMOs who are recommended on the same date.

4. Accordingly, the seniority list of SMOs in the grade of Rs.4500-5700/- was prepared on 1.7.1992 and published vide order dated 21.8.1992. In the seniority list respondent Nos. 4, 5 and 6 were placed above the appellant.

5. As the appellant felt aggrieved by the publication of the said seniority list, he made representations in the year 1992, 1993 and 1995 before the respondent No.1. However, no reply was received by the appellant from the respondent No.1.

6. Being aggrieved, the appellant preferred an original application (O.A.No.457 of 1995) before the Central Administrative Tribunal, Jabalpur Bench ('the Tribunal') and prayed to quash the said seniority list and also for maintenance of discipline wise seniority list initially prepared by the UPSC and for keeping Confidential Reports as criteria for selection to the next higher grade and also to rearrange the seniority of the candidates on the basis of age of candidates by placing the oldest candidate on top of the seniority list followed by juniors in age. The appellant contended, inter alia, before the Tribunal that the:

(a) The relative seniority of SMOs was not determined by UPSC, at the time of selection

(b) The Department should have requested the UPSC to recommend candidates for such posts on the basis of aconsolidatedorder of merit and not subject wise

(c) The Department never requested the UPSC to prepare a combinedseniority list as per merit on the basis of performance in the interview. It was therefore notpossible forthe UPSC to prepare a combinedseniority list in the year 1992.

7. The UPSC before the Tribunal contended, inter alia, that the interview for different disciplines viz specialists I medicine, surgery and gynecology in Ordnance Factories Organization were conducted on different dates. Before the Tribunal UPSC further contended that:

(i) As far as the Specialist (Obstetrics and Gynecologist) is concerned the date of advertisement was 13.11.1982, date of interview was 28.2.1983 and date of UPSC recommendation letter was16.3.1983.

(ii) Insofar as the Specialist (Medicine) is concerned the date of advertisement was6.11.1983, date of interview was15/16.03.1983 and date of UPSC recommendation letter was 14.4.1983.

(iii) And so far as the Specialist (Surgery) is concerned, the date of advertisement was 13.11.1982, date of interview was 22/24.03.1983 and date of UPSC recommendation letter was 14.4.1983.

8. The UPSC also filed the extracts of its file which contain the note sheets from Page 2 to Page 13. From those extracts the basis of arriving at the methodology adopted for fixing the seniority of two different disciplines, whose recommendations were made on the same date were available.

9. By a judgment and order dated 26.7.2000, the Tribunal dismissed the O.A.457 of 1995 and in paragraph 8.4 held as under:

"8.4 It is fact that date of recommendation of the applicant who belongs to surgery discipline and the private respondents belonging to medicine discipline was same i.e.14.4.1983. Also that the rules provide for fixing the seniority based on the date of recommendations of the UPSC maintaining inter se merit as per the recommendation. It is also fact that respondent did not approach the UPSC for preparing a combined merit list of such specialist which they should have done as per DOPTs instructions for seeing future promotion prospects for these specialists and also the fact that separate seniority list for number of specialist disciplines and separate promotion prospects thereof were not feasible. From the extract of note sheet filed by the respondent, it

is seen that the Commission, based on detailed examination decided to fix the seniority in such case, based on date of interview i.e. candidates interviewed on an early date to be senior to those interviewed on a later date. The contention of learned counsel for applicant that their seniority should have been fixed based on the date of birth cannot be accepted since presuming this criteria was to be adopted then very purpose of preparation of merit list of the candidates, will get defeated. The reckoning of seniority based on age may be relevant in cases of recruitment where no merit list is made and the selection criteria is for qualifying the test along or where the recommendations are only as 'fit' of 'unfit'."

10. Being aggrieved, the appellant filed a writ petition before the High Court of Madhya Pradesh.

11. By the impugned judgment dated 30.6.2003, the High Court dismissed the writ petition, affirming the methodology adopted by the UPSC for fixing the seniority of two different disciplines whose recommendations were made on the same date.

12. The High Court in para 15 held that:

"15. ……. What is reasonable to be seen in the obtaining factual matrix is that under regrettable circumstances the inter se merit list was not available as there was no requisition for fixing such seniority. However, the UPSC had evolved a base which indicates that the date of interview would be the criteria for fixing the seniority, in such a case. Ordinarily this may look quite peculiar but it has to be borne in mind that peculiar circumstances are solved by taking recourse to innovative methods. The tribunal in paragraph 6.1 has reproduced the date of advertisement and the date of recommendation letter of UPSC. We have also reproduced the same above. The date of advertisement for the post of Specialist

(Surgery) was 13.11.1982. The date of advertisement for post of Specialist (Medicine) was 6.11.1983. Definitely there was advertisement for the post of Specialist (Surgery) earlier than Specialist (Medicine) but the interview of Specialist (Medicine) was on 15/16.3.83 whereas the date of interview of Specialist (Surgery) was on 22/24.3.93. The Tribunal has taken note of the fact that from the note sheets, which has been produced by the UPSC, it was perceivable that recommendations were made on the date of interview. Thus, selection was made on that date. It is noticeable that recommendations were sent on the same date i.e. 14.4.1983. Thus, the date of interview has earned the status of date of selection. Submission of Mr. Gupta is that it can be fortuitous circumstances as the interview in one subject may take place earlier than the other. The aforesaid submission may appear on a first blush to be quite attractive but on a closer scrutiny of the same it has to be repelled……. The UPSC has determined the seniority on the basis of the date of interview and the date when selection had taken place. In the absence of any document on record, in the absence any preparation of merit list, in the absence of drawing of the seniority list at the initial stage and taking note of the peculiar facts and circumstances of the case, we are of the considered view that the UPSC has adopted a rational approach and the Tribunal has not flawed in accepting the same……."

13. It is pertinent to note here that on 28.8.1946, the Government of India, Department of Home issued an Office Memorandum (O.M.) for determination of seniority of direct recruits

14. Clause 2(iv) thereof provides as under:

"When a number of vacancies for direct recruits are filled simultaneously without candidates first being placed in order of merit or preference, seniority should be

determined by age provided a candidate joins within such period not exceeding one month from the date of appointment as may be fixed by the appointing authority. A candidate who does not join within the time so specified will rank below those who did so join, and seniority among the later arrivals will be according to the date of joining.

The orders in this paragraph will be of general application."

15. Vide an Office Memorandum dated 22.12.1959, the Government of India, Ministry of Home Affairs issued general principles for the determination of seniority in Central Civil Services.

16. It is pertinent to note that the O.M. dated 22.12.1959 does not supersedes Office Memorandum of 1946 but expressly discontinues the application of some previous Office Memorandum cited below:

- Office Memorandum No. 30/44/48- Apptts, dated the 22nd June, 1949.
- Office Memorandum No. 65/28/49 – DGS.(Appts.) dated the 3rd Feburary, 1950 and other subsequent Office Memorandum regarding fixation of seniority of ex-employees of the Government of Burma
- Office Memorandum No. 31/223/50 – DGS, dated the 27th April, 1951 and other subsequent Office Memorandum regarding fixation of seniority of displace Government Servants.
- Office Memorandum No. 9/59/56 – RPS dated the 4th August, 1956.
- Office Memorandum No. 32/10/49 – CS dated the 31st March, 1950

- Office Memorandum No. 32/49/CS(C) dated the 20th September, 1952.

17. Para 4 of the Annexure attached to the said O.M. dated 22.12.1959 specifically provides that "…..the relative seniority of all direct recruits shall be determined by the order of merit in which they are selected for such appointment on the recommendations of the UPSC or other selecting authority, persons appointed as a result of subsequent selection."

18. But this circular fails to address the situation, where no combined merit list is prepared in the order of merit in which the candidates are appointed and their date of recommendation being the same, as in the present case.

19. The learned counsel for the appellant contended that the O.M. dated 22.12.1959 has not repealed O.M. dated 28.8.1946 and therefore the O.M. of 1946 shall be applicable in this situation.

20. The learned counsel for the respondents contended that the intention of the authorities was clear in O.M. of 1959, so as to repeal all the prior O.Ms. in relation to the determination of seniority, which is expressed in para 2 of the O.M. which reads as under:

> "…..It has therefore, been decided in consultation with the UPSC, that hereafter the seniority of all persons appointed to the various Central Services after the date of these instructions should be determined in accordance with the General Principles annexed here to."

21. However as noted above, office memorandum of 1959 does not answer the problems arising in this case.

22. The law is clear that seniority is an incidence of service and where the service rules prescribe the method of its computation, it is squarely governed by such rules. In the

absence of a provision ordinarily the length of service is taken into account.

23. The Supreme Court in *M.B. Joshi & others. V. Satish Kumar Pandey & Ors.,* AIR 1993 SC 267 has laid down that it is the well settled principle of service jurisprudence then in the absence of any specific rule the seniority amongst persons holding similar posts in the same cadre has to be determined on the basis of the length of the service and not on any other fortuitous circumstances.

24. Determination of seniority is a vital aspect in the service career of an employee. His future promotion is dependent on this. Therefore, the determination of seniority must be based on some principles, which are just and fair. This is the mandate of Articles 14 and 16.

25. In *The Manager, Government, Branch Press and another v. D.B. Belliappa* reported AIR 1979 SC 429, a three-Judge Bench of this Court construing Articles 14 and 16 interpreted the equality clause of the Constitution as follows:-

> "…The executive, no less than the judiciary, is under a general duty to act fairly. Indeed, fairness founded on reason is the essence of the guarantee epitomized in Articles 14 & 16(1)." (see para 24 at page 434)

26. Another three-Judge Bench of this Court in *Bimlesh Tanwar v. State of Haryana & other,* (2003) 5 SCC 604, while dealing with the question of absence of a rule governing seniority held that an executive order may be issued to fill up the gap. Only in the absence of a rule or executive instructions, the court may have to evolve a fair and just principle of seniority, which could be applied in the facts and circumstances of the case. (see para 47 at page 619)

27. In the instant case, no record has been brought before the Court to ascertain merit wise position of the persons who were directly recruited. Except the office memorandum of 1946,

which is still in force, no other rule or executive instruction has been shown to apply to the facts of the case.

28. The appellant argued that the date of interview would have to be considered as a guide for determination of seniority. This cannot be accepted as such a date is wholly fortuitous. Accepting as guideline, something which is absolutely fortuitous and based on chance, is inherently unfair and unjust.

29. As in this case there is no rule prescribed for the determination of seniority, this Court is left with only the guideline flowing from the executive instruction of 1946, in order to evolve a just policy, for determination of seniority.

30. From the analysis of the executive instructions referred to hereinabove, it is clear that the 1946 instruction has not been superseded and the same refers to the acceptance of the age of the candidate as the determining factor for seniority. Such a basis is not fortuitous and is otherwise just and reasonable.

31. In the premises aforesaid the seniority of the officers who were recommended on the same date must be decided by their respective age.

32. The contrary view taken by the High Court of fixing seniority on the basis of date of interview, being wholly fortuitous, cannot be accepted.

33. The reliance by the respondent(s) on judgment of this Court in *B. Premanand and others v. Mohan Koikal and others,* (2011) 4 SCC 266, is misconceived in the facts of the case. In that case this Court was dealing with Rule 27(c) of the Kerala State and Subordinate Services Rules, 1958. In the instant case there is no rule. Therefore in this case, this Court has to evolve a fair and just basis of seniority on the basis of the office memorandum discussed herein above.

34. For the reasons aforesaid this Court holds that for determination of seniority of the officers who were

recommended on the same date, age is the only valid and fair basis as such their seniority should be decided on the basis of age of the candidates who have been recommended.

35. The appeal is, thus, allowed. The judgment of the High Court which has taken a contrary view is set aside. In the facts of the case, there will be no orders as to costs.

B.B.B. Appeal allowed.

STATE OF UTTARANCHAL & ANR.
v.
SUNIL KUMAR VAISH & ORS.
(Civil Appeal No. 5374 of 2005)

AUGUST 16, 2011

[G.S. SINGHVI AND K.S. RADHAKRISHNAN, JJ.]

Administrative Law – Executive action – File notings – Nature of – R' was found to be an unauthorised occupant of the land in question – That finding attained finality – District Magistrate sent an inter-departmental communication to the Secretary,State Government making recommendations for payment of compensation to 'R' with regard to the said land – State Government rejected the recommendations made by the District Magistrate for payment of compensation – Writ petition – High Court placed reliance upon the recommendations made by the District Magistrate in its said earlier inter-departmental communication to the Secretary,State Government and granted relief of compensation to respondents (the successors-in-interest of 'R') – Validity – Held: In the face of the decision taken by the State Government, the High Court could not have relied upon the recommendations made by the District Magistrate by treating the same as an order of the State Government – Unless an order is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the rules, the same cannot be treated as an order on behalf of the Government – A noting recorded in the file is merely a noting simpliciter and nothing more – It merely represents expression of opinion by the particular individual and cannot be treated as a decision of the Government – Even if the competent authority records its opinion in the file on the merits of the matter under consideration, the same cannot be termed as a decision of the Government unless it is sanctified

and acted upon by issuing an order in accordance with Articles 77(1) and (2) or Articles 166(1) and (2) – The noting in the file or even a decision gets culminated into an order affecting right of the parties only when it is expressed in the name of the President or the Governor, as the case may be, and authenticated in the manner provided in Article 77(2) or Article 166(2) – A noting or even a decision recorded in the file can always be reviewed/reversed/overruled or overturned and the court cannot take cognizance of the earlier noting or decision for exercise of the power of judicial review – Constitution of India, 1950 – Articles 77 and 166.

Judgment/Order – Judicial determination – Reasoned decisions – Necessity of – Duty of Judges to give finality to litigation – Held: Duty is cast on the judges to give finality to the litigation so that the parties would know where they stand – Judicial decisions must in principle be reasoned and the quality of a judicial decision depends principally on the quality of its reasoning – Proper reasoning is an imperative necessity which should not be sacrificed for expediency – The requirement of providing reasons obliges the judge to respond to the parties' submissions and to specify the points that justify the decision and make it lawful and it enables the society to understand the functioning of the judicial system and it also enhances the faith and confidence of the people in the judicial system.

The State Government had leased out the land in question to 'R' for agricultural purposes. The District Magistrate determined the lease as per the lease deed stating that the land was required by the Government for a public purpose and directed 'R' to vacate the premises. 'R' did not vacate the premises. The State Government then initiated ejectment proceedings under Section 4 of the U.P. Public Premises (Eviction of Unauthorised Occupants) Act, 1972 before the Prescribed authority (Sub Divisional Magistrate). The Prescribed authority as

well as the appellate forum held against 'R'. 'R' filed Writ petition before the High Court contending that he should be treated as Bhumidar under the U.P. Zamindari Abolition and Land Reforms Act. High Court dismissed the writ petition. The order of the High Court was affirmed by the Supreme Court.

Subsequently, the District Magistrate sent an inter-departmental communication to the Secretary, State Government recommending payment of compensation to 'R' with regard to the land in question. The State Government, however, took the view that it was improper on the part of the District Magistrate in recommending payment of compensation.

The matter came up before the High Court in another round of litigation whereupon a Division Bench of the High Court, placing reliance on the said earlier inter-departmental communication sent by the District Magistrate to the Secretary, State Government, directed the State Government to pay an amount of Rs.70,99,951.50 with interest to the successors-in-interest of 'R' i.e. the respondents.

In the instant appeal, the question which arose for consideration was whether relevant facts were not taken into consideration by the High Court while granting relief to the respondents which caused serious prejudice to the State Government.

Allowing the appeal, the Court

HELD: 1. The Division Bench of the High Court had overlooked vital facts while deciding the lis between the parties. Non-application of mind is writ large in the order of the High Court, not even an attempt or effort has been made to refer to the pleadings of parties or examine the

documents produced, in spite of the fact that those materials were on record. [Para 13] [768-C]

2.1. Duty is cast on the judges to give finality to the litigation so that the parties would know where they stand. Of late, it is seen that some of the judges are averse to decide the disputes when they are complex or complicated, and would find out ways and means to pass on the burden to their brethren or remand the matters to the lower courts not for good reasons. Few judges, for quick disposal, and for statistical purposes, get rid of the cases, driving the parties to move representations before some authority with a direction to that authority to decide the dispute, which the judges should have done. Often, causes of action, which otherwise had attained finality, resurrect, giving a fresh causes of action. [Para 14] [768-D-F]

2.2. Judicial determination has to be seen as an outcome of a reasoned process of adjudication initiated and documented by a party based, on mainly events which happened in the past. Courts' clear reasoning and analysis are basic requirements in a judicial determination when parties demand it so that they can administer justice justly and correctly, in relation to the findings on law and facts. Judicial decision must be perceived by the parties and by the society at large, as being the result of a correct and proper application of legal rules, proper evaluation of the evidence adduced and application of legal procedure. The parties should be convinced that their case has been properly considered and decided. Judicial decisions must in principle be reasoned and the quality of a judicial decision depends principally on the quality of its reasoning. Proper reasoning is an imperative necessity which should not be sacrificed for expediency. The statement of reasons not only makes the decision easier for the parties to understand and many

a times such decisions would be accepted with respect. The requirement of providing reasons obliges the judge to respond to the parties' submissions and to specify the points that justify the decision and make it lawful and it enables the society to understand the functioning of the judicial system and it also enhances the faith and confidence of the people in the judicial system. [Para 15] [768-G-H; 769-A-D]

2.3. The judgment in question does not satisfy the standards set for proper determination of disputes. These types of orders weaken our judicial system. Serious attention is called for to enhance the quality of adjudication of our courts. [Para 16] [769-D-E]

CONCLUSION

3.1. The facts clearly indicate that 'R' was an unauthorised occupant of the land since 27.11.1972 and that finding had attained finality and the Judges of the High Court had failed to note the relevant documents, apart from the pleadings of the parties. [Para 17] [769-G]

3.2. The State Government had rightly rejected the recommendations made by the District Magistrate for payment of Rs.70,99,951.50 because while doing so, the concerned officer conveniently ignored the fact that 'R' had already been declared as unauthorised occupant of the land in question. In the face of the decision taken by the State Government, the High Court could not have relied upon the recommendations made by the District Magistrate by treating the same as an order of the State Government. It is settled law that all executive actions of the Government of India and the Government of a State are required to be taken in the name of the President or the Governor of the State concerned, as the case may be [Articles 77(1) and 166(1)]. Orders and other instruments made and executed in the name of the President or the

Governor of a State, as the case may be, are required to be authenticated in the manner specified in rules made by the President or the Governor, as the case may be [Articles 77(2) and 166(2)]. Unless an order is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the rules, the same cannot be treated as an order on behalf of the Government. [Para 18] [770-F-H; 771-A-B]

3.3. A noting recorded in the file is merely a noting simpliciter and nothing more. It merely represents expression of opinion by the particular individual. By no stretch of imagination, such noting can be treated as a decision of the Government. Even if the competent authority records its opinion in the file on the merits of the matter under consideration, the same cannot be termed as a decision of the Government unless it is sanctified and acted upon by issuing an order in accordance with Articles 77(1) and (2) or Articles 166(1) and (2). The noting in the file or even a decision gets culminated into an order affecting right of the parties only when it is expressed in the name of the President or the Governor, as the case may be, and authenticated in the manner provided in Article 77(2) or Article 166(2). A noting or even a decision recorded in the file can always be reviewed/reversed/overruled or overturned and the court cannot take cognizance of the earlier noting or decision for exercise of the power of judicial review. [Para 19] [771-C-E]

State of Punjab v. Sodhi Sukhdev Singh **AIR 1961 SC 493: 1961 SCR 371;** *Bachhittar Singh v. State of Punjab* **AIR 1963 SC 395: 1962 Suppl. SCR 713;** *State of Bihar v. Kripalu Shankar* **(1987) 3 SCC 34; 1987 (3) SCR 1;** *Rajasthan Housing Board v. Shri Kishan* **(1993) 2 SCC 84: 1993(1) SCR 269;** *Sethi Auto Service Station v. DDA* **(2009) 1 SCC 180: 2008 (14) SCR 598;** *Shanti Sports Club v. Union of India* **(2009) 15 SCC 705: 2009 (13) SCR 710 – relied on.**

Case Law Reference:

1961 SCR 371	**relied on**	**Para 19**
1962 Suppl. SCR 713	**relied on**	**Para 19**
1987 (3) SCR 1	**relied on**	**Para 19**
1993(1) SCR 269	**relied on**	**Para 19**
2008 (14) SCR 598	**relied on**	**Para 19**
2009 (13) SCR 710	**relied on**	**Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5374 of 2005.

From the Judgment & Order dated 06.7.2004 of the High Court of Uttaranchal at Nainital in Civil Writ Petition No. 401 of 2002 (M/S).

S.S. Shamshery (for J.K. Bhatia) for the Appellants.

Rakesj Kr. Khanna, Asha Jain Madan, Shivika Jain, Mukesh Jain, Seema Rao, Parvinder Jit Singh, Jatinder Kumar Bhatia for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. We are, in this appeal, concerned with the legality of the direction given by a Division Bench of the High Court of Uttaranchal at Nainital to the State Government to pay an amount of Rs.70,99,951.50 with interest to the respondents, placing reliance on an inter-departmental communication sent by the District Magistrate, Haridwar to the Secretary, Government of Uttar Pradesh.

2. The State of Uttaranchal (the State which has interest now) submits that the above direction was given overlooking several important and vital documents which have considerable bearing for a proper and just determination of the dispute.

Further, it was also pointed out that the High Court had failed to notice that even the inter-departmental communication was found to be improper by the Government of Uttar Pradesh.

3. Mr. S.S.Shamshery, learned counsel appearing for the State of Uttaranchal referred to the pleadings of the parties, documents produced and submitted those relevant facts were not taken into consideration by the High Court while granting relief to the respondents causing serious prejudice to the State.

4. Mr. Rakesh Khanna, learned counsel appearing for the respondents, submitted that there is no legality in the order passed by the High Court warranting interference by this Court and that no substantial questions of law arise for consideration and the appeal deserves dismissal.

FACTS:

5. Plot No. 1008 measuring 7 Bighas, 14 Biswas situated at Rampur Colony, Roorkee, originally belonged to the grand-father of the respondents Late Ram Rattan Lal, was acquired for rehabilitation of refugee camp at Roorkee and the amount of compensation for the acquisition was paid to Ram Rattan Lal on 13.3.1952. On 14.9.1962 Ram Rattan Lal made a request to the Government to lease out the said land for agricultural purposes. Request was considered favourably by the Government and a grant/lease deed was executed on 14.9.1962 in favour of Ram Rattan Lal on certain terms and conditions, which are extracted hereinbelow:

> 1. In consideration of the sum of Rs.2742.00 (two thousand and seven hundred and forty two only) paid by the Grantee to Grantor, the receipt of which the Grantor hereby acknowledges, and of the covenants on the part of the Grantee hereinafter contained, the Granter hereby demises to the Grantee. All the land described in the Scheduled hereto to hold the said land with only the rights and obligations akin to a Bhumidhar as defined in the U.P. Zamindari Abolition and Land Reforms Act, 1950 or any statutory notification thereof, subject to such conditions, restrictions and limitations as are imposed under this deed.
>
> 2. The Grantee hereby covenants with the Grantor as follows:-
>
> (1) The Grantee shall use the land granted to him only for the purposes of cultivation and purposes incidental thereto, and for no other purpose whatsoever.
>
> (2) The Grantee's rights in the said land shall be heritable but he shall not be entitled to alienate the said land without the previous permission in writing of the Grantor.
>
> (3) The Grantee shall pay the rent in accordance with the hereditary rates applicable and shall also pay taxes or cesses that may be imposed on the said land.
>
> (4) In the event of any rent payable hereunder, whether lawfully demanded or not, remaining in arrears for months or in the event of the Grantee not at any time cultivating the said land for two successive years, or if there shall be any breach of any covenant by the Grantee herein contained, the Grantor may notwithstanding the waiver of any previous right or cause for re-entry, re-entry upon the said land or any part thereof in the name of the whole and thereafter the whole of the said land shall remain to the use of and be vested in the Grantor and this grant shall absolutely determine, and the Grantee shall not be

entitled to any compensation therefore or for any improvement made on the said land.

Provided always that should the State Government at any time require the said land, or any part thereof for any public purpose, the Grantor may determine the same in whole or part and may also take possession of the whole or part, as the case may be, and in such a case the Grantee shall be entitled to such compensation as the District Officer of Saharanpur may in his discretion assess.

(5) Notwithstanding anything herein before contained the Grantor shall be entitled to recover the arrears of rent due as arrears of land revenue.

(6) The stamp duty and registration charges on this deed shall be borne by the Grantee."

6. Apprehending forcible dispossession, Ram Rattan Lal filed Civil Misc. Writ No. 1974 of 1967 before the Allahabad High Court. The High Court allowed the writ petition on 26.8.1982 restraining the State Government from forcibly dispossessing him, though it was found that the land in question was acquired by the Government under Section 9 of the U.P. Land Acquisition (Rehabilitation of Refugees) Act, 1948.

7. The District Magistrate, Saharanpur accordingly vide his proceeding dated 24.12.1971 determined the lease as per Clause 4 of the lease deed dated 14.9.1962 stating that the land was required by the Government for a public purpose i.e. for construction of a building for the use of a Government Litho Press at Roorkee. Ram Rattan Lal was, therefore, directed to vacate the premises within a period of thirty days from the date of receipt of notice. Ram Rattan Lal did not vacate the premises

within the stipulated time and was found to be in unauthorised occupation of the land since 27.1.1972. The State of Uttar Pradesh then initiated ejectment proceedings under the U.P. Public Premises (Eviction of Unauthorised Occupants) act, 1972 [for short U.P. Act XXII of 1972] before the Sub Divisional Magistrate (Prescribed authority) by filing case No. 1227 of 1972 under Section 4 of the U.P. Act XXII of 1972. It was pointed out that the State was entitled to possession since 27.1.1972 and was suffering a loss of Rs.500/- per month from that date and that Ram Rattan Lal was liable to pay damages of Rs.3,000/- and also the damages till the date of delivery of possession.

8. Ram Rattan Lal filed a detailed written statement before the Prescribed authority. Both the parties also adduced oral as well as documentary evidence before the Prescribed authority and, after detailed examination of the contentions, the prescribed authority passed an order dated 13.9.1973, the operative portion of which reads as follows:

"As provided in grant-deed dated 14.9.1962 the O.P. was bound to give possession to the granter in response to notice dated 24.12.71 which was served upon him on 27.12.71 with in a period of 30 days but he did not do so any by violating the condition of the grant deed he remained in unauthorised occupation over the disputed land after 27.1.72 for which he is liable to pay the damages to the applicant. The applicant has demanded Rs.500/- P.M. from the O.P. which seem to be excessive and in my opinion the damages at the rate of Rs.150/- per month will be reasonable and the opposite party is therefore, liable to pay Rs.150/- as damages per month with effect from 27.1.72 upto the date of delivery of possession."

9. Aggrieved by the above-mentioned order Ram Rattan Lal preferred Misc. Appeal No.335 of 1973 before the 1st Additional District and Sessions Judge, Saharanpur and the Court held that the land was a public premises and Ram Rattan

Lal was in unauthorised occupation after the determination of grant and action for his eviction under the U.P. Act No. XXII of 1972 was fully justified. However, the rate of damages fixed by the prescribed authority was reduced to Rs.60/- per month. Aggrieved by the said order Ram Rattan Lal filed Civil Misc. Writ No.12304 of 1975 before the High Court of judicature at Allahabad. Before the High Court, the contention was raised that Ram Rattan Lal should be treated as Bhumidar under the U.P. Zamindari Abolition and Lad Reforms Act. High Court rejected all those contentions and held that Ram Rattan Lal had not acquired the rights of a Bhumidar under any of the provisions of the U.P. Zamindari Abolition and Land Reforms Act and was not a tenure holder under any of the clauses mentioned in Section 129 of the aforesaid Act and held that the step taken for eviction in respect of Ram Rattan Lal was fully justified under U.P. Act XXII of 1972. The writ petition was accordingly dismissed with costs.

10. Aggrieved by the said order of the High Court Ram Rattan Lal approached this Court and filed SLP(C) No.6851 of 1979 and the same was also dismissed by this Court on 23.12.1981

11. District Magistrate, Haridwar, without referring to any of those facts, sent a communication dated 17.9.1993 to the Secretary, Government of Uttar Pradesh stating as under:

> "As per the conditions mentioned in the Patta, Pattedar was dispossessed from the land under the provisions of Section 4 of the Public Premises Act, but whatever payment as per allowance had to be made to the farmer was not made. Therefore the Pattedar is entitled to receive the compensation of the land. But by not paying the compensation amount under the Land Acquisition Act no policy for payment of compensation to the Patta holder with regard to the said land is given in the Patta and for determination of the same it would be proper to hold the stamp duty prevailing for the year 1987 in the area in

> question as the basis of determination of compensation amount. Hence the compensation towards the said land admeasuring 6-14-0 Bighas i.e. 15777.67 Sq.mts. @ Rs.450/- per sqm. As per the prescribed stamp duty for the year 1987 comes to Rs.70,99,951.50, in which arrangement would have to be made by the Government Photo Litho Press, Roorkee and the same could be demanded from the concerned department."

12. The Government of Uttar Pradesh considered the communication received from the District Magistrate, Haridwar and took the view that it was not proper on the part of the District Magistrate in recommending payment of compensation for the following reasons:

> 1. "The Hon'ble Courts in its judgments under the cases in question, especially in the judgment dated 26.2.79 of the Hon'ble High Court, Patta holder has been declared in unauthorised possession of the land in question from 27.1.72 and compensation amount of Rs.60/- per month has been granted to the State Government. Therefore, payment of compensation amount by the State Government to the persons in unauthorised possession of the land is not proper.
>
> 2. Under the provisions of Section 108(Q) of the Transfer of Property Act, within the prescribed period of notice of completion of Patta i.e. upto 27.1.72, Patta holder had to hand over the possession of land in question to the State Government, which was not given by them upto 6.6.87 and during that period debarred the State Government from the use of land in question and themselves took the benefit of the same. In this way this rule has been violated and the condition mentioned in para 4 of the Patta dated 14.9.62 has

also been violated and hence Patta Holder is not entitled to receive the compensation amount.

3. As per the judgment of the Hon'ble High Court the Patta holders have to pay compensation amount at the rate of Rs.60/- per month to the State Government for the period they were in unauthorised possession of the land. In such circumstances, payment of compensation amount to them by the State Government, when conditions of Patta dated 14.9.62 has been violated, is not proper.

4. Land in question was acquired in the year 1948. Payment of compensation in regard to the land acquired was made by the State Government at that time itself and this compensation was paid to one of the members of Patta holder family as per the condition then was. Hence for the second time payment of compensation amount pertaining to the same land on the same basis is not as per the law.

5. Under the condition mentioned in para 4 of the Patta deed dated 14.09.1962 payment of compensation amount had to make upto 27.1.1972 then the Patta would be as per condition, but the Patta Holders had to hand over the possession of land to the State Government upto 27.1.1972 but the same was not given upto 6.6.87 and situation changed and responsibility of this fault was on the patta holders and the guilty person could not take benefit of its own wrong. Hence the payment of compensation amount as has been proposed by you is not proper.

6. In the aforesaid circumstances payment of compensation amount to the Patta holders is neither lawful not logical. Therefore, it is requested

to take action for recovery of compensation amount of Rs.11,062/- which has to be paid by the Patta holdes @ 60/- per month for the period from 27.1.1972 to 6.6.1987 to the State Government under the provision of point No.1 of said para 1 and accordingly acknowledge the government with the action taken."

13. We are surprised to note that the Division Bench of the High Court had overlooked the above mentioned vital facts while deciding the lis between the parties. Non-application of mind is writ large in the order of the High Court, not even an attempt or effort has been made to refer to the pleadings of parties or examine the documents produced, in spite of the fact that those materials were on record.

14. Of late, we have come across several orders which would indicate that some of the judges are averse to decide the disputes when they are complex or complicated, and would find out ways and means to pass on the burden to their brethren or remand the matters to the lower courts not for good reasons. Few judges, for quick disposal, and for statistical purposes, get rid of the cases, driving the parties to move representations before some authority with a direction to that authority to decide the dispute, which the judges should have done. Often, causes of action, which otherwise had attained finality, resurrect, giving a fresh causes of action. Duty is cast on the judges to give finality to the litigation so that the parties would know where they stand.

15. Judicial determination has to be seen as an outcome of a reasoned process of adjudication initiated and documented by a party based, on mainly events which happened in the past. Courts' clear reasoning and analysis are basic requirements in a judicial determination when parties demand it so that they can administer justice justly and correctly, in relation to the findings on law and facts. Judicial decision must be perceived by the parties and by the society

at large, as being the result of a correct and proper application of legal rules, proper evaluation of the evidence adduced and application of legal procedure. The parties should be convinced that their case has been properly considered and decided. Judicial decisions must in principle be reasoned and the quality of a judicial decision depends principally on the quality of its reasoning. Proper reasoning is an imperative necessity which should not be sacrificed for expediency. The statement of reasons not only makes the decision easier for the parties to understand and many a times such decisions would be accepted with respect. The requirement of providing reasons obliges the judge to respond to the parties' submissions and to specify the points that justify the decision and make it lawful and it enables the society to understand the functioning of the judicial system and it also enhances the faith and confidence of the people in the judicial system.

16. We are sorry to say that the judgment in question does not satisfy the above standards set for proper determination of disputes. Needless to say these types of orders weaken our judicial system. Serious attention is called for to enhance the quality of adjudication of our courts. Public trust and confidence in courts stem, quite often, from the direct experience of citizens from the judicial adjudication of their disputes.

CONCLUSION

17. We have gone through the writ petition filed before the High Court, counter affidavit filed by the State Government and the oral and documentary evidence adduced by the parties before the prescribed authority and before the higher forums. Facts would clearly indicate that Ram Rattan Lal was an unauthorised occupant of the land since 27.11.1972 and that finding had attained finality and the Judges of the High Court had failed to note the following relevant documents, apart from the pleadings of the parties:

1. The order of the Prescribed authority in case No. 12272 dated 13.9.1973, wherein there was a clear finding that Ram Rattan Lal was an unauthorised occupant of the disputed land from 27.11,1972.

2. Judgment of the Court of 1st Additional and Sessions Judge, Saharanpur dated 8.11.1975 in Misc. Appeal No. 335 of 1973 affirming the finding that Ram Rattan Lal was an unauthorised occupant after determination of the grant and the action for his eviction was fully justified.

3. Judgment of the High Court of Allahabad in Civil Misc. Writ No. 12304 of 1975 affirming the above mentioned orders.

4. Order of this Court in SLP © No. 6851 of 1979 dated 22.3.1981.

5. Letter of the Special Secretary, State of Uttar Pradesh bearing No. 1251 PS/18-8-21 (10) PS/93 dated 25.6.1994, stating that the reasons stated in inter-departmental communication dated 17.9.1993 was improper.

18. In our view, the State Government had rightly rejected the recommendations made by the District Magistrate for payment of Rs.70,99,951.50 because while doing so, the concerned officer conveniently ignored the fact that Ram Rattan Lal had already been declared as unauthorised occupant of the land in question. In the face of the decision taken by the State Government, the High Court could not have relied upon the recommendations made by the District Magistrate by treating the same as an order of the State Government. It is settled law that all executive actions of the Government of India and the Government of a State are required to be taken in the name of the President or the Governor of the State concerned, as the case may be [Articles 77(1) and 166(1)]. Orders and other instruments made and executed in the name of the president

or the Governor of a State, as the case may be, are required to be authenticated in the manner specified in rules made by the President or the Governor, as the case may be [Articles 77(2) and 166(2)]. In other words, unless an order is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the rules, the same cannot be treated as an order on behalf of the Government.

19. A nothing recorded in the file is merely a noting simpliciter and nothing more. It merely represents expression of opinion by the particular individual. By no stretch of imagination, such noting can be treated as a decision of the Government. Even if the competent authority records its opinion in the file on the merits of the matter under consideration, the same cannot be termed as a decision of the Government unless it is sanctified and acted upon by issuing an order in accordance with Articles 77(1) and (2) or Articles 166(1) and (2). The noting in the file or even a decision gets culminated into an order affecting right of the parties only when it is expressed in the name of the President or the Governor, as the case may be, and authenticated in the manner provided in Article 77(2) or Article 166(2). A noting or even a decision recorded in the file can always be reviewed/reversed/overruled or overturned and the court cannot take cognizance of the earlier noting or decision for exercise of the power of judicial review. – *State of Punjab v. Sodhi Sukhdev Singh* AIR 1961 SC 493, *Bachhittar Singh v. State of Punjab* AIR 1963 SC 395, *State of Bihar v. Kripalu Shankar* (1987) 3 SCC 34, *Rajasthan Housing Board v. Shri Kishan* (1993) 2 SCC 84, *Sethi Auto Service Station v. DDA* (2009) 1 SCC 180 and *Shanti Sports Club v. Union of India* (2009) 15 SCC 705.

20. We, therefore, set aside the judgment of the High Court in Writ Petition No. 401 of 2002 expressing our strong disapproval. Appeal is, therefore, allowed with costs, which is quantified as Rs.10,000/-.

B.B.B. Appeal allowed.

COMMNR. OF CUSTOMS EXCISE, NEW DELHI
v.
M/S. LIVING MEDIA (INDIA) LTD.
(Civil Appeal Nos. 8627-8628 of 2002)

AUGUST 17, 2011

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

Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 – rr. 2(f),3,4 and 9(1)(c) – Determination of value of imported goods – Method of valuation – Valuation of recorded audio cassettes/CDs imported by respondents-assessees – Whether the value of the royalty required to be paid by the respondents-assessees for the imported goods was to be included in the transaction value of the imported goods for the purpose of customs duty assessment – Held: In determining the transaction value there has to be added to the price actually paid or payable for the imported goods, royalties and the license fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of sale of goods – In all the cases in consideration, there is no dispute that the cassettes under question were brought to India as pre-recorded cassettes which carried the music or song of an artist – There was an agreement existing in all the matters that royalty payment was towards money to be paid to artists and producers who had produced such cassettes – Such royalty became due and payable as soon as cassettes were distributed and sold and therefore, such royalty became payable on the entire records shipped less records returned – It could therefore, be concluded that the payment of royalty was a condition of sale – When pre-recorded music cassette is imported as against the blank cassette, definitely its value goes up in the market which is in addition to its value and therefore duty shall have to be charged on the value of the final product – Therefore, value

of the royalty paid is to be included in the transaction value – Customs Act, 1962 – s.14.

The valuation of the recorded audio cassettes/CDs imported by respondents-assessees was the subject matter of the instant appeals. The question which arose for consideration was whether the value of the royalty required to be paid by the respondents-assessees for the imported goods was to be included in the transaction value of the imported goods for the purpose of customs duty assessment.

Disposing of the appeals, the Court

HELD: 1. Section 14 of the Customs Act, 1962 deals with valuation of goods for the purpose of assessment. In exercise of the power vested under the Customs Act, the Central Government made Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Rule 2(f) of the Rules defines "transaction value" where it says that it means the value determined in accordance with rule 4 of the Rules whereas Rule 3 of the Rules deals with the determination of the method of valuation. [Paras 24, 25 and 26] [781-B; 782-F-H]

2. The issue for consideration herein appears to be answered by the decision in *Associated Cements Companies Ltd*.* In the said decision the Supreme Court had stated clearly that if a pre-recorded music cassette or a popular film or musical score is imported into India, duty will necessarily have to be charged on the value of the final product. As per Rule 9, in determining the transaction value there has to be added to the price actually paid or payable for the imported goods, royalties and the license fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of sale of goods. Therefore, when pre-recorded music cassette is imported as against the blank cassette,

definitely its value goes up in the market which is in addition to its value and therefore duty shall have to be charged on the value of the final product. Therefore, there can be no dispute with regard to the fact that value of the royalty paid is to be included in the transaction value. In all the cases in consideration, there is no dispute that the cassettes under question were brought to India as pre-recorded cassettes which carried the music or song of an artist. There was an agreement existing in all the matters that royalty payment was towards money to be paid to artists and producers who had produced such cassettes. Such royalty became due and payable as soon as cassettes were distributed and sold and therefore, such royalty became payable on the entire records shipped less records returned. It could therefore, be concluded that the payment of royalty was a condition of sale. [Paras 32, 33] [787-B-G]

Associated Cement Companies Ltd. v. Commissioner of Customs **(2001) 4 SCC 593: 2001 (1) SCR 608 – relied on.**

Commissioner of Customs v. Ferodo India Pvt. Ltd. **2008 (4) SCC 563: 2008 (3) SCR 147;** *Collector of Customs (Prev.), Ahmedabad v. Essar Gujarat Ltd.,* **1996 88 ELT 609 (S.C.) – referred to.**

Case Law Reference:

2008 (3) SCR 147	**referred to**	**Para 29**
1996 88 ELT 609 (S.C.)	**referred to**	**Para 30**
2001 (1) SCR 608	**relied on**	**Para 31, 32, 34**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8627-8628 of 2002.

From the Judgment & Order dated 23.01.2002 of the Customs Excise and Gold Control Appellate Tribunal, New Delhi in Appeal No. C/405 & C/414/2001-A.

WITH

C.A. Nos. 2959 of 2008, 4751, 2832 of 2006 & 1 of 2009.

Mukul Gupta, Shalini Kumar, Arun Krishnan, B.K. Prasad, Anil Katiyar, Balbir Singh, Abhishek Singh Baghal, Rupender Sinhmar, Rajesh Kumar, B.V. Balram Das, Alok Yadav, Krishna Mohan, V. Balachandran, E.C. Agrawala for the appearing parties.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. The Civil Appeal Nos. 8627-8628 of 2002 are filed against the judgment and order passed by the Customs, Excise & Gold (Control) Appellate Tribunal (hereinafter for short referred to as "CEGAT") on 23.1.2002, however, Civil Appeal No. 2959 of 2008, Civil Appeal No. 4751 of 2006, Civil Appeal No. 2832 of 2006 and Civil Appeal No. 1 of 2009 are filed against the judgment and order passed by the Customs Excise and Service Tax Appellate Tribunal (hereinafter for short referred to as "CESTAT") on 21.9.2007, 2.2.2006, 2.9.2005 and 16.10.2008 respectively.

CIVIL APPEAL NOS. 8627-8628 of 2002

2. The facts leading to the filing of the present appeals are that the Respondent-company undertakes various music projects in India and under these projects it enters into agreements with reputed artists for composing and recording musical works. The music thus recorded is converted into DAT [Digital Audio Tape] Master which is then sent to Singapore for replicating the musical work on compact discs. Apart from this, the Respondent also renders service for quality production/ duplication of various music titles on compact discs.

3. The Respondent has entered into an agreement for rendering services with M/s. World Media India Ltd., New Delhi, which provides masters to the Respondent and Respondent in

turn sends these masters to Australia for replicating the musical work on compact discs (CDs).

4. The Respondent imported a consignment of Audio Compact Discs from Singapore vide Bill of Entry No. 659308 dated 27.05.1998 for home consumption. Customs duty was paid on the invoice value of the replicator in Singapore and the declared value of each CD was USD 0.6. The Respondent had similar import of Audio Compact Discs from Australia under Bill of Entry No. 659289 dated 27.05.1998 for home consumption and the declared value of each CD was @ 1.62 Australian Dollar. The dispute regarding the valuation of these consignments imported by the Respondent herein is the subject matter of these appeals.

5. The Assistant Commissioner vide order dated 23.06.1998, while assessing the value of CDs imported from Singapore allowed all deductions except expenses incurred under advertisement and publicity and fixed the assessable value at Rs.100 per CD. For the CDs imported from Australia, the assessing authority granted deductions except to the extent of those claimed towards expenses on royalty and advertisement and publicity and the assessable value was determined as Rs.199 per CD.

6. Aggrieved by the aforesaid order of the Assistant Commissioner, the Respondent – assessee filed appeals before the Commissioner (Appeals). The Commissioner (Appeals), vide order dated 12.06.2001, confirmed the order of the assessing authority. Aggrieved thereby, the Respondent – assessee appealed to the CEGAT. The CEGAT, vide order dated 23.01.2002, allowed the appeals and set aside the order of the Commissioner (Appeals) dated 12.06.2001.

CIVIL APPEAL NO. 2959 of 2008

7. The present appeal is filed against the judgment and order of **CESTAT** passed on 21.09.2007 whereby the appeal

filed by the Revenue was rejected and the order of the Commissioner of Customs (Appeals) dated 18.09.2006, was upheld.

8. The facts leading to the filing of the present appeal are that the case of import of goods by respondent M/s Sony BMG Music Entertainment (I) Pvt. Ltd. from supplier M/s Sony Music Entertainment (Hong Kong) Ltd. was examined by GATT Valuation Cell, Mumbai. The Deputy Commissioner of Customs vide order dated 10.02.2006 held that the Respondent and the supplier were related under Rule 2(2) of Customs Valuation Rules, 1988 and rejected the transaction value of goods imported and ordered that the royalty at the note indicated in clause 4 read with Schedule A to the International Repertorise License Agreement entered into between the importer and M/s Sony BMG Music Entertainment, New York, was to be added to the declared value in addition to 50% for the purpose of Customs Duty assessment. Payment of royalty was held to be condition for sale at some subsequent stage in the commercial history of the CDs.

9. Being aggrieved by the said order, the Respondent preferred an appeal before the Commissioner of Customs (Appeals). The Commissioner (Appeals) vide order dated 18.09.2006 set aside the order of the adjudicating authority dated 10.02.2006 and held that the inclusion of royalty in the invoice value was not permissible. Aggrieved thereby, the Revenue filed an appeal before the CESTAT. The CESTAT vide order dated 21.09.2007 rejected the appeal of the Revenue and upheld the order of Commissioner (Appeals) dated 18.09.2006.

CIVIL APPEAL NO. 4751 of 2006

10. The present appeal is filed against the judgment and order of **CESTAT** passed on 02.02.2006 whereby the appeal filed by the Respondent was allowed and the order of the Commissioner (Appeals) dated 24.09.2004 was set aside.

11. The facts leading to the filing of the present appeal are that the case of imports of CDs from M/s EMI Compact Disc, Holland by M/s Virgin Records (I) Pvt. Ltd. was taken up for examination. The Deputy Commissioner of Customs vide order dated 17.08.2000 held that the Respondent and the Supplier are related to each other by virtue of 2(2) of Customs Valuation Rules, 1988. The relationship has not in any way affected the prices and the value of the imports can be taken to be on the transaction value and therefore did not propose the loading of the invoice bill.

12. Aggrieved thereby, the Revenue preferred an appeal to the Commissioner (Appeals). The Commissioner (Appeals) vide order dated 24.09.2004 rejected the order of the assessing authority and held that the assessable value of the CDs should be assessed on the basis of the invoice price plus the copyright fees payable on the resale of records. Aggrieved by the aforesaid order of the Commissioner (Appeals), the Respondent filed an appeal before the CESTAT. The CESTAT vide order dated 02.02.2006 set aside the order of the Commissioner (Appeals) dated 24.09.2004 and restored the order of the assessing authority dated 17.08.2000.

CIVIL APPEAL NO. 2832 of 2006

13. The present appeal is filed against the judgment and order of **CESTAT** passed on 02.09.2005 whereby the appeal filed by the Respondent - assessee was allowed and the order of the Commissioner of Customs (Appeals) dated 20.11.2002, was set aside.

14. The facts leading to the filing of the present appeal are that the Respondent herein - M/s. Sony Music Entertainment (India) Ltd., is a wholly owned subsidiary of Sony Music Entertainment (India) Inc., USA. They have a Licensing Agreement with Sony Corporation of America, New York, U.S.A. The Indian Company has entered into various

agreements (licensing etc.) with their foreign collaborator and associates.

15. The issue for determination in the said appeal is of royalty at the rate of 20% of MRP minus Sales Tax minus 6.5% packaging deduction payable by the Respondent herein on the sale of imported recorded compact disc in India. The Adjudicating Authority, vide order dated 31.10.2000, accepted the transaction value declared in the invoice, holding that the payment of royalty is not the condition of sale of goods and that there is no distraction on the Respondents sourcing CDs from any manufacturer/supplier. The Commissioner (Appeals), however, vide order dated 20.11.2002, set aside the Adjudication order dated 31.10.2000, on appeal by the Revenue, holding that the royalty payment is a condition of sale of imported goods.

16. The CESTAT vide order dated 02.09.05, set aside the order of the Commissioner (Appeals) dated 20.11.2002 on appeal by the Respondent and held that the Respondents are correct in their contention based upon the interpretative notes to Rules 9(1)(c) that the payment of royalty by them to Sony Corporation of America cannot be included in the price of the imported goods. Hence, this civil appeal by the Department.

CIVIL APPEAL NO. 1 of 2009

17. The present appeal is filed against the judgment and order of **CESTAT** passed on 16.10.2008 whereby the appeal filed by the Appellant - assessee was rejected and the order of the Commissioner of Customs (Appeals) dated 09.04.2002, was upheld.

18. The facts leading to the filing of the present appeal are that the Appellant in this case are engaged in the marketing of audio cassettes and CDs imported inter alia from M/s Universal Manufacturing and Logistics, Germany and associated

companies. Their company is a 100% subsidiary of Universal Music Holding, Netherlands.

19. The issue for determination in the said appeal is whether the royalty paid by the Appellant to Universal Music Holding, Netherlands on net sales in India can be added to the transaction value of Audio Compact Disc imported from Universal Manufacturing and Logistics, Germany.

20. As per the agreement entered into with the foreign collaborator the Indian company was required to pay royalty at the rate of 15% at the retail sale price of the goods to the foreign supplier. Since the importer was a 100% subsidiary company, it was considered as a related person and the royalty payable by it to the supplier was considered to be as a condition of sale and therefore required to be included in the declared invoice value to the extent of royalty amount for which a show cause notice was issued to the Appellant and adjudicated by the Deputy Commissioner, who vide order dated 16.10.2001, held that the value of the goods imported by the Appellant is to be loaded by 15% as per Rule 9(1)(c) of Customs Valuation Rules, 1988.

21. Aggrieved thereby, the Appellant preferred an appeal to the Commissioner (Appeals), who vide order dated 09.04.2002 rejected the same and upheld the order of the assessing authority. Aggrieved by the aforesaid order of the Commissioner (Appeals), the Appellant filed an appeal before the CESTAT which was rejected vide order dated 16.10.2008 and the order of the Commissioner (Appeals) dated 09.04.2002 was upheld.

22. Since all these appeals involve almost similar facts and the issues raised therein also being similar, we propose to dispose of all these appeals by this common judgment and order.

23. The learned counsel appearing for the parties made

extensive arguments and drawn our attention to the relevant materials on record also. On the basis of the same, we proceed to answer the issue that arises for our consideration.

24. In order to appreciate the contentions of the parties, we propose to extract the provisions of Section 14 of the Customs Act, 1962 which deals with valuation of goods for the purpose of assessment. The said section reads as follows:-

> "14. **Valuation of goods.** – (1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf;
>
> Provided that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf:
>
> Provided further that the rules made in this behalf may provide for, -
>
> (i) the circumstances in which the buyer and the seller shall be deemed to be related;
>
> (ii) the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale or in any other case;
>
> (iii) the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section:
>
> Provided also that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46, or a shipping bill of export, as the case may be, is presented under section 50.
>
> *(2) Notwithstanding anything contained in sub-section (1), if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value."*

25. In exercise of the power vested under the Customs Act, the Central Government has made Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (hereinafter for short called "the Rules").

26. Rule 2(f) of the Rules defines "transaction value" where it says that it means the value determined in accordance with rule 4 of the Rules. Rule 3 of the Rules deals with the determination of the method of valuation where it states as follows:-

"Determination of the method of valuation.- For the purpose of these rules –

(i) subject to rules 9 and 10-A the value of imported goods shall be the transaction value;

(ii) if the value cannot be determined under the provisions of Cl. (i) above, the value shall be determined by proceeding sequentially through rule 5 to 8 of these rules."

27. What is transaction value is stated in Rule 4 in the following manner:-

"4. **Transaction value** – (1) The transaction value of imported goods shall be the price actually paid or payable for the goods when sold for export to India, adjusted in accordance with the provisions of Rule 9 of these rules."

28. Rule 9(1)(c) of the Rules states as follows:-

"9. **Costs and services** (1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods -

***** ***** ***** *****

***** ***** ***** *****

(c) – royalties and license fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable."

29. In the case of *Commissioner of Customs Vs. Ferodo India Pvt. Ltd.* reported in 2008 (4) SCC 563 this Court had occasion to analyze the aforesaid relevant provision of Rule 9(1)(c) with which we are also concerned in the present

appeals. The relevant portion of which is extracted herebelow: -

"16. Under Rule 9(1)(c), the cost of technical know-how and payment of royalty is includible in the price of the imported goods if the said payment constitutes a condition prerequisite for the supply of the imported goods by the foreign supplier. If such a condition exists then the payment made towards technical know-how and royalties has to be included in the price of the imported goods. On the other hand, if such payment has no nexus with the working of the imported goods then such payment was not includible in the price of the imported goods.

17. In Essar Gujarat Ltd. the condition prerequisite, referred to above, had direct nexus with the functioning of the imported plant and, therefore, it had to be loaded to the price thereof.

18. Royalties and license fees related to the imported goods is the cost which is incurred by the buyer in addition to the price which the buyer has to pay as consideration for the purchase of the imported goods. *In other words, in addition to the price for the imported goods the buyer incurs costs on account of royalty and license fee which the buyer pays to the foreign supplier for using information, patent, trade mark and know-how in the manufacture of the licensed product in India.* Therefore, there are two concepts which operate simultaneously, namely, price for the imported goods and the *royalties/ license fees which are also paid to the foreign supplier.*

19. Rule 9(1)(c) stipulates that payments made towards technical know-how must be a condition prerequisite for the supply of imported goods by the foreign supplier and if such condition exists then such royalties and fees have to be included in the price of the imported goods. Under Rule 9(1)(c) the cost of technical

know-how is included if the same is to be paid, directly or indirectly, as a condition of the sale of imported goods. At this stage, we would like to emphasize the word indirectly in Rule 9(1)(c). As stated above, the buyer/importer makes payment of the price of the imported goods. He also incurs the cost of technical know-how. Therefore, the Department in every case is not only required to look at TAA, it is also required to look at the pricing arrangement/agreement between the buyer and his foreign collaborator. For example, if on examination of the pricing arrangement in juxtaposition with TAA, the Department finds that the importer/buyer has misled the Department by adjusting the price of the imported item in guise of increased royalty/ license fees then the adjudicating authority would be right in including the cost of royalty/license fees payment in the price of the imported goods. In such cases the principle of attribution of royalty/license fees to the price of imported goods would apply. This is because every importer/buyer is obliged to pay not only the price for the imported goods but he also incurs the cost of technical know-how which is paid to the foreign supplier. Therefore, such adjustments would certainly attract Rule 9(1))(c)."

30. While laying down the aforesaid proposition this Court has considered the case of *Collector of Customs (Prev.), Ahmedabad Vs. Essar Gujarat Ltd.* reported in 1996 88 ELT 609 (S.C.) to which also reference was made at the time of hearing of the appeals.

31. There is yet another decision on the aforesaid issue rendered by three Judges' Bench of this Court in the case of *Associated Cement Companies Ltd. Vs. Commissioner of Customs* reported in (2001) 4 SCC 593. Having referred to the case of *Essar Gujarat* (supra) and after having noted Rules 3, 4 and 9 of the Rules, this Court has stated thus in paragraph 42, 43 and 44 as follows:-

"42. …… Therefore, the intellectual input in such items greatly enhances the value of the paper and ink in the aforesaid examples. This means that the charge of a duty is on the final product, whether it be the encyclopaedia or the engineering or architectural drawings or any manual.

43. *Similar would be the position in the case of a programme of any kind loaded on a disc or a floppy. For example in the case of music the value of a popular music cassette is several times more than the value of a blank cassette. However, if a pre-recorded music cassette or a popular film or a musical score is imported into India duty will necessarily have to be charged on the value of the final product.*

…….

…….

44. It is a misconception to contend that what is being taxed is intellectual input. What is being taxed under the Customs Act read with the Customs Tariff Act and the Customs Valuation Rules is not the input alone but goods whose value has been enhanced by the said inputs. The final product at the time of import is either the magazine or the encyclopaedia or the engineering drawings as the case may be. There is no scope for splitting the engineering drawing or the encyclopaedia into intellectual input on the one hand and the paper on which it is scribed on the other. For example, paintings are also to be taxed. Valuable paintings are worth millions. A painting or a portrait may be specially commissioned or an article may be tailor-made. This aspect is irrelevant since what is taxed is the final product as defined and it will be an absurdity to contend that the value for the purposes of duty ought to be the cost of the canvas and the oil paint even

though the composite product, i.e., the painting, is worth millions."

32. The issue that arises for our consideration is therefore appears to be answered by the aforesaid decision in *Associated Cements Companies Ltd.* (Supra). In the said decision this Court had stated clearly that if a pre-recorded music cassette or a popular film or musical score is imported into India, duty will necessarily have to be charged on the value of the final product. As per Rule 9, in determining the transaction value there has to be added to the price actually paid or payable for the imported goods, royalties and the license fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of sale of goods. Therefore, when pre-recorded music cassette is imported as against the blank cassette, definitely its value goes up in the market which is in addition to its value and therefore duty shall have to be charged on the value of the final product. Therefore, there can be no dispute with regard to the fact that value of the royalty paid is to be included in the transaction value.

33. In all these cases, there is no dispute that the cassettes under question are brought to India as pre-recorded cassettes which carry the music or song of an artist. There is an agreement existing in all the matters that royalty payment is towards money to be paid to artists and producers who had produced such cassettes. Such royalty becomes due and payable as soon as cassettes are distributed and sold and therefore, such royalty becomes payable on the entire records shipped less records returned. It could therefore, be concluded that the payment of royalty was a condition of sale. Counsel appearing for the Respondent relied upon the commentary on the GATT Customs Valuation Code. We failed to see as to how the aforesaid commentary on the GATT Customs Valuation Code could be said to be applicable to the facts of the present case. The specific sections and the rules quoted hereinbefore are themselves very clear and unambiguous. We are required

only to give interpretation of the same and apply the same to the facts of the present case.

34. Considering/Looking at the decision of this Court in the case of *Associated Cement Companies Ltd.* [supra] and also to the clear and unambiguous provisions of law discussed above we set aside the orders passed by the Tribunal in matters, i.e., Civil Appeal No. 8627-8628 of 2002, Civil Appeal No. 2959 of 2008, Civil Appeal No. 4751 of 2006, Civil Appeal No. 2832 of 2006 and restore the order passed by the Department, whereas Civil Appeal No. 1 of 2009 is dismissed. We leave the parties to bear their own costs.

B.B.B. Appeals disposed of.

SHAGUN MAHILA UDYOGIK SAHAKARI SANSTHA MARYADIT

v.

STATE OF MAHARASHTRA & ORS.

(Civil Appeal No.7104 of 2011)

AUGUST 19, 2011

[ALTAMAS KABIR AND SURINDER SINGH NIJJAR, JJ.]

Government Contracts – Tender – Eligibility criteria – Supply of food under Supplementary Nutrition Programme of Integrated Child Development Scheme (ICDS) – Central Government revised nutritional and feeding norms which required the food to be fortified with essential micro nutrients – Extrusion technology was required to produce such food – In response, respondent-State took out Expression of Interest (EOI) for supply of fortified blended food manufactured through process of extrusion – Contract granted to respondent Nos.4 to 6 – Challenge to – Writ petition filed by appellant dismissed by the High Court – On appeal, held: The writ petition was rightly dismissed by the High Court – The EOI had deliberately stressed on the need of precise measurements for preparation of the food – The food was to be prepared in the manner prescribed by the Government for safety and nutrient composition of the food – It could not be left to uncertainties of the machinery available with individual manufacturers – The procedure adopted was necessary to ensure that there was "zero infection" in the food – Since the beneficiaries were infants from the age group of 6 months to 3 years and pregnant and lactating mothers, it was all the more desirable to have fully automated plants and thus avoid the use of human hands in processes like- handling, cleaning, grinding, extrusion and mixing – Such considerations were not extraneous to the purpose for which the EOI was floated – The condition in EOI of asking for

minimum Rs. 1 crore turnover for the last three years was also not arbitrary – The appellant failed to satisfy the eligibility criteria as contained in Clause 6 of the EOI which required that the tenderer should have produced the specified food for the last three consecutive years and supplied the same to Anganwadi's in ICDS – Since the appellant did not possess a suitable manufacturing unit, it was ineligible on this score alone – The appellant was not eligible at all to be even considered in the tender process.

In the year 1975, the Central Government floated a scheme termed as "Integrated Child Development Scheme" (ICDS) in order to improve the health and nutrition status of the children (between the age group of 0-6 years) and pregnant and lactating women, by providing them with supplementary food. Under the Scheme, certain kind of specified food was proposed to be supplied through Anganwadi Centres (AWCS). Apparent lack of progress in implementation of the aforesaid Scheme prompted the Peoples Union for Civil Liberties (PUCL) to move this Court by way of a Writ Petition under Article 32 of the Constitution, whereafter by a series of orders passed in the aforesaid writ proceedings, this Court issued necessary directions.

Pursuant to the directions, respondent Nos.1 and 2 passed a resolution which provided for a detailed procedure of making available "Ready to Eat" ('RTE') food targeted to beneficiaries through Anganwadis. The food was to be supplied by Mahila Mandal, Mahila Sanstha, Women Self Helping Saving Groups, Sale Assistant Saving Group for Anganwadis.

Subsequently, in 2009, the Central Government revised the nutritional and feeding norms for supplementary nutrition in ICDS Scheme. The revised

norms required that the supplementary food be fortified with essential micro nutrients with 50% of RDA level per beneficiary per day. The Central Government thereafter circulated the Recipe to the Maharashtra State Government (respondent No.1) as per new norms of ICDS for preparation of the food. It was provided that the feeding norms ought to have two components in it, to be provided as supplementary nutrition to the beneficiaries at Anganwadi Centres (AWCS) namely:- Hot Cooked Meal (HCM) and Take Home Ration (THR). Directions were issued that HCM and THR should be given in the form of "energy dense food / micro nutrient fortified food" and the food be processed by using Extrusion Technology. It was further emphasised that since the revised guidelines laid major stress on micro nutrient fortification of the THR, there was requirement of "expert technical supervision" and that it can be achieved by using accurate machines with precision in measurement.

In response, respondent No.1, Maharashtra Government passed a resolution whereunder, the Government prescribed the procedure for implementing the revised norms. Based on the above, an Expression of Interest ('EOI') was taken out by respondent No. 2, the Commissioner, i.e., Integrated Child Development Services Scheme, Maharashtra, for supply of fortified blended food manufactured through process of extrusion.

Appellant, a society having several years of experience in supplying hot cooked meal (ready to eat food) for children and other beneficiaries of AWCS in the State of Maharashtra, submitted representations requesting respondent Nos.1 and 2 to consider it for supply of food under the ICDS Scheme. It is the case of the appellant that without considering these representations, respondent nos. 1 and 2 signed an

agreement, awarding the contract to respondent Nos. 4 to 6 for a period of one year, with a clause for extension of two years. Aggrieved by the action of respondent Nos. 1 and 2 in awarding the contract to respondent Nos. 4 to 6, the appellant filed a writ Petition. The writ petition was dismissed by the High Court.

In the instant appeal, the appellant contended that condition Nos. 6, 7, 8 and 9 in the EOI were arbitrary; that the Government order permitted the grant of contract for a period of one year, however, the agreement entered into with respondent Nos. 4 to 6 provided that the agreement will remain valid for one year and extendable for next 24 months; that permitting extension of the contract for three years was contrary to the decision taken by the Competent Authority and hence, the contract was liable to be declared illegal; that the entire selection process was suspect and respondent Nos. 4 to 6 were shown undue favour by respondent Nos.1 and 2 and that the conditions were clearly tailor-made for respondent Nos. 4 to 6, to the exclusion of everybody else.

Dismissing the appeal, the Court

HELD: 1.1. The writ petition was rightly dismissed by the High Court after examination of the entire issue. The High Court concluded that the appellant failed to satisfy the eligibility criteria as contained in Clause 6 of the EOI which required that the tenderer should have produced the specified food for the last three consecutive years and supplied the same to Anganwadi's in ICDS. Since the appellant did not possess a suitable manufacturing unit, the appellant would be rendered ineligible on this score alone. The High Court also found that in the facts and circumstances of the case, it was only respondent Nos. 4 to 6, who were suitable for grant of contract. [Paras 31, 32] [811-D-E; 812-A-B]

1.2. It cannot be said that the original Government decision had limited the period of contract to one year. In fact, as demonstrated by the respondents, the Government decision as well as tender condition clearly stipulated that the contract would be initially for one year; that upon completion of one year, the work of the successful candidate would be re-assessed and in case, it was found that the performance was satisfactory, the tender shall be extended for a period of two more years. [Para 33] [812-C-D]

1.3. The food, which was to be supplied to the recipients as a part of the supplementary nutrition programme was to be prepared in the manner prescribed by the Government for safety and nutrient composition of the food. It could not be left to uncertainties of the machinery available with individual manufacturers. The successful supplier was duty bound to necessarily comply with all the specifications laid down by the Government in its norms. The various documents clearly demonstrate that the appellant was not eligible at all to be even considered in the tender process. All the objections raised by the appellant and other Mahila Mandal / Mahila Sanstha /Mahila Bachat Gat etc. etc. were duly considered by the Government. [Para 34] [812-E-G]

1.4. The condition of asking for minimum Rs. 1 crore turnover for the last three years could not be said to be arbitrary. In fact, the condition would be of utmost importance. [Para 35] [813-B]

1.5. The EOI had deliberately stressed on the need of precise measurements for the preparation of the food. The supplier was required to provide a fine mix of all kinds of ingredients including the revised intake of proteins and calories to the precise level. In fact, the level of precision was earmarked for each kind of food. The

concept behind the same cannot be permitted to be demonized by referring to it as food prepared by "automated machines". The procedure adopted was necessary to ensure that there was "zero infection" in the food which was going to be consumed by infants and the children who were already under-nourished. Since the beneficiaries of the Dense Energy Food and Fortified Blended Mixture were infants from the age group of 6 months to 3 years and pregnant and lactating mothers, it was all the more desirable to have fully automated plants. Such procedure avoids the use of human hands in processes like– handling, cleaning, grinding, extrusion, mixing etc., all of which are done automatically. The aforesaid considerations could not be said to be extraneous to the purpose for which the EOI was floated. [Paras 36, 37] [813-C-G]

Glodyne Technoserve Limited v. State of Madhya Pradesh and Ors. **(2011) 5 SCC 103 and** *Larsen and Toubro Limited & Anr. vs. Union of India & Ors.* **(2011) 5 SCC 430 – cited.**

Case Law Reference:

(2011) 5 SCC 103	**cited**	**Para 29**
(2011) 5 SCC 430	**cited**	**Para 29**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7104 of 2011.

From the Judgment & Order dated 09.09.2010 of the High Court of Judicature at Bombay, Nagpur Bench at Nagpur in Writ Petition No. 4210 of 2010.

Mukul Rohatgi, Dhruv V. Mehta, P.M. Shah, C.U. Singh, P.S. Patwalia, P.N. Shah, Jayashree Wad, Dipti, Tamali Wad, Ashish Wad, Shikhar Srivastava, Kanika Bhutani, Shriramkrishna, Ninad Laud (for J.S. Wad & Co.) Uday B.

Dube, Sanjay Kharde, Asha Gopalan Nair, Ravi Prakash Mehrotra, Vibhu Tiwari, Rohit Shetty, Viraj Kadam, D.M. Nargolkar for the appearing parties.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1._Leave granted.

2. The instant appeal is directed against the final judgment and order of the High Court of judicature at Bombay, Nagpur Bench at Nagpur dated 9th September, 2010, in Writ Petition No. 4210 of 2010 vide which the Division Bench of the High Court dismissed the petition of the appellant thereby affirming the decision of awarding the contract to the respondent Nos. 4 to 6.

3. We may notice here the essential facts, which would have a bearing on the determination of the issues raised in this appeal.

4. The appellant is a society registered under the Maharashtra Co–operative Societies Act, 1960. The appellant has several years of experience in supplying hot cooked meal (ready to eat food) for children and other beneficiaries of Anganwadi Centres (in short 'AWCS') in the State of Maharashtra.

5. In the year 1975, the Central Government floated a scheme termed as "Integrated Child Development Scheme" (in short 'ICDS') in order to improve the health and nutrition status of the children (between the age group of 0-6 years); pregnant and lactating women, by providing them with supplementary food. Under the said Scheme, certain kind of specified food was proposed to be supplied through AWCS. Accordingly, around fourteen lakhs Anganwadi Centres were proposed to be set up.

6. It appears that the lack of progress made in the implementation of the aforesaid Scheme prompted the

Peoples Union for Civil Liberties (in short 'PUCL) to move this Court by way of a Writ Petition (Civil) No. 196 of 2001 under Article 32 of the Constitution of India, seeking necessary directions for implementation of the Scheme. By a series of orders passed in the aforesaid writ proceedings, this Court issued the necessary directions. On 8th May, 2002, this Court gave detailed directions with regard to implementation of various Schemes, which have been floated for giving relief to the poor, impoverished and the hungry. At the same time, this Court appointed Dr. N.C. Saxena and Shri S.R. Sankaran as Commissioners of the Court, inter-alia, for the purpose of looking into the grievances that may persist after the grievance resolution procedure, laid down in the said order was exhausted. Scope of the work of the Commissioners also included monitoring of the implementation of the Court's orders as well as monitoring and reporting to this Court of the implementation by the respondents of various welfare measures and schemes.

7. Again on 29th October, 2002, this Court directed the respective State Governments to appoint Government Officials as Assistants to the Commissioners. The Commissioners submitted a very detailed report to this Court, salient features of which have been noticed by the order dated 7th April, 2004. This Court appreciated the work done by the Commissioners. It was also noticed that although fourteen lakhs AWCS were directed to be established, only six lakhs centres had been sanctioned. It was also noticed that many of the sanctioned centres were not operational. In some States, the problem seemed to be more acute than the others. Upon consideration of the entire matter, directions were issued for the sanction of remaining AWCS and for increase of norm for the food value to be supplied to these beneficiaries from rupee one to rupee two per day. This Court also noticed that on an average, forty two paisa as against the norm of rupee one was being allocated per beneficiary per day by the State of Jharkhand. The position in Bihar and Uttar Pradesh was also no better.

Therefore, necessary directions were issued to the State Governments to make operational all sanctioned AWCS by 30th November, 2004.

8. Taking into consideration all the facts and circumstances placed on record by the two Court Commissioners and through various affidavits filed by the respondents, this Court issued the following twelve directions:-

(i) The aspect of sanctioning 14 lakhs AWCS and increase of norm of rupee one to rupees two per child per day would be considered by this Court after two weeks.

(ii) The efforts shall be made that all SC/ST hamlets/ habitations in the country have AWCS as early as possible.

(iii) The contractors shall not be used for supply of nutrition in Anganwadis and preferably ICDS funds shall be spent by making use of village communities, self-help groups and Mahila Mandals for buying of grains and preparation of meals.

(iv) All State Governments/Union Territories shall put on their website full data for the ICDS schemes including where AWCS are operational, the number of beneficiaries category-wise, the funds allocated and used and other related matters.

(v) All State Governments/Union Territories shall use the Pradhanmantri Gramodaya Yojna fund (PMGY) in addition to the state allocation and not as a substitute for State funding.

(vi) As far as possible, the children under PMGY shall be provided with good food at the Centre itself.

(vii) All the State Governments/Union Territories shall

allocate funds for ICDS on the basis of norms of one rupee per child per day, 100 beneficiaries per AWC and 300 days feeding in a year, i.e., on the same basis on which the Centre make the allocation.

(viii) BPL shall not be used as an eligibility criteria for ICDS.

(ix) All sanctioned projects shall be operationalised and provided food as per these norms and wherever utensils have not been provided, the same shall be provided (Instance of Jharkhand State has been noticed in the Report where utensils have not been provided). The vacancies for the operational ICDS shall be filled forthwith. (Instance of Uttar Pradesh where vacancies have not been filled up is quite alarming though in the affidavit it has been stated that a drive has been initiated to fill up the vacancies).

(x) All the State Governments/Union Territories shall utilize the entire State and Central allocation under ICDS/PMGY and under no circumstances, the same shall be diverted and preferably also not returned to the Centre and, if returned, a detailed explanation for non-utilisation shall be filed in this Court.

(xi) All State/Union Territories shall make earnest effort to cover the slums under ICDS.

(xii) The Central Government and the States/Union Territories shall ensure that all amounts allocated are sanctioned in time so that there is no disruption whatsoever in the feeding of children.

9. Pursuant to the aforesaid directions, respondent Nos.

1 and 2 passed a resolution on 28th October, 2005. The resolution provided for a detailed procedure of making available "Ready to Eat" ('RTE') food targeted to beneficiaries through Anganwadis. The food was to be supplied by Mahila Mandal, Mahila Sanstha, Women Self Helping Saving Groups, Sale Assistant Saving Group for Anganwadis, registered under the provisions of either (i) Public Trust Act, 1950, (ii) Societies Registration Act, 1860, (iii) Maharashtra Cooperative Societies Act, and (iv) Company registered under the Companies Act, 1956. The resolution further required that every member of the Group should be a woman.

10. In the meantime, this Court had passed a number of other orders providing for Supplementary Nutrition to the beneficiaries, particular attention was directed to be paid to the following:-

(i) Children falling within the age group of 6 months to 3 years,

(ii) Pregnant and lactating women and

(iii) Severely underweight children within the age group of 6 months to 3 years.

11. The Central Government found that the original ICDS scheme was insufficient to cater to the nutritional demands of the categories of children and women noticed above. The Central Government, therefore, conducted further surveys through experts which recommended that the gap in the calories norms between the Recommended Dietary Allowance (in short 'RDA') and the Actual Dietary Intake (in short 'ADI') be filled. Therefore, the Central Government, in consultation with its experts, published a revised nutritional and feeding norm for supplementary nutrition in ICDS Scheme on 24th February, 2009. The revised norms required that the supplementary food may be fortified with essential micro nutrients with 50% of RDA level per beneficiary per day.

12. These revised norms were filed before this Court alongwith an affidavit dated 2nd March, 2009 by the Central Government highlighting the various factors including the recommendations received from the Task Force constituted by the Central Government. Upon consideration of the affidavit of the Central Government, this Court passed a further order on 22nd April, 2009. In Paragraph 5 and 6, it was observed as follows:-

"**5.** The Revised Nutritional and Feeding Norms for SNP in ICDS Scheme circulated vide letter no.5-9/2005/ND/Tech.(Vol. I) dated 24.02.2009 states that children in the age group of 6 months to 3 years must be entitled to food supplement of 500 calorie of energy and 12-15 gm. of protein per child per day in the form of take home ration (THR). For the age group of 3-6 years, food supplement of 500 calories of energy and 12-15 gm of protein per child must be made available at the Anganwadi Centers in the form of a hot cooked meal and a morning snack for severely underweight children in the age group of 6 months to 6 years, an additional 300 calories of energy and 8-10 gm of protein would be given as THR. For pregnant and lactating mothers, a food supplement of 600 calories of energy and 18-20 gm of protein per beneficiary per day would be provided as THR.

6. The letter dated 24.02.2009 No.5-9/2005/NO/Tech (Vol. II) has been annexed to the affidavit dated 2nd March, 2009 filed by the Union of India. It is directed that norms indicated in the said letter addressed to all the State Government sand Union Territories have to be implemented forthwith and the respective States/UTS would make requisite financial allocation and undertake necessary arrangements to comply with the stipulation contained in the said letter."

13. This Court noticed the statement made by the learned Additional Solicitor General that Supplementary Nutrition Food

(in short 'SNF') in the form of Take Home Ration (in short 'THR') shall be provided to all children in the age group of 6 months to 3 years and additional 300 calories to severely underweight children in the age group of 3 to 6 years, pregnant women and lactating mothers as per norms laid down in the letter dated 24th February, 2009. Accordingly, all Union Territories and State Governments were directed to ensure compliance with the aforementioned stipulations without fail. A further direction was issued to all the States and Union Territories to provide supplementary nutrition in the form of a morning snack and a hot cooked meal to the children in the age group of 3 to 6 years, in accordance with the guidelines contained in the letter dated 24th February, 2009 preferably by 31st December, 2009. Provision was also made for continuance of the Nutritional Programme for Adolescent Girls and Kishori Shakti Yojana till such time as a comprehensive universal scheme for the empowerment of adolescent girls called the Rajiv Gandhi Scheme for the Empowerment of Adolescent Girls is implemented.

14. The Central Government, through the Ministry of Women and Child Development and Food and Nutrition Board Office vide its letter dated 28th July, 2009, circulated the Recipe to the State Government (respondent No. 1) as per new norms of ICDS for preparation of the food. It was provided that the feeding norms ought to have two components in it, to be provided as supplementary nutrition to the beneficiaries at Anganwadis namely:- Hot Cooked Meal (HCM) and Take Home Ration (THR). Directions were issued that HCM and THR should be given in the form of "energy dense food / micro nutrient fortified food" and should conform to the standards laid by the Prevention of Food Adulteration Act, Integrated Food Law, Infant and Young Child Practices. The micro nutrient fortified food was defined to be the food in which essential mineral and vitamins are added separately to ensure that minimum dietary requirements are met. It was emphasised that to attain the required protein content in the food proposed to be supplied,

the only source was Soyabean. The food was to be processed by using Extrusion Technology to draw maximum results by use of Soyabean. The guidelines in the aforesaid letter further emphasised that since the revised guidelines laid major stress on micro nutrient fortification of the THR, it required "expert technical supervision" and that it can be achieved by using accurate machines with precision in measuring the quantity in milligrams.

15. It was in response to the directions issued by this Court from time to time and to implement the revised norms set by the Central Government that respondent No. 1, Maharashtra Government passed a resolution on 24th August, 2009. Under this resolution, the Government not only prescribed the procedure for implementing the revised norms but also revised the rates in all the categories of beneficiaries.

16. Based on the above, an Expression of Interest (in short 'EOI') was taken out by respondent No. 2, the Commissioner, i.e., Integrated Child Development Services Scheme, Maharashtra, on 7th December, 2009 for supply of fortified blended food manufactured through process of extrusion. In response to the aforesaid EOI, the State Government received 351 applications for 34 districts across the State of Maharashtra.

17. The aforesaid EOI was challenged by one Smt. Nanda Chandrabhan Thakur in Writ Petition No. 2588 of 2009 before a Division Bench of the Bombay High Court. Primary challenge of that petitioner was to condition No.6 which required the applicant to possess a turn over of Rs. 1 crore for the last three consecutive financial years. Condition No. 6 of the EOI provided as under:-

> "6. The eligible Mahila Mandal, Mahila Sanstha, self helping saving group, should attach a certificate about producing of the Food or equivalent like Fortified Blended Premix and supplying the same upto the Anganwadi in

ICDS for the last 3 consecutive financial years having a turn over of Rs. 1.00 crores. The said certificate should be certified by the Chartered Accountant. (Year 2006-2007, 2007-2008, 2008-2009)."

18. Upon consideration of the matter, the Division Bench observed that plain language of the condition indicates that only Mahila Mandal, Mahila Sanstha and Self helping Saving Group can participate in the tender process, provided they qualify other requirements in Clause 6. It was further observed that one of the requirements of this clause was that the tenderer should attach a certificate about producing the specified food for three consecutive financial years (2006-2007, 2007-2008 and 2008-2009) having a turnover of atleast one crore. The said certificate should be certified by a Chartered Accountant.

19. The writ petition was dismissed with the observations that since the petitioners were not espousing the case of Mahila Mandal or Mahila Sanstha or Self helping Saving Group, they were not eligible as per the tender document at all. Secondly, even if the petitioners were held to be eligible, they did not have a turn over of Rs. 1 crore as required under Clause 6. The petitioners had also sought to argue that the condition of Rs. 1 crore would deprive small time traders and business persons from participating in the tender process. This submission was also negated by the Division Bench with the observation that the criteria fixed by the respondent is a policy matter and is keeping in mind all other factors to further the implementation of child development service scheme. The clause was found to be not arbitrary in any manner.

20. It appears that the EOI had also given rise to certain agitations by some of the Mahila Bachat Gats. During the pendency of these complaints, the Government decided not to proceed further and stayed the process under the EOI on 16th January, 2010. A Committee was constituted on 19th January, 2010 to go into the complaints. Upon examination of the entire material, the Committee concluded that the Extrusion

Technology was necessary to produce the food as required under the directions of the Central Government. On 5th February, 2010, the Committee, therefore, recommended that the stay granted by the State Government may be vacated. The decision was communicated by respondent No. 1 to respondent No. 2 through letter dated 22nd February, 2010. The tender submitted by the petitioner was rejected.

21. This led to the appellant herein filing a Writ Petition No. 1311 of 2010, seeking a direction that the appellant be also considered in respect of supply of extruded fortified blended food / energy food under ICDS Scheme. However, the aforesaid writ petition was withdrawn on 17th February, 2010 with liberty to approach the Government.

22. It is the claim of the appellant that the writ petition was withdrawn as respondent No. 1 had itself stayed the decision of respondent No. 2 to award the contract and was reviewing the condition Nos. 6, 7 and 8. Not knowing that the stay order dated 16th July, 2010 had been recommended to be vacated on 5th February, 2010, the appellant made a representation to respondent Nos. 1 and 2 for consideration to supply the food under the ICDS Scheme. As noticed earlier, in view of the vacation of the stay on 22nd February, 2010, condition Nos. 6, 7 and 8 remained intact. We may further notice here that in the order dated 22nd February, 2010, respondent No. 1 had decided as under:-

(i) That 5% of the tender work be reserved for Mahila Mandal / Mahila Bachat Gat etc., who do not have the Extrusion Technology.

(ii) For this 5% work so reserved, the Extrusion Technology is not required.

23. However, on 23rd February, 2010, the decision taken in the letter dated 22nd February, 2010, was withdrawn. It was, however, further provided that "in future, if some Mahila Bachat Gat / Mahila Sanstha / Mahila Mandal made production

machinery, set up unit and shown their ability of making products, then the Commissioner, Ekatmik Bal Vikas Seva Yojana, Navi Mumbai will give them an opportunity and will purchase THR production made by them."

24. Thereafter, the appellant submitted three representations on 26th February, 2010, 2nd March, 2010 and 4th March, 2010 requesting respondent Nos. 1 and 2 to consider them for supply of the food under ICDS Scheme. It is the case of the appellant that without considering these representations, the respondent Nos. 1 and 2 signed an agreement, awarding the contract to respondent Nos. 4 to 6 for a period of one year, with a clause for extension of two years. Ultimately, in spite of further representations of the appellant, the work order was awarded to respondent Nos. 4 to 6 to support the supply of food material forthwith in accordance with the agreement signed on 28th April, 2010.

25. Aggrieved by the action of respondent Nos. 1 and 2 in awarding the contract to respondent Nos. 4 to 6, the appellant filed a writ Petition No. 4210 of 2010 on 25th August, 2010. The High Court initially passed an order on 30th August, 2010 granting interim relief. Respondent Nos. 1 and 2 filed an application for vacation of stay, the appellant in the reply to the aforesaid application stated that the respondent Nos. 4 to 6 have not fulfilled one of the conditions in the original application form namely that of applicants should submit the copies of the documents signed by the notary, which included VAT Clearance Certificate as on 31st March, 2009. It was also stated that the respondent Nos. 4 to 6 had wrongly stated that no tax was due and payable. Upon consideration of the entire matter, the High Court dismissed the writ petition filed by the appellant. Hence the present Special Leave Petition.

26. We have heard the learned counsel for the parties at length. Although, very elaborate submissions have been made by the learned counsel for the parties, it would be appropriate

to summarize the submissions.

27. Mr. Mukul Rohtagi, learned senior counsel, appearing for the appellant, submitted that the condition Nos. 6, 7, 8 and 9 in the EOI are arbitrary. He further submits that the Government order permitted the grant of contract for a period of one year. However, the agreement entered into with respondent Nos. 4 to 6 provides that the agreement will remain valid for one year and extendable for next 24 months from the date of allotment of the first dispatch advice by the Commissioner with the same terms and conditions. Learned counsel submitted that since the period of one year has expired, it would be appropriate to invite fresh tenders. Learned counsel invited our attention to the Government Resolution dated 24th August, 2009, which clearly provided that as per existing practice, the period of supplying supplementary nutrition food, Mahila Mandal, Women Institutions, Self Assistance Saving Group will be for the period of one year only. Mr. Rohtagi further invited our attention to the Minutes of the meeting held on 5th February, 2010, in view of the Government Circular dated 19th January, 2010 regarding selection of tenders. In Paragraph 7 of the Minutes, it is mentioned that "the agreement for the supply of THR will be for one year and the orders for supply will be given for one year only." On the basis of the above, it is submitted that permitting the extension of the contract for three years is contrary to the decisions taken by the Competent Authority. Hence, the contract is liable to be declared illegal. Learned senior counsel, thereafter, submitted that the entire selection process was suspect. Having stayed the selection process, it was vacated only to show undue favour to respondent Nos. 4 to 6. According to the learned senior counsel, it would have been much more transparent if the tender process was conducted afresh. Mr. Rohtagi then submitted that even if the appellant is not successful on the one year issue, respondent Nos. 4 to 6 still could not be selected as they are not qualified. Learned senior counsel made a

reference to Clause 17 of the EOI, which reads as under:-

- "All applicants should submit the copies of the following documents signed by the Notary.
- Certificate of District Industry Centre, VAT Registration/CST Registration certificate.
- Validity Certificate as per Food Adulteration Prohibition Act, 1954.
- PAN Card.
- ISO 9001 : 2000 Certificate, H.A.C.C.P. Certificate for preparing extruded fortified blended/energy food.
- Income tax returns
- VAT clearance certificate (as on 31.3.2009)
- Evidence/proof to the effect that production centre having permanent structure which is owned public acquired on agreement is in the possession of the Institution."

28. Mr. Rohtagi submits that the VAT Clearance Certificate given by respondent Nos. 4, 5 and 6 depict the details of tax dues from 1st April, 2006 to 31st March, 2009 as "Nil". The statement made is that amount of tax dues is given as per return. The aforesaid declaration, according to the learned

senior counsel is not correct. It is submitted that the information given by the Tax Department in response to an enquiry made by the appellant under the Right to Information shows that respondent Nos. 4, 5 and 6 owe lakhs of rupees. It is further submitted by Mr. Rohtagi that not only the statements made by respondent No. 4 are incorrect but there is concealment of the fact that the aforesaid respondents were black listed by the Tax Department. Mr. Rohtagi submits that cumulative effect of all the aforesaid facts would clearly show that the respondent Nos. 4 to 6 have been shown undue favour by respondent Nos. 1 and 2. Learned senior counsel buttressed this submission on the ground that conditions are clearly tailor-made for respondent Nos. 4 to 6, to the exclusion of everybody else.

29. In response to these submissions, Mr. C.U. Singh, learned senior counsel, appearing for respondent Nos. 1 and 2 submitted that there is no condition limiting the contract to one year. In fact, it has always been one year extendable by two years. Learned senior counsel drew our attention to the events leading to the passing of the order by this Court on 22nd April, 2009. Mr. Singh has pointed out that the appellant admittedly does not fulfill any of the conditions, i.e., 6, 7, 8 and 9. The appellant does not have the turn over of over Rs. 1 crore each year for the last continuous three financial years. This condition has already been upheld by the Bombay High Court in Writ Petition No. 2588 of 2009. The appellant also does not fulfill condition No. 9 as admittedly, it does not have a functioning unit for preparation of fortified blended nourishing food (premix) prepared by extruded system. Learned senior counsel pointed out that initially in Writ Petition No. 1311 of 2010, the appellant had challenged condition Nos. 6, 8, 13 and 14 of the EOI. This writ petition was withdrawn on 17th February, 2010 with liberty to represent to the Government. The present writ petition was filed on 24th August, 2010 before the Nagpur bench. In this writ petition, none of the tender conditions were challenged. The appellant merely prayed for a declaration that condition No. 6 be deemed to be waived. Learned senior

counsel submits that the points urged by Mr. Rohtagi in this Court were never argued before the High Court. Therefore, according to the learned senior counsel, the submissions of the appellant need to be shut out at the threshold. It is further submitted that the representations submitted by the appellant and others were duly considered. The appellant was duly heard. The contract was given initially for one year, which was extendable for three years, on satisfactory performance in the twelve months. Therefore, the agreement clearly stipulated that the work order shall be for one year, extendable by 24 months. According to the learned senior counsel, there is no justification for saying that the contract was to be limited only to one year. Learned senior counsel further submitted that under any circumstances, appellant by its own showing has no locus standi to challenge the grant of contract to respondent Nos. 4 to 6. Mr. Singh points out to the submission made by the appellant in I.A. No. 1 of 2010 seeking permission for filing additional documents. In Paragraph 1, the appellant submits that it had submitted the application for supply of ICDS food for all 34 districts of Maharashtra. It is further submitted that all documents as required by the Notice dated 7th December, 2010 were also submitted. The appellant further states that it had complied with all conditions mentioned in the application, excepting conditions 6, 7 and 8 of the application form. Mr. Singh submits that in the face of this admission, the appellant does not deserve to be heard at all. He has relied on two judgments of this Court in the case of *Glodyne Technoserve Limited Vs. State of Madhya Pradesh & Ors.*[1] and *Larsen and Toubro Limited & Anr. Vs. Union of India & Ors.*[2], in support of the submissions that the tender conditions have to be strictly complied with by all the candidates.

30. Mr. P.S. Patwalia, learned senior counsel, appearing for respondent Nos. 4 to 6, submitted that it was on the representations made by various associations and the appellant

1. (2011) 5 SCC 103.
2. (2011) 5 SCC 430.

that the tender process was stayed. Upon consideration of the entire material, the two letters dated 22nd February, 2010 and 23rd February, 2010 were issued. Learned senior counsel further submitted that although in the letter dated 22nd February, 2010, it was stated that the period of the tender would be one year, the same was withdrawn the next date. Thereafter, the respondent Government reverted back to the EOI. It is further submitted that respondent Nos. 4 to 6 had already been supplying hot meals for a number of years. The condition with regard to supply of THR was added pursuant to the orders passed by this Court, as noticed earlier. In any event, it is submitted by the learned senior counsel that the condition of one year relates only to hot food, it has no connection to the supply of THR. The respondent Nos. 4 to 6 are supplying only THR. It is further submitted that the Sales Tax objection raised by the appellant is wholly without any basis. On 31st March, 2009, there was no Sales Tax dues. This is evident from the assessment made in favour of the respondents, which was much later in point of time. As on 31st March, 2009, the statement made by the respondents was in accordance with the return filed. Learned senior counsel also submitted that these arguments were not raised before the High Court. On the question of black listing, it is submitted that the recommendation for black listing was based on an incident in the year 2004. This was subsequently explained and there was no black listing. Mr. Patwalia also emphasised that the appellant is even otherwise ineligible. It is not in possession of a unit. A reference is made in this connection to the Lease Agreement executed by the appellant on 24th December, 2009. In this agreement, the appellant would be permitted to lease out an existing manufacturing facility. Therefore, on 7th December, 2009, relevant for the purpose of EOI, the appellant did not have a manufacturing unit. Again referring to the Joint Venture Agreement, entered into by the appellant with a third party, it is pointed out that it is without any definite terms and conditions, no consideration was so ever provided for the Joint Venture Agreement. Mr. Patwalia further submits that the

appellant is trying to mislead the Court by relying on an Analysis Certificate dated 25th December, 2009, which shows that the appellant had manufactured fortified blended sukhadi premix on 12th December, 2009. Since the appellant did not have a manufacturing unit, the certificate is clearly procured for the purposes of this case. Learned senior counsel, therefore, submits that the High Court rightly dismissed the writ petition filed by the appellant herein. In reply to the submissions, Mr. Rohtagi submitted that the appellant is concerned only with transparency which must be observed in any tender process. The appellant is only desirous of getting an opportunity to participate in the tender process.

31. We have considered the submissions made by the learned counsel for the parties. We are of the considered opinion that the writ petition has been rightly dismissed by the High Court after examination of the entire issue. The High Court concluded that the appellant failed to satisfy the eligibility criteria as contained in Clause 6, as noticed earlier. The aforesaid clause requires that the tenderer should have produced the specified food for the last three consecutive years and supplied the same to Anganwadi's in ICDS. Since the appellant did not possess a suitable manufacturing unit, the appellant would be rendered ineligible on this score alone. As pointed out by Mr. C.U. Singh, the appellant admitted in terms in its pleadings in I.A. No. 1 of 2010 that it does not satisfy conditions 6, 7 and 8. We could have, therefore, dismissed the appeal solely on the ground that the appellant had made a voluntary admission by which it was bound. However, keeping in view the importance of the issues involved, i.e., the provision of supplementary diet to a segment of the Indian population, which is either severely undernourished or in need of extra calories, we have chosen to examine the entire matter to ensure that the Scheme is being implemented in its letter and spirit by all the participating agencies.

32. In our view, the High Court also correctly observed that the validity of the eligibility criteria contained in Clause 6 of the

tender dated 7th December, 2009 has already been upheld by the Division Bench whilst dismissing the Writ Petition No. 2588 of 2009. The High Court also correctly negated the submissions of the appellant that in spite of not having a unit of its own, the appellant ought to be declared eligible. The High Court also found that in the facts and circumstances of the case, it was only respondent Nos. 4 to 6, who were suitable for grant of contract.

33. We are also unable to accept the submission of Mr. Rohtagi that the original Government decision had limited the period of contract to one year. In fact, as demonstrated by the learned senior counsel for the respondents, the Government decision as well as tender condition clearly stipulated that the contract would be initially for one year. Upon completion of one year, the work of the successful candidate would be reassessed. In case, it is found that the performance has been satisfactory, the tender shall be extended for a period of two more years.

34. We are also of the considered opinion that the food, which is to be supplied to the recipients as a part of the supplementary nutrition programme has to be prepared in the manner prescribed by the Government for safety and nutrient composition of the food. It can not be left to uncertainties of the machinery available with individual manufacturers. The successful supplier is duty bound to necessarily comply with all the specifications laid down by the Government in its norms. Mr. C.U. Singh and Mr. Patwalia, in our opinion, by referring to the various documents, have clearly demonstrated that the appellant is not eligible at all to be even considered in the tender process. It has also been pointed out that all the objections raised by the appellant and other Mahila Mandal / Mahila Sanstha / Mahila Bachat Gat etc. etc. were duly considered by the Government. This is evident from the letters dated 22nd February, 2010 and 23rd February, 2010.

35. We are also not impressed by the submission of Mr.

Rohtagi that the condition of having Rs. 1 crore over the three previous consecutive years, is either arbitrary or whimsical. Mr. C.U. Singh by making detailed reference to the counter affidavit has shown that in the State of Maharashtra, there are 34 districts having an annual value in terms of at-least Rs. 1.7 crores per district. Therefore, the condition of asking for minimum Rs. 1 crore turn over for the last three years can not be said to be arbitrary. In fact, the condition would be of utmost importance.

36. We also find substance in the submission of Mr. C.U. Singh and Mr. Patwalia that EOI had deliberately stressed on the need of precise measurements for the preparation of the food. The supplier is required to provide a fine mix of all kinds of ingredients including the revised intake of proteins and calories to the precise level. In fact, the level of precision is earmarked for each kind of food. The concept behind the same can not be permitted to be demonized by referring to it as food prepared by "automated machines". The procedure adopted is necessary to ensure that there is "zero infection" in the food which is going to be consumed by infants and the children who are already under nourished. It cannot be over emphasised that, since the beneficiaries of the Dense Energy Food and Fortified Blended Mixture are infants from the age group of 6 months to 3 years and pregnant and lactating mothers, it was all the more desirable to have fully automated plants. Such procedure avoids the use of human hands in processes like – handling, cleaning, grinding, extrusion, mixing etc., all of which are done automatically.

37. We are of the considered opinion that the aforesaid considerations can not be said to be extraneous to the purpose for which EOI was floated.

38. Taking into consideration, all the facts and circumstances of the case, we find the appeal to be wholly devoid of any merit and is, therefore, dismissed.

B.B.B. Appeal dismissed.

C. VENKATACHALAM
v.
AJITKUMAR C. SHAH AND OTHERS
(Civil Appeal No. 868 of 2003)

AUGUST 29, 2011

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

Consumer Protection Act, 1986:

Historical perspective of the consumer movement – Discussed.

Appearance before consumer fora by"authorised agent" – Permissibility – Whether authorized agents, who are not advocates, can file complaints and represent persons before the Consumer fora as a lawyer and whether this would not violate the Advocates Act – Held: The appearance of authorized agents is not inconsistent with s.33 of the Advocates Act – The legislature in its wisdom has granted permission to the authorized agents because most of the cases before the Consumer Forums are small cases of relatively poor people where legal intricacies are not involved and great legal skills are not required, which may be handled by the authorized agents – The other reason is that a large number of litigants may not be able to afford heavy professional fees of trained advocates, therefore, authorized agents have been permitted – The agents have been permitted to appear to accomplish the main object of the act of disposal of consumers' complaints expeditiously with no costs or small costs – The High Court was fully justified in observing that the authorised agents do not practise law when they are permitted to appear before the District Forums and the State Commissions – The legislature has given an option to the parties before the Consumer Forums to either

personally appear or be represented by an 'authorized agent' or by an advocate, then the court would not be justified in taking away that option or interpreting the statute differently – The functioning, conduct and behaviour of authorized agents can always be regulated by the Consumer Forums – When the legislature has permitted authorized agents to appear on behalf of the complainant, then the courts can't compel the consumer to engage the services of an advocate –Advocates Act, 1961 – s.33.

Rules for regulation of practice by agents, representatives, registered organizations and/or non-advocates before consumer fora – Held: In order to ensure smooth, consistent, uniform and unvarying functioning of the National Commission, the State Commissions and the District Forums, direction issued to the National Commission to frame comprehensive rules regarding appearances of the agents, representatives, registered organizations and/or non-advocates appearing before the National Commission, the State Commissions and the District Forums governing qualifications, conduct and ethical behaviour of agents/non-advocates/representatives, registered organizations and/or agents appearing before the consumer forums.

Advocates – Appearance by non-advocate representative before authorities and forums – Permissibility – Held: Many statutes and Acts in India permit non-advocates to represent the parties before the authorities and forums – In other jurisdictions also, non-advocates are permitted to appear before quasi-judicial fora or subordinate courts – In most of these jurisdictions, specific rules have been framed for the regulation of qualifications, conduct and ethical behaviour of the non-advocates appearing in these fora – In most jurisdictions, the statutes or court rules impose some form of restrictions on appearances of non-advocate representatives in quasi-judicial fora or subordinate courts – Restrictions on non-advocates agents vary significantly in

terms of their specificity, but most forums have rules granting them some discretion in admitting or refusing the appearance of a non-advocate representative.

In the instant appeals, the issue which arose for consideration was whether authorized agents, who are not advocates, can file complaints and represent persons before the Consumer fora as a lawyer and whether this would not violate the Advocates Act, 1961.

The appellants contended that ordinarily the right to practise has been given only to advocates who are enrolled with the Bar Council of a State. Placing reliance on provisions of the Advocates Act, 1961, as also international law and conventions, the appellants contended that only advocates can act, plead and argue before the Consumer Forums and that the agents have no legal training to handle complicated legal matters pertaining to consumers and hence they cannot be permitted to practise law before the Consumer Forums.

The High Court vide the impugned judgment held that a party before the District Consumer Forum/State Commission cannot be compelled to engage services of an advocate and also that the right of audience inheres in favour of authorized agents of the parties in the proceedings before the District Consumer Forum and the State Commission and such right is not inconsistent or in conflict with the provisions of the Advocates Act, 1961.

Dismissing the appeals, the Court

HELD:

Historical perspective of the consumer movement

1.1. The consumer movement had primarily started in the West. The organized English consumer movement

started after the Second World War. The Labour Party for the first time gave slogan of "battle for the consumers" in Parliament. In the decade of 1960, number of legislations were introduced in Britain for the protection of the consumers. The consumer movement in the United States of America developed in the beginning of the 19th century. Subsequently, the General Assembly of the United Nations adopted a set of general guidelines for consumer protection and the Secretary General of the United Nations was authorized to persuade member countries to adopt these guidelines through policy changes or law. These guidelines constitute a comprehensive policy framework outlining what governments need to do to promote consumer protection in following seven areas: Physical safety; Protection and Promotion of the consumer economic interest; Standards for the safety and quality of consumer goods and services; Distribution facilities for consumer goods and services; Measures enabling consumers to obtain redress; Measures relating to specific areas (food, water and pharmaceuticals); and Consumer education and information programme. Though not legally binding, the guidelines provide an internationally recognized set of basic objectives particularly for governments of developing and newly independent countries for structuring and strengthening their consumer protection policies and legislations. These guidelines were adopted recognizing that consumers often face imbalances in economic terms, educational levels and bargaining power and bearing in mind that consumers should have the right of access to non hazardous products as well as the importance of promoting just, equitable and sustainable economic and social development. [Paras 23, 27, 28, 33, 34] [836-A; 837-A-C; 839-E-H; 840-A-D]

Indian perspective

1.2. It was in this background that the Indian Parliament had enacted the Consumer Protection Act, 1986. The declared objective of the statute was "to provide for better protection of the interests of consumers." It seeks to provide a speedy and inexpensive remedy to the consumer. The Consumer Protection Act, 1986 is one of the benevolent social legislations intended to protect the large body of consumers from exploitation. The Act has come as a panacea for consumers all over the country and is considered as one of the most important legislations enacted for the benefit of the consumers. The Consumer Protection Act, 1986 provides inexpensive and prompt remedy. The Consumer Protection Act, 1986 is dedicated, as its preamble shows, to provide for effective protection of the rights of the consumers. According to the Statement of Objects and Reasons, it seeks to provide speedy and simple redressal to consumer disputes. The object of the Act is to render simple, inexpensive and speedy remedy to the consumers with complaints against defective goods and deficient services and for that a quasi-judicial machinery has been sought to be set up at the District, State and Central levels. The Consumer Protection Act has come to meet the long-felt necessity of protecting common man from wrongs for which the remedy under the ordinary law for various reasons has become illusory. The Consumer Protection Act, 1986 was amended in the years 1991, 1993 and in 2002 to make it more effective and purposeful. To effectuate this objective, a provision has been made in Chapter II of the Act for the constitution of 'the Central Consumer Protection Council' and 'the State Consumer Protection Councils." The purpose as indicated in section 6 is to "promote and protect the rights of consumers" against the "marketing of goods and services which are

hazardous to life and property; the right to be informed about the quality, quantity, potency, purity, standard and price of goods or services, as the case may be, so as to protect the consumer against unfair trade practices; the right to be assured, wherever possible, access to a variety of goods and services at competitive prices; the right to be heard and to be assured that consumer's interests will receive due consideration at appropriate Forums; the right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers and the right to consumer education." A perusal of Chapter II clearly shows that the statute seeks to protect the 'consumer' of goods and services in every possible way. It aims at providing a speedy and inexpensive remedy. Any interpretation of the provisions of the 1986 Act and the rules framed thereunder must promote this objective of the enactment. In furtherance of the declared objective of protecting the consumer against exploitation as well as providing an inexpensive and speedy remedy, the competent authority has framed Rules which enable the party to appear either personally or through an 'agent'. [Paras 35 to 41] [840-E-H; 841-A-H; 842-A-B]

Harishankar Rastogi v. Girdhari Sharma and Another **(1978) 2 SCC 165: 1978 (3) SCR 493 – referred to.**

Carlill v. Carbolic Smoke Ball Company **1893 (1) Q.B. 256;** *Donoghue v. Stevenson* **(1932) A.C. 562 and** *Donald C. MacPherson v. Buick Motor Company* **217 N.Y. 382, 111 N.E. 1050 – referred to.**

O.N. Mohindroo v. The Bar Council of Delhi and Others **1968 (2) SCR 709 – cited.**

Article on "Consumer Movement" **by Paul S. Boyer [Oxford Companion to United States History, 2001] – referred to.**

Legislative intention

2.1. The agents have been permitted to appear before the Consumer Forums. The appearance of authorized agents is not inconsistent with section 33 of the Advocates Act, 1961. The legislature in its wisdom has granted permission to the authorized agents because most of the cases before the Consumer Forums are small cases of relatively poor people where legal intricacies are not involved and great legal skills are not required, which may be handled by the authorized agents. The other reason is that a large number of litigants may not be able to afford heavy professional fees of trained advocates, therefore, authorized agents have been permitted. It is the bounden duty and obligation of the Court to carefully discern the legislative intention and articulate the same. In the instant case one is not really called upon to discern legislative intention because there is specific rule defining the agents and the provisions of permitting them to appear before the Consumer Forums. The agents have been permitted to appear to accomplish the main object of the act of disposal of consumers' complaints expeditiously with no costs or small costs. [Paras 79 to 82] [854-B-F]

2.2. The High Court was fully justified in observing that the authorised agents do not practise law when they are permitted to appear before the District Forums and the State Commissions. In the impugned judgment the High Court aptly observed that many statutes, such as, Sales Tax, Income Tax and Competition Act also permit non-advocates to represent the parties before the authorities and those non-advocates cannot be said to practise law. On the same analogy those non-advocates who appear before Consumer fora also cannot be said to practise law. [Paras 83, 84] [854-G-H; 855-A-B]

2.3. The legislature has given an option to the parties before the Consumer Forums to either personally appear or be represented by an 'authorized agent' or by an advocate, then the court would not be justified in taking away that option or interpreting the statute differently. [Para 85] [855-B-C]

2.4. The functioning, conduct and behaviour of authorized agents can always be regulated by the Consumer Forums. When the legislature has permitted authorized agents to appear on behalf of the complainant, then the courts can't compel the consumer to engage the services of an advocate. [Paras 86, 87] [855-D-E]

R.M.D. Chamarbaugwalla and Another v. Union of India and Another **AIR 1957 SC 628;** *Anandji Haridas & Company Private Limited v. Engineering Mazdoor Sangh and Another* **(1975) 3 SCC 862: 1975 (3) SCR 542;** *Kartar Singh v. State of Punjab* **(1994) 3 SCC 569: 1994 (2) SCR 375;** *District Mining Officer and Others v. Tata Iron and Steel Company and Another* **(2001) 7 SCC 358: 2001 (1) Suppl. SCR 147;** *Bhatia International v. Bulk Trading S.A. and Another* **(2002) 4 SCC 105: 2002 (2) SCR 411;** *Lucknow Development Authority v. M.K. Gupta* **(1994) 1 SCC 243: 1993 (3) Suppl. SCR 615;** *Laxmi Engineering Works v. P.S.G. Industrial Institute* **(1995) 3 SCC 583: 1995 (3) SCR 174;** *Indian Photographic Company Limited* v. *H.D. Shourie* **(1999) 6 SCC 428: 1999 (1) Suppl. SCR 9;** *Dr. J.J. Merchant and Others v. Shrinath Chaturvedi* **(2002) 6 SCC 635: 2002 (1) Suppl. SCR 469;** *Common Cause, A Registered Society v. Union of India and others* **(1997) 10 SCC 729: 1993 (1) SCR 10 – referred to.**

Blackstone's Commentaries on the Laws of England, **Vol. I, 2001; Edited by Wayne Morrison.**

3. The National Commission being aware of a

possibility of misuse of the right by an agent had framed Regulation 30-A of the Consumer Protection Act, 1986, wherein certain restrictions on the right of audience and also certain precautions to rule out any misuse of liberty granted has been taken by way of framing Regulation 16. Clauses 6 and 7 of Regulation 16 were enacted for providing proper guidelines and safeguards for regulating appearance and audience of the agents. The aforesaid regulation is a reasonable restriction on the right to appear by an agent. Such reasonable restrictions as provided for are to be strictly adhered to and complied with by the Consumer Forum hearing cases under the Consumer Protection Act so as to rule out any misuse of the privilege granted. In terms of the said regulation and other regulations as provided and framed by the National Commission and as approved by the Parliament of India, the Consumer Forum has the right to prevent an authorized agent to appear in case it is found and believed that he is using the said right as a profession. The Consumer Forums being empowered with such Regulations would be in a position to judge whether the agent appearing before it is in any manner exercising such privileges granted for any ulterior purpose. [Paras 88, 89] [855-F; 856-C-E]

4. Many statutes and Acts in India permit non-advocates to represent the parties before the authorities and forums. In other jurisdictions also, non-advocates are permitted to appear before quasi-judicial fora or subordinate courts. In most of these jurisdictions, specific rules have been framed for the regulation of qualifications, conduct and ethical behaviour of the non-advocates appearing in these fora. In most jurisdictions, the statutes or court rules impose some form of restrictions on appearances of non-advocate representatives in quasi-judicial fora or subordinate courts. Restrictions on non-advocates agents vary

significantly in terms of their specificity, but most forums have rules granting them some discretion in admitting or refusing the appearance of a non-advocate representative. [Paras 90, 91 and 92] [856-F-H; 857-A-D]

Directions

5.1. In order to ensure smooth, consistent, uniform and unvarying functioning of the National Commission, the State Commissions and the District Forums, it is deemed appropriate to direct the National Commission to frame comprehensive rules regarding appearances of the agents, representatives, registered organizations and/or non-advocates appearing before the National Commission, the State Commissions and the District Forums governing their qualifications, conduct and ethical behaviour of agents/non-advocates representatives, registered organizations and/or agents appearing before the consumer forums. [Para 109] [862-B-C]

The National Commission may consider following suggestions while framing rules

5.2. The Commission may consider non-advocates appearing without accreditation - A party may appoint a non-advocate as its representative provided that the representative –

(1) is appearing on an individual case basis

(2) has a pre-existing relationship with the complainant (e.g., as a relative, neighbour, business associate or personal friend)

(3) is not receiving any form of direct or indirect remuneration for appearing before the Forum and files a written declaration to that effect

(4) demonstrates to the presiding officer of the Forum that he or she is competent to represent the party.

Accreditation Process

(a) The National Commission may consider creating a process through which non-advocates may be accredited to practice as representatives before a Forum.

(b) Non-advocates who are accredited through this process shall be allowed to appear before a Forum on a regular basis

(c) The accreditation process may consist of –

(1) an written examination that tests an applicant's knowledge of relevant law and ability to make legal presentations and arguments

(2) an inspection of the applicant's educational and professional background

(3) an inspection of the applicant's criminal record

(d) the National Commission may prescribe additional requirements for accreditation at its discretion provided that the additional requirements are not arbitrary and do not violate existing law or the Constitution.

Fees

(a) A representative who wishes to receive a fee must file a written request before the Forum

(b) The presiding officer will decide the amount of the fee, if any, a representative may charge or receive

(c) When evaluating a representative's request for a fee, the presiding officer may consider the following factors :

(1) the extent and type of services the representative performed

(2) the complexity of the case

(3) the level of skill and competence required of the representative in giving the services

(4) the amount of time the representative spent on the case; and

(5) the ability of the party to pay the fee

(d) If a party is seeking monetary damages, its representative may not seek more a fee of more than 20% of the damages

Code of Conduct for representatives

- The National Commission to create a code of conduct which would apply to non-advocates, registered organizations and agents appearing before a Forum.

Disciplinary Powers of a Forum

(a) The presiding officer of a Forum may be given specific power to discipline non-advocates, agents, authorized organizations and representatives for violating the code of conduct or other behaviour that is unfitting in a Forum

(a) In exercising its disciplinary authority, the presiding officer may –

(1) revoke a representative's privilege to appear before the instant case

(2) suspend a representative's privilege to appear before the Forum

(3) ban a representative from appearing before the forum

(4) impose a monetary fine on the representative [Para 110] [862-D-H; 863-A-H; 864-A-H]

5.3. The National Commission is directed to frame comprehensive Rules as expeditiously as possible, in any event, within three months from the date of communication of this order. The copy of this judgment be sent to the National Commission. [Para 111] [865-A]

Case Law Reference:

1968 (2) SCR 709	cited	Para 20
1978 (3) SCR 493	referred to	Para 21, 52
1893 (1) Q.B. 256	referred to	Para 23
(1932) A.C. 562	referred to	Para 25
217 N.Y. 382, 111 N.E. 1050	referred to	Para 28
AIR 1957 SC 628	referred to	Para 58
1975 (3) SCR 542	referred to	Para 59
1994 (2) SCR 375	referred to	Para 60
2001 (1) Suppl. SCR 147	referred to	Para 61
2002 (2) SCR 411	referred to	Para 62

1993 (3) Suppl. SCR 615	**referred to**	**Para 74**
1995 (3) SCR 174	**referred to**	**Para 75**
1999 (1) Suppl. SCR 9	**referred to**	**Para 76**
2002 (1) Suppl. SCR 469	**referred to**	**Para 77**
1993 (1) SCR 10	**referred to**	**Para 78**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 868 of 2003.

From the Judgment & Order dated 04.09.2002 of the High Court of Judicature at Bombay in Writ Petition No. 1425 of 2002.

WITH

C.A. Nos. 869-870 of 2003.

J.L. Gupta, Santosh Paul, Arvind Gupta, K.K Bhat, Meera Mathew (for M.J. Paul), Sanjeev Sachdeva, Pree Pal Singh, Vibhu Verma for the Appellant.

Bharat Sangal, Vernica Tomar, Alka Singh for the Respondents.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. These appeals emanate from the judgment dated 4.9.2002 delivered by the Division Bench of the Bombay High Court in Writ Petition Nos. 1147 and 1425 of 2002. We propose to dispose of these appeals by a common judgment because same questions of law are involved in these appeals.

BRIEF FACTS:

2. A complaint bearing no.428 of 2000 of alleged deficiency in service was filed before the South Mumbai District

Consumer Disputes Redressal Forum, Mumbai (for short, Consumer Forum) against the two tour operators. During the pendency of the complaint, applications were filed by the opposite parties contending that the authorized agent should not be granted permission to appear on behalf of the complainants as he was not enrolled as an Advocate. The Consumer Forum considered the applications and held that the authorized agent had no right to act and plead before the Consumer Forum as he was not enrolled as an advocate.

3. In complaint bearing no.167 of 1997 filed before the Consumer Forum, the majority expressed the view that the authorized agents have a right to file, act, appear, argue the complaint to its logical conclusion before the Consumer Agencies. The issue was taken to the State Consumer Disputes Redressal Commission (for short, State Commission) which stayed the hearing of the matters in which authorized agents were appearing and refused to grant stay where authorized agents were injuncted from appearing before the Consumer Forum. As a result, the proceedings in a large number of cases where the authorized agents were appearing had come to standstill.

4. The interim order passed by the State Commission was challenged in two writ petitions before the Bombay High Court. The petitions were allowed by the Division Bench. The High Court held that the Consumer Fora constituted under the Consumer Protection Act, 1986 have "trappings of a civil court" but "are not civil courts within the meaning of the provisions of the Code of Civil Procedure."

5. The High Court in the impugned judgment held that a party before the District Consumer Forum/State Commission cannot be compelled to engage services of an advocate.

6. The High Court further held that the Act of 1986 is a special piece of legislation for the better protection of the interests of consumers. The Act has been enacted to give

succour and relief to the affected or aggrieved consumers quickly with nil or small expense. The Consumer Forum created under the Act of 1986 is uninhibited by the requirement of court fee or the formal procedures of court – civil or criminal…..any recognized consumers Association can espouse his cause……Even the Central Government or State Governments can act on his/their behalf…restrictive meaning shall not be consistent with the objectives of the Act of 1986…The right to appear, therefore, includes right to address the Court, examining, cross-examining witnesses, oral submissions etc..

7. The Division Bench also held that the right of audience inheres in favour of authorized agents of the parties in the proceedings before the District Consumer Forum and the State Commission and such right is not inconsistent or in conflict with the provisions of the Advocates Act, 1961.

8. The Division Bench also observed that the right of an advocate to practise is not an absolute right but is subject to other provisions of the Act. According to the Division Bench, permitting the authorized agents to represent parties to the proceedings before the District Forum/State Commission cannot be said to practise law.

9. The Division Bench also held that there are various statutes like Income Tax Act, Sales Tax Act and the Monopolies and Restrictive Trade Practices Act which permit non-advocates to represent the parties before the authorities under those Acts and those non-advocates appearing before those Forums for the parties cannot be said to practise law. The Rules of 2000 framed under Act of 1986 permit authorized agents to appear for the parties and such appearance of authorized agents cannot be said to be inconsistent with section 33 of Advocates Act.

10. The Division Bench also dealt with the disciplinary aspect of the matter and held that if authorized agent appearing for the party to the proceedings misbehaves or exhibits violent

behaviour or does not maintain the decency and decorum of the District Forum or State Commission or interferes with the smooth progress of the case then it is always open to such District Forum or State Commission to pass an appropriate order refusing such authorized agent the audience in a given case.

11. These appeals have been preferred before this court against the impugned judgment.

12. A two-judge Bench of this Court on 21.2.2007 referred these matters to a larger Bench in view of the importance of the matter. The order dated 21.2.2007 reads as under:

> "The basic issue involved in these appeals is whether a person under the purported cover of being an "agent" can represent large number of persons before the forums created under the Consumer Protection Act, 1986 (In short the 'Act') and the Rules made thereunder. According to the appellant Rule relating to agents cannot be used to by passing stipulations under the provisions of the Advocates Act, 1961 (in short the 'Advocates Act'), more particularly under Sections 29, 31 and 32. Rule 2(b) of the Consumer Protection Rules, 1987 (in short the 'The Rules') defines an 'agent' as under:
>
> > "agent means a person duly authorized by a party to present any complaint, appeal or reply on its behalf before the National Commission."
>
> Similarly, Rule 14(1) and 14(3) also deal with the acts which an agent can undertake.
>
> Learned counsel for the respondents has submitted that in Civil Appeal No. 2531 of 2006 (R.D. Nagpal Vs. Vijay Dutt & Anr.) this Court has accepted the stand that even a Doctor is authorised by a party can cross examine the complainant.

So far as individual cases are concerned, it may not present difficulty. But the question is whether somebody who is not a legal practitioner, can represent large number of parties before their forums thereby frustrating objects embodied in the Advocates Act.

It is submitted by the learned counsel for the appellants that a large number of persons who are otherwise not entitled to appear before the forums are doing so under the garb of being agents.

As the matter is of great importance, we refer the same to a larger Bench.

Papers may be placed before Hon'ble the Chief Justice of India so that necessary orders can be passed for placing these matters before the appropriate Bench."

13. Hon'ble the Chief Justice of India has referred these appeals before a three judge Bench.

14. It is imperative to properly comprehend the objects and reasons of the Consumer Protection Act, 1986 in order to deal with the controversy involved in the case.

"**Statement of Objects and Reasons –** The Consumer Protection Bill, 1986 seeks to provide for better protection of the interests of consumers and for the purpose, to make provisions for the establishment of Consumer Councils and other authorities for the settlement of consumer disputes and for matters connected therewith.

2. It seeks, *inter alia,* to promote and protect the rights of consumers such as-

(a) the right to be protected against marketing of goods which are hazardous to life and property;

(b) the right to be informed about the quality, quantity,

potency, purity, standard and price of goods to protect the consumer against unfair trade practices;

(c) the right to be assured, wherever possible, access to an array of goods at competitive prices;

(d) the right to be heard and to be assured that consumer interests will receive due consideration at appropriate forums;

(e) the right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers; and

(f) right to consumer education.

3. These objects are sought to be promoted and protected by the Consumer Protection Council to be established at the Central and State level.

4. To provide speedy and simple redressal to consumer disputes, a quasi-judicial machinery is sought to be set-up at the district, State and Central levels. These quasi-judicial bodies will observe the principles of natural justice and have been empowered to give relief of a specific nature and to award, wherever appropriate, compensation to consumers. Penalties for non-compliance of the orders given by the quasi-judicial bodies have also been provided."

15. Mr. Santosh Paul, learned counsel appearing for the appellants argued these appeals and also submitted the written submissions. He submitted that ordinarily right to practise has been given only to advocates who are enrolled with the Bar Council of a State. Section 29 of the Advocates Act, 1961 recognised advocates as class of persons entitled to practise the profession of law. Section 29 reads as under:

"29. Advocates to be the only recognized class of

persons entitled to practice law – Subject to the provisions of this Act and any rules made thereunder, there shall, as from the appointed day, be only one class of persons entitled to practise the profession of law, namely, advocates."

16. Section 32 of the Advocates Act, 1961 deals with the power of court to permit appearances in particular cases where court can permit any person not enrolled as an advocate. Section 32 reads as under:

"**Power of Court to permit appearances in particular cases –** Notwithstanding anything contained in this Chapter, any court, authority, or person may permit any person, not enrolled as an advocate under this Act, to appear before it or him in any particular case."

17. Section 33 of the Advocates Act, 1961 says that no person shall, on or after the appointed day, be entitled to practise in any court or before any authority unless he is enrolled as an advocate. Section 33 reads as under:

"**Advocates alone entitled to practise –** Except as otherwise provided in this Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practise in any court or before any authority or person unless he is enrolled as an advocate under this Act."

18. According to Mr. Paul, analysis of these provisions lead to clear conclusion that only advocates can act, plead and argue before the Consumer Forums.

19. He placed reliance on the following judgments of this court :-

20. In *O.N. Mohindroo v. The Bar Council of Delhi and Others* 1968 (2) SCR 709, the court held as under:-

"The object of the Act is thus to constitute one common Bar for the whole country and to provide machinery for its regulated functioning. Since the Act sets up one Bar, autonomous in its character, the Bar Councils set up thereunder have been entrusted with the power to regulate the working of the profession and to prescribe rules of professional conduct and etiquette, and the power to punish those who commit breach of such rules. The power of punishment is entrusted to the disciplinary committees ensuring a trial of an advocate by his peers. Sections 35, 36 and 37 lay down the procedure for trying complaints, punishment and an appeal to the Bar Council of India from the orders passed by the State Bar Councils. As an additional remedy section 38 provides a further appeal to the Supreme Court. Though the Act relates to the legal practitioners, in its pith and substance it is an enactment which concerns itself with the qualifications, enrollment, right to practise and discipline of the advocates. As provided by the Act once a person is enrolled by any one of the State Bar Councils, he becomes entitled to practise in all courts including the Supreme Court. As aforesaid, the Act creates one common Bar, all its members being of one class, namely, advocates. Since all those who have been enrolled have a right to practise in the Supreme Court and the High Courts, the Act is a piece of legislation which deals with persons entitled to practise before the Supreme Court and the High Courts. Therefore the Act must be held to fall within entries 77 and 78 of List I. As the power of legislation relating to those entitled to practise in the Supreme Court and the High Courts is carved out from the general power to legislate in relation to legal and other professions in entry 26 of List III, it is an error to say, as the High Court did, that the Act is a composite legislation partly falling under entries 77 and 78 of List I and partly under entry 26 of List III."

21. In *Harishankar Rastogi v. Girdhari Sharma and Another* (1978) 2 SCC 165, the court held as under:-

> "Advocates are entitled as of right to practise in this Court (Section 30(i) of the Advocates Act, 1961). But, this privilege cannot be claimed as of right by any one else. While it is true that Article 19 of the Constitution guarantees the freedom to practise any profession, it is open to the State to make a law imposing, in the interest of the general public, reasonable restrictions on the exercise of the right. The Advocates Act, by Section 29, provides for such a reasonable restriction, namely, that the only class of persons entitled to practise the profession of law shall be advocates. Even so, is it not open to a party who is unable for some reason or other to present his case adequately to seek the help of another person in this behalf? To negative such a plea may be to deny justice altogether in certain cases, especially in a land of illiteracy and indigence and judicial processes of a sophisticated nature. That is precisely why legislative policy has taken care to provide for such contingencies. Sections 302, 303 and 304 of the Criminal Procedure Code are indicative of the policy of the legislature. I do not think that in this Court we should totally shut out representation by any person other than the party himself in situations where an advocate is not appearing for the party…."

22. Mr. Paul appearing for the appellants also gave reference to international law and conventions to strengthen his submissions that only advocates enrolled with the respective Bar Councils alone can practise in the Consumer Forums and the agents cannot appear. He submitted that practice under the Consumer Protection Act, 1986 requires extensive legal skills which only a trained legal practitioner possesses and he alone can discharge those functions. He submitted that the agents have no legal training to handle complicated legal matters pertaining to consumers and hence the agents cannot be permitted to practise law before the Consumer Forums.

Historical perspective of the consumer movement

23. The consumer movement had primarily started in the West. We can trace history of the consumer movement from the judgment of the leading case *Carlill v. Carbolic Smoke Ball Company* 1893 (1) Q.B. 256. In this case first time Manufacturers' liability for minimum quality standard for product was established.

24. For the first time in 1856 a select committee recommended that a cheap and easy remedy, by a summary charge before a magistrate, should be afforded to consumers who received adulterated or falsely described food. This suggestion was taken up in the Merchandise Marks Act, 1887. Section 17 of the Act provides as follows :

> "That a person applying a trade description to a product was deemed to warrant that it was true, so that a false trade description constituted breach of both criminal and civil law."

25. In a leading English case *Donoghue v. Stevenson* (1932) A.C. 562, where the consumer claimed to have suffered injury as well as result of drinking from a bottle of ginger-beer containing a decomposed snail. Over a strong dissent the majority held that the manufacturer would be liable. The case did not herald strict liability but it facilitated more claims than were provided under the nineteenth century approach. Lord Atkin enunciated the manufacturer's duty of care in the following words:

> "…….the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

26. This theory of strict liability already exists under the Consumer Protection Act, 1961.

27. The organized English consumer movement started after the Second World War. The Labour Party for the first time gave slogan of "battle for the consumers" in Parliament. In the decade of 1960, number of legislations were introduced in Britain for the protection of the consumers. The Consumer Safety Act, 1978 was enacted.

United States of America

28. The consumer movement in the United States of America developed in the beginning of the 19th century when in *Donald C. MacPherson v. Buick Motor Company* 217 N.Y. 382, 111 N.E. 1050 the New York Court of Appeal observed that a car manufacturer had to compensate a consumer who had been injured when one of the car wheels collapsed because of defect. The court held that the manufacturer had been negligent because the defect could have been discovered by reasonable inspection. In 1972, the Consumer Product Safety Act was enacted.

29. Paul S. Boyer, a distinguished author, in his article on "Consumer Movement", published by The Oxford Companion to United States History, 2001, has mentioned about the modern consumer movement. The relevant following extract is instructive and is reproduced as under.

> "The modern consumer movement arose in the *Progressive Era*, as citizens concerned about unsafe products and environmental hazards used lobbying, voting, and journalistic exposés to press for government protection. In the same vein, the Consumers Union (1936), publisher of *Consumer Reports,* tests products for safety, economy, and reliability, to give consumers an objective basis for choice.
>
> …….Such socially engaged consumerism actually had long historical antecedents, including Revolutionary Era patriots who had boycotted English tea and textiles and

> abolitionists who had refused to purchase goods made of slave•]produced cotton.
>
> Consumer activism revived in the late 1960s, flourished in the 1970s, and, despite a conservative backlash against government regulation, survived in diminished form in the 1990s. A by•]product of 1960s social activism, consumer advocates insisted on citizens' rights to safe and reasonably priced goods and services and to the full disclosure of product information. The lawyer Ralph *Nader* gained fame for *Unsafe at Any Speed* (1965), which detailed safety hazards plaguing General Motors' (GM) Corvair automobile. Using $425,000 won in an invasion•]of•]privacy suit against GM in 1970, Nader founded numerous consumer groups, nicknamed "Nader's Raiders," that pursued legal challenges to unsafe products and demanded greater government protection for consumers. The formation of the Consumer Federation of America (1968), the Occupational Safety and Health Administration (1970), and the Consumer Product Safety Commission (1972) attested to the movement's success but also to its regulatory and legalistic bent. Focused on consumers' rights, the modern movement downplayed the power of consumers to effect social change."

30. Ralph Nader played an extremely important role in consumer movement in the United States of America. A note appears in "America in Ferment : The Tumultuous 1960s – Ralph Nader and the Consumer Movement.' An extract is reproduced. It reads :-

> "Ralph Nader has been called the nation's nag. He denounced soft drinks for containing excessive amounts of sugar (more than nine teaspoons a can). He warned Americans about the health hazards of red dyes used as food colorings and of nitrates used as preservatives in hot dogs. He even denounced high heels: "It is part of the whole tyranny of fashion, where women will inflict pain on

themselves ... for what, to please men." Since the mid-1960s, Ralph Nader has been the nation's leading consumer advocate."

31. Ralph Nader is an extraordinary example of total devotion to the cause. It is men like him who leave an imprint and make history. Consumer movements all over the world have taken great inspiration from Ralph Nader.

32. Every year 15th March is observed as the World Consumer Rights Day. On that day in 1962 President John F. Kennedy of the United States called upon the United States Congress to accord its approval to the Consumer Bill of Rights. They are (i) right to choice; (ii) right to information; (iii) right to safety; and (iv) right to be heard. President Gerald R. Ford added one more right i.e. right to consumer education. Further other rights such as right to healthy environment and right to basic needs (food, clothing and shelter) were added. Unfortunately, in most of the countries these rights are still not available to the consumers. In India 24th December every year celebrated as National Consumer Rights Day.

33. The General Assembly of the United Nations adopted a set of general guidelines for consumer protection and the Secretary General of the United Nations was authorized to persuade member countries to adopt these guidelines through policy changes or law. These guidelines constitute a comprehensive policy framework outlining what governments need to do to promote consumer protection in following seven areas:

(i) Physical safety;

(ii) Protection and Promotion of the consumer economic interest;

(iii) Standards for the safety and quality of consumer goods and services;

(iv) Distribution facilities for consumer goods and services;

(v) Measures enabling consumers to obtain redress;

(vi) Measures relating to specific areas (food, water and pharmaceuticals); and

(vii) Consumer education and information programme.

34. Though not legally binding, the guidelines provide an internationally recognized set of basic objectives particularly for governments of developing and newly independent countries for structuring and strengthening their consumer protection policies and legislations. These guidelines were adopted recognizing that consumers often face imbalances in economic terms, educational levels and bargaining power and bearing in mind that consumers should have the right of access to non hazardous products as well as the importance of promoting just, equitable and sustainable economic and social development.

Indian perspective

35. It was in this background that the Indian Parliament had enacted the Consumer Protection Act, 1986. The declared objective of the statute was "to provide for better protection of the interests of consumers." It seeks to provide a speedy and inexpensive remedy to the consumer.

36. The Consumer Protection Act, 1986 is one of the benevolent social legislations intended to protect the large body of consumers from exploitation. The Act has come as a panacea for consumers all over the country and is considered as one of the most important legislations enacted for the benefit of the consumers. The Consumer Protection Act, 1986 provides inexpensive and prompt remedy.

37. The Consumer Protection Act, 1986 is dedicated, as its preamble shows, to provide for effective protection of the

rights of the consumers. According to the Statement of Objects and Reasons, it seeks to provide speedy and simple redressal to consumer disputes. The object of the Act is to render simple, inexpensive and speedy remedy to the consumers with complaints against defective goods and deficient services and for that a quasi-judicial machinery has been sought to be set up at the District, State and Central levels. The Consumer Protection Act has come to meet the long-felt necessity of protecting common man from wrongs for which the remedy under the ordinary law for various reasons has become illusory.

38. The Consumer Protection Act, 1986 was amended in the years 1991, 1993 and in 2002 to make it more effective and purposeful.

39. To effectuate this objective, a provision has been made in Chapter II of the Act for the constitution of 'the Central Consumer Protection Council' and 'the State Consumer Protection Councils." The purpose as indicted in section 6 is to "promote and protect the rights of consumers" against the "marketing of goods and services which are hazardous to life and property; the right to be informed about the quality, quantity, potency, purity, standard and price of goods or services, as the case may be, so as to protect the consumer against unfair trade practices; the right to be assured, wherever possible, access to a variety of goods and services at competitive prices; the right to be heard and to be assured that consumer's interests will receive due consideration at appropriate Forums; the right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers and the right to consumer education."

40. A perusal of Chapter II clearly shows that the statute seeks to protect the 'consumer' of goods and services in every possible way. It aims at providing a speedy and inexpensive remedy. Any interpretation of the provisions of the 1986 Act and the rules framed thereunder must promote this objective of the enactment.

41. In furtherance of the declared objective of protecting the consumer against exploitation as well as providing an inexpensive and speedy remedy, the competent authority has framed Rules which enable the party to appear either personally or through an 'agent'.

42. The issue is – Do the Rules permit a party to have an 'Agent' for merely presenting the papers on its behalf or can the Agent even act and argue?

Maharashtra Consumer Protection Rules, 1987

- Rule 2(b) defines an Agent to mean "a person duly authorized by a party to present any complaint, appeal or reply on its behalf before the State Commission or the District Forum."
- Under Rule 4(7), the parties are obliged to either appear personally or through "authorized agent." If "the complainant or his authorized agent fails to appear before the District Forum" it may "in its discretion either dismiss the complaint for default or decide it on merit." Similarly, "where the opposite party (defendant) or its authorized agent fails to appear on the day of hearing, the District Forum may decide the complaint ex parte."
- A perusal of the provisions show that while the advocates have not been debarred from pleading and appearing, the parties have been given an option to either appear personally or be represented by "duly authorized" agents. Every advocate appointed by a party is an agent. However, the agent as contemplated under the rules need not necessarily be an advocate.
- The provision in the Rules promotes the object of the statute. It is meant to help the consumer to

vindicate his right without being burdened with intricate procedures and heavy professional fees.

- In the very nature of things, the disputes under the 1986 Act can involve claims for small amounts of money by way of compensation. Engagement of advocates in all such matters may not be economically viable. It is equally possible that the claim may involve professional expertise. To illustrate: A person may sue a hospital for medical negligence. Or an Architect for a faulty design. Or a building contractor for defective work. In such cases, a professional like a doctor, architect or an engineer may be more suitable than an advocate. Thus, both the parties have been given an option to choose from an advocate or any other person who may even be a professional expert in the particular field.

43. Such an interpretation is not only literally correct but also promotes the declared objective of the statute. It helps the claimant and the defendant equally. It does not violate any provision of the Advocates Act.

44. The Consumer Protection Act, 1986 was amended in the year 2002, in pursuance to the United Nations resolution passed in April, 1985 indicating certain guidelines under which the Government could make law for better protection of the interest of the consumers. Such laws were necessary, particularly in the developing countries to protect the consumers from hazards to their health and safety and to provide them available speedier and cheaper redressal of their grievances.

45. The amended Act 62 of 2002 reads as under:

"**Amendment Act 62 of 2002. –** The enactment of the Consumer Protection Act, 1986 was an important milestone in the history of the consumer movement in the

country. The Act was made to provide for the better protection and promotion of consumer rights through the establishment Consumer Councils and quasi-judicial machinery. Under the Act, consumer disputes redressal agencies have been set up throughout the country with the District Forum at the district level, State Commission at the State level and National Commission at the National level to provide simple, inexpensive and speedy justice to the consumers with complaints against defective goods, deficient services and unfair and restrictive trade practices. The Act was also amended in the years 1991 and 1993 to make it more effective and purposeful."

46. In the developed countries the consumer movement has been going on for several decades in which the trader and the consumer find each other as adversaries.

47. The Consumer Protection Act, 1986 was enacted with the object and intention of speedy disposal of consumer disputes at a reasonable cost, which is otherwise not possible in ordinary judicial/court system.

48. In the book on Administrative law, its distinguished author M.P. Jain has brought about the distinction between the Court and the Tribunal. According to him Courts are bound by prescribed rules of procedures and evidence and their proceedings are conducted in public. The lawyers are entitled to appear before them and the judge in the open Court hears the case and decides it by giving reasons for a judgment. The courts are totally independent of the executive will, whereas, the Tribunals are not ordinarily governed by the provisions of Code of Civil Procedure and the Evidence Act, except to the extent it is indicative in the Act itself. There is also a significant difference between the Court and the Tribunal with regard to the appointment of Members. The object of the constitution of a Tribunal is to provide speedy justice in a simple manner and the Tribunal be should easily accessible to all.

49. According to the celebrated book on 'Administrative Law' by Wade, the other object of constituting a Tribunal is to create specialist Forum which would include specialists in the field to adjudicate efficiently and speedily the matters requiring adjudication in that field and that commands the confidence of all concerned in the quality and reliability of the result of such adjudication.

50. The Consumer Protection Rules, 1987 also defines the expression 'agent' in the same manner.

51. The appellants submitted before the High Court that the complainant may appear through its authorized agent, but, that doesn't mean that authorized agent is empowered to act, appear or plead on behalf of the party before the State Commission or the District Forum as a lawyer. According to the appellants (Bar Council of India and advocate), the agent appointed by the complainant is empowered only to present any complaint, appeal or rely on behalf of the party to the complaint before the Consumer Forum by physically remaining present on the date/dates of hearing. This contention was rejected by the Division Bench of the High Court.

52. According to the judgment of this Court in *Harishankar Rastogi* (supra), a non-advocate can appear with the permission of the Court. The Court may, in an appropriate case, even after grant of permission withdraw it if the representative proves himself reprehensible. It is only a privilege granted by the Court and it depends entirely on the discretion of the court.

53. The learned counsel for the respondent has drawn our attention to Rule 9 of the Maharashtra Consumer Protection Rules, 2000 which provides for procedure for hearing appeals. He also referred to sub-rules 1 and 6 of Rule 9 which reads as under:

"9. Procedure for hearing appeal –

(1) Memorandum shall be presented by the appellant or his authorized agent to the State Commission in person or sent by registered post addressed to the Commission.

(6) On the date of hearing or any other day to which hearing may be adjourned, it shall be obligatory for the parties or their authorized agents to appear before the State Commission. If appellant or his authorized agent fails to appear on such date, the State Commission may, in its discretion, either dismiss the appeal or decide it on the merit of the case. If respondent or his authorized agents fails to appear on such date, the State Commission shall proceed ex-parte and shall decide the appeal ex-parte on merits of the case."

54. The clear interpretation of the Rules is that the authorised agent appointed by the (consumer) complainant may appear before the Consumer Fora. The Consumer Fora may, in its discretion, either dismiss the appeal or decide it on the merit of the case. In this view of the matter, it is abundantly clear that the authorized agent of the complainant can act and plead before the State Tribunal otherwise the complaint is liable to the dismissed.

55. The learned counsel for the respondents submitted that non-advocates are permitted to appear in various Forums including Income Tax Tribunal, Sales Tax Tribunal and Monopolies and Restrictive Trade Practises Tribunal, therefore, wherever the legislature has accorded the permission to the persons other than advocates, who appear before these Tribunals can act and appear according to the object of the Act and legislative intention.

Legislative intention

56. We deem it appropriate to briefly deal with the importance of gathering legislative intention while interpreting provisions of law.

57. In Blackstone's Commentaries on the Laws of England, Volume I, published in the year 2001 (Edited by Wayne Morrison), it has been observed as under:-

> "The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, of the spirit and reason of the law."

58. A Constitution Bench of this Court in *R.M.D. Chamarbaugwalla and Another v. Union of India and Another* AIR 1957 SC 628 has laid down that in interpreting the statute the legislative intent is paramount and the duty of the Court is to act upon the true intention of the legislature.

59. In *Anandji Haridas & Company Private Limited v. Engineering Mazdoor Sangh and Another* (1975) 3 SCC 862, this Court laid down that as a general principle of interpretation where the words of a statute are plain, precise and unambiguous, the intention of the Legislature is to be gathered from the language of the statute itself and no external evidence such as parliamentary debates, reports of the Committees of the Legislature or even the statement made by the minister on the introduction of a measure or by the framers of the Act is admissible to construe those words.

60. In another Constitution Bench judgment in *Kartar Singh v. State of Punjab* (1994) 3 SCC 569, this Court has observed that though normally the plain ordinary grammatical meaning of an enactment affords the best guide and the object of interpreting a statute is to ascertain the intention of the legislature enacting it, other methods of extracting extracting the meaning can be resorted to if the language is contradictory, ambiguous or leads really to absurd results so as to keep at the real sense and meaning.

61. In *District Mining Officer and Others v. Tata Iron and Steel Company and Another* (2001) 7 SCC 358, a three Judge Bench of this Court has observed:

> "A statute is an edict of the legislature and in construing a statute, it is necessary to seek the intention of its maker. A statute has to be construed according to the intent of them that make it and the duty of the court is to act upon the true intention of the legislature. If a statutory provision is open to more than one interpretation, the court has to choose that interpretation which represents the true intention of the legislature."

62. In *Bhatia International v. Bulk Trading S.A. and Another* (2002) 4 SCC 105, a three Judge Bench of this Court has held as under:-

> "The conventional way of interpreting a statute is to seek the intention of its makers. If a statutory provision is open to more than one interpretation then the Court has to choose that interpretation which represents the true intention of the legislature."

63. It is the bounden duty of the courts to discern legislative intention and interpret the statutes accordingly. The instant case Act and Rules have made specific provisions by which the agents have been permitted to plead and appear on behalf of the parties before the Consumer Forums. Therefore, to interpret it differently would be contrary to legislative intention.

64. We have heard the learned counsel for the parties and the learned amicus curiae.

65. In the written submissions, Shri Jawahar Lal Gupta, learned amicus curiae, submitted that the advocates in these appeals can have no cause for any apprehension. In case, a party chooses an incompetent person as its agent before the Consumer Forum or the State Commission, he can pose no

competition or threat to any profession. Such a person will get automatically eliminated with the passage of time. However, in case the parties choose competent persons to act an agents and they perform well, it will not only promote the object of the 1986 Act and the Rules framed thereunder but also provide healthy competition to the advocates. It violates no provision of the Advocates Act, 1961 or any other law. It can provide no cause for complaint.

66. He further submitted that there is another aspect of the matter. Every person has the right to lead a life of dignity. Every person has a right to work and make an honest living. Every individual has the right and freedom to do anything so long as he does not violate any law. Thus, a retired or even an unemployed doctor, engineer, scientist, teacher or any other person has the right to offer his/her services as an 'agent'. In other words, an individual has the right to choose 'acting as agent' as his profession. Article 19(1)(g) guarantees that freedom. The mandate of Article 21 is fulfilled. In doing so, he does not practise the profession of law or violate the provisions of the Advocates Act, 1961. He only invokes the freedom guaranteed under the Constitution and exercises the right conferred by the Rules. He merely helps the party before the Consumer Forum or the Commission. It also enables him to earn some money and lead a dignified existence. He has the freedom and the right to do so. The action is in conformity with the Constitution. It even promotes the objective as contained in Article 39A.

67. Shri Gupta further submitted that the provision permitting the parties to be represented by agents as made in the Rules has not been challenged. In fact, the provision is in strict conformity with the constitution. It violates no law. Actually, there are various statutes which permit the parties to be represented by persons who may not be advocates. By way of instance, reference may be made to the provisions of the Industrial Disputes Act; the Income Tax Act and the Sales Tax

Act or the Monopolies and Restrictive Trade Practices Act. Such instances can be multiplied.

68. Shri Gupta also dealt with the disciplinary aspect of the matter. He submitted that in the appeal filed by the Bar Council, considerable emphasis on discipline and ethics was expressed by the learned counsel for the Council. During the course of hearing, a reference was made to the Regulations as framed by the National Consumer Disputes Redressal Commission (For short, 'National Commission') under the Act with the approval of the Central Government in 2005. The Regulations actually appear at page 52 of the Bar Act (Professional's – 2010 Edition).

69. A perusal thereof shows that the Regulations appear to have been framed by the National Commission in exercise of the power conferred by section 30A with the previous approval of the Central Government. The footnote indicates that these were published in the Gazette of India dated May 31, 2005.

70. Specifically, Regulation 16 *inter alia* makes provision to ensure that the agents do not indulge in any malpractice or commit misconduct. The relevant part provides as under:-

"(6) A Consumer Forum has to guard itself from touts and busybodies in the garb of power of attorney holders or authorised agents in the proceedings before it.

(7) While a Consumer Forum may permit an authorised agent to appear before it, but authorised agent shall not be one who has used this as a profession: Provided that this sub-regulation shall not apply in case of advocates.

(8) An authorised agent may be debarred from appearing before a Consumer Forum if he is found guilty of misconduct or any other malpractice at any time."

71. Mr. Bharat Sangal, learned counsel appearing for the

respondents submitted that Maharashtra Consumer Protection Rules, 2000 defines 'agents'. The authorized agents can appear on behalf of complainant in consumer fora.

72. Mr. Sangal also submitted that when the legislature permits the authorized agents to appear, then they cannot be restrained from appearing before the consumer fora.

73. Mr. Sangal also submitted that the authorized agents can't be said to practise law. He further submitted that there are many Forums and Tribunals where non-advocates are permitted to appear, therefore, there is no merit in restraining the agents from appearing before the Consumer Fora.

74. Reliance was placed on the judgment in the case of *Lucknow Development Authority v. M.K. Gupta* (1994) 1 SCC 243. This court observed that the provisions of the Act have to be construed in favour of the consumer to achieve the purpose of enactment as it is a social benefit oriented legislation. The primary duty of the court while construing the provisions of such an Act is to adopt a constructive approach subject to that it should not do any violence to the language of the provisions and is not contrary to the attempted objective of the enactment. In other words, according to the purpose of enactment the interest of the consumer is paramount.

75. In *Laxmi Engineering Works v. P.S.G. Industrial Institute* (1995) 3 SCC 583 this Court observed thus:

> **"10.** A review of the provisions of the Act discloses that the quasi-judicial bodies/authorities/agencies created by the Act known as District Forums, State Commissions and the National Commission are not courts though invested with some of the powers of a civil court. They are quasi-judicial tribunals brought into existence to render inexpensive and speedy remedies to consumers. It is equally clear that these forums/commissions were not supposed to supplant but supplement the existing judicial

> system. The idea was to provide an additional forum providing inexpensive and speedy resolution of disputes arising between consumers *and* suppliers of goods and services. The forum so created is uninhibited by the requirement of court fee or the formal procedures of a court. Any consumer can go and file a complaint. Complaint need not necessarily be filed by the complainant himself; any recognized consumers' association can espouse his cause. Where a large number of consumers have a similar complaint, one or more can file a complaint on behalf of all. Even the Central Government and State Governments can act on his/their behalf. The idea was to help the consumers get justice and fair treatment in the matter of goods and services purchased and availed by them in a market dominated by large trading and manufacturing bodies. Indeed, the entire Act revolves round the consumer and is designed to protect his interest. The Act provides for "business-to-consumer" disputes and not for "business-to-business" disputes. This scheme of the Act, in our opinion, is relevant to and helps in interpreting the words that fall for consideration in this appeal."

76. In *Indian Photographic Company Limited* v. *H.D. Shourie* (1999) 6 SCC 428 the court has held that a rational approach and not a technical approach is the mandate of law.

77. In *Dr. J.J. Merchant and Others* v. *Shrinath Chaturvedi* (2002) 6 SCC 635 it is observed as under:-

> "7. …One of the main objects of the Act is to provide speedy and simple redressal to consumer disputes and for that a quasi-judicial machinery is sought to be set up at the district, State and Central level. These quasi-judicial bodies are required to observe the principles of natural justice and have been empowered to give relief of a specific nature and to award, wherever appropriate, compensation to consumers. Penalties for non-compliance with the orders given by the quasi-judicial bodies have also

been provided. The object and purpose of enacting the Act is to render simple, inexpensive and speedy remedy to the consumers with complaints against defective goods and deficient services and the benevolent piece of legislation intended to protect a large body of consumers from exploitation would be defeated. Prior to the Act, consumers were required to approach the civil court for securing justice for the wrong done to them and it is a known fact that decision in a suit takes years.

12. …It should be kept in mind that legislature has provided alternative efficacious, simple, inexpensive and speedy remedy to the consumers and that should not be curtailed on the ground that complicated questions of facts cannot be decided in summary proceedings. It would also be totally wrong assumption that because summary trial is provided, justice cannot be done when some questions of facts required to be dealt with or decided. The Act provides sufficient safeguards."

78. In *Common Cause, A Registered Society v. Union of India and others* (1997) 10 SCC 729, the Supreme Court held thus:

"The object of the legislation, as the Preamble of the Act proclaims, is "for better protection of the interests of consumers". During the last few years preceding the enactment there was in this country a marked awareness among the consumers of goods that they were not getting their money's worth and were being exploited by both traders and manufacturers of consumer goods. The need for consumer redressal fora was, therefore, increasingly felt. Understandably, therefore, legislation was introduced and enacted with considerable enthusiasm and fanfare as a path-breaking benevolent legislation intended to protect the consumer from exploitation by unscrupulous manufacturers and traders of consumer goods. A three-tier fora comprising the District Forum, the State

Commission and the National Commission came to be envisaged under the Act for redressal of grievances of consumers…"

79. The agent has been defined both in the Consumer Protection Rules, 1987 and under the Maharashtra Consumer Protection Rules, 2000. The agents have been permitted to appear before the Consumer Forums. The appearance of authorized agents is not inconsistent with section 33 of the Advocates Act, 1961.

80. The legislature in its wisdom has granted permission to the authorized agents because most of the cases before the Consumer Forums are small cases of relatively poor people where legal intricacies are not involved and great legal skills are not required, which may be handled by the authorized agents.

81. The other reason is that a large number of litigants may not be able to afford heavy professional fees of trained advocates, therefore, authorized agents have been permitted.

82. It is the bounden duty and obligation of the Court to carefully discern the legislative intention and articulate the same. In the instant case we are not really called upon to discern legislative intention because there is specific rule defining the agents and the provisions of permitting them to appear before the Consumer Forums. The agents have been permitted to appear to accomplish the main object of the act of disposal of consumers' complaints expeditiously with no costs or small costs.

83. In our considered view the High Court was fully justified in observing that the authorised agents do not practise law when they are permitted to appear before the District Forums and the State Commissions.

84. In the impugned judgment the High Court aptly observed that many statutes, such as, Sales Tax, Income Tax

and Competition Act also permit non-advocates to represent the parties before the authorities and those non-advocates cannot be said to practise law. On the same analogy those non-advocates who appear before Consumer fora also cannot be said to practise law. We approve the view taken by the High Court in the impugned judgment.

85. The legislature has given an option to the parties before the Consumer Forums to either personally appear or be represented by an 'authorized agent' or by an advocate, then the court would not be justified in taking away that option or interpreting the statute differently.

86. The functioning, conduct and behaviour of authorized agents can always be regulated by the Consumer Forums. Advocates are entitled as of right to practise before Consumer Fora but this privilege cannot be claimed as a matter of right by anyone else.

87. When the legislature has permitted authorized agents to appear on behalf of the complainant, then the courts can't compel the consumer to engage the services of an advocate.

88. However, at this stage we hasten to add that the National Commission being aware of a possibility of misuse of the right by an agent had framed Regulation 30-A of the Consumer Protection Act, 1986, wherein certain restrictions on the right of audience and also certain precautions to rule out any misuse of liberty granted has been taken by way of framing Regulation 16. Reference is made to Clauses 6 and 7 thereof. We may extract the aforesaid provisions for ready reference:

> "16. **Appearance of Voluntary Consumer Organization:**
>
> **(6)** A Consumer Forum has to guard itself from touts and busybodies in the garb of power of attorney holders or authorized agents in the proceedings before it.

> (7) While a Consumer Forum may permit an authorized agent to appear before it, but authorised agent shall not be one who has used this as a profession:
>
> Provided that this sub-regulation shall not apply in case of advocates."

89. These provisions are enacted for providing proper guidelines and safeguards for regulating appearance and audience of the agents. The aforesaid regulation in our considered opinion is a reasonable restriction on the right to appear by an agent. Such reasonable restrictions as provided for are to be strictly adhered to and complied with by the Consumer Forum hearing cases under the Consumer Protection Act so as to rule out any misuse of the privilege granted. In terms of the said regulation and other regulations as provided and framed by the National Commission and as approved by the Parliament of India, the Consumer Forum has the right to prevent an authorized agent to appear in case it is found and believed that he is using the said right as a profession. The Consumer Forums being empowered with such Regulations would be in a position to judge whether the agent appearing before it is in any manner exercising such privileges granted for any ulterior purpose.

90. In the foregoing paragraph, it has been indicated that many statutes and Acts in India permit non-advocates to represent the parties before the authorities and forums.

91. In other jurisdictions also, non-advocates are permitted to appear before quasi-judicial fora or subordinate courts. In most of these jurisdictions, specific rules have been framed for the regulation of qualifications, conduct and ethical behaviour of the non-advocates appearing in these fora.

92. In most jurisdictions, the statutes or court rules impose some form of restrictions on appearances of non-advocate representatives in quasi-judicial fora or subordinate courts.

Restrictions on non-advocates agents vary significantly in terms of their specificity, but most forums have rules granting them some discretion in admitting or refusing the appearance of a non-advocate representative.

Brief summary of Rules pertaining to Non-Advocates in different jurisdictions

United States of America

- Congressional legislation neither grants nor denies the right to have a non-attorney representative in quasi-judicial proceedings.
- The individual fora (administrative law courts) are allowed to create their own rules for non-attorney representatives.
- Several administrative law courts/fora allow non-attorney representatives to appear if they meet certain qualifications.

Social Security Administration

93. In addition to administering Social Security Retirement and Disability payments, the Social Security Administration (SSA) handles disputes arising from Social Security Payments or the lack thereof. If a current or former recipient of social security believes that he has been wrongfully denied some or all of his benefit amount, he may first apply for reconsideration.

94. According to SSA Rules, any attorney in good standing is allowed to represent a claimant before the ALJ and Appeals Council. A non-attorney is allowed to represent a claimant if the non-attorney :

(1) Is generally known to have a good character and reputation;

(2) Is capable of giving valuable help to you in connection with your claim;

(3) Is not disqualified or suspended from acting as a representative in dealings with us; and

(4) Is not prohibited by any law from acting as a representative.

95. SSA rules also restrict the amount that any representative of claimant (attorney or non-attorney) may receive for the services rendered by him.

Tax Court

96. The US Tax Court adjudicates disputes over federal income tax. Taxpayers are permitted to litigate in many legal forums (such as a district federal court), but many choose the Tax Court because they may litigate their case without first paying the disputes tax amount in full.

Non-Attorney Representation

97. Tax Court Rules state that all representatives must be admitted to practice before the Tax Court in order to appear in proceedings on behalf of a taxpayer. To be admitted, a non-attorney must pass a special written examination and obtain sponsorship from two persons who are already admitted to practice before the Court.

98. Representatives before the Court are instructed to act "in accordance with the letter and spirit of the Model Rules of Professional Conduct of the American Bar Association." Representatives may be disciplined for inappropriate conduct and may be suspended or banned from appearing in the Court.

Court of Appeals for Veterans' Claims

99. The Court of Appeals for Veteran's Claims reviews decision of the Board of Veterans' Appeals, which adjudicates

disputes pertaining to Veteran's benefits.

Non-Attorney representation

100. A non-attorney may represent claimants if (1) he is under direct supervision of an attorney or (2) he is employed by an organization that the Secretary of Veteran's Affairs has deemed is competent to handle veterans' claims. However, if the Court deems it appropriate it may admit non-attorney representatives to represent the claimants.

South Africa

The Equality Court

101. The Equality Court hears complaints pertaining to unfair discrimination, harassment and hate speech. The court rules allow parties in this court to be represented by lawyers and non-lawyers. However, the rules also require the judge of the court inform a party accordingly if he is of the opinion that a particular non-attorney representative "is not a suitable person to represent the party."

England and Wales

102. There are two kinds of courts in England that are similar in structure and function to the consumer courts in India: Magistrate Courts and Tribunals.

Magistrates' Courts

103. Magistrates' Courts are lowest level of court in England and Wales and deals with minor civil and criminal offences. There are also specialist courts within the Magistrates' Courts system, such as the Family Proceedings Court and the Youth Court. Under statute, a party may only be represented in a Magistrates' Court by a "legal representative". A "legal representative" is a person who has been authorized by a government-approved regulator to perform "reserved legal activities."

Tribunals

104. England and Wales also have a fairly complex system of tribunals that hear special complaints. These tribunals are similar to US administrative courts in that they are allowed to create their own procedural rules that regulate representation. For instance, the Asylum and Immigration Tribunal permits non-attorney representatives to appear if they meet certain requirements elaborated in Section 84 of the Immigration and Asylum Act, 199. Other tribunals may follow different procedures.

Small Claims Court

105. There is no bar for small claims court. A non-attorney may appear as a representative without prior authorization from the court. He may, however, be dismissed at the judge's discretion.

(1) Non-attorney advocates do not appear to be bound by any code of conduct. But they may be dismissed by a judge if they judge disapproves of their conduct.

(2) The judge may disqualify a non-attorney from appearing in court if the judge "has reason to believe" the non-attorney "has intentionally misled the court, or otherwise demonstrated that he is unsuitable to exercise [the right to be a representative]. The statute specifically mentions that the judge may disqualify a representative for conduct done in previous judicial appearances.

(3) The court rules and relevant legislation do not appear to prescribe a limit to the number of appearances a non-lawyer can make before the small claims court. However, the statute allows a judge to discipline a non-attorney representative for conduct in previous judicial proceedings. This

suggests that if a judge believes a non-attorney is making frequent appearances before a small claims court and charging in appropriate fees, the judge may disqualify the non-attorney from appearing in a particular case.

Australia

106. State Governments in Australia have their own court systems and also specialized courts to deal with certain subject matter. In the State of Victoria, statutory law states that only lawyers may appear in court as representatives with a few exceptions. A non-attorney may represent a party in a cause of action for a debt or liquidated demand if the non-attorney is in the exclusive employment of the aggrieved party. Also, the statute mentions that a non-attorney representative may appear if empowered by some other piece of legislation.

New Zealand

107. New Zealand has a large number of tribunals that are similar to India's consumer courts and seek to provide quick and easy dispute resolution. There appears to be a strong preference in tribunals for the parties to represent themselves; professional lawyers are rarely allowed to appear as representatives. Two tribunals are discussed below, but New Zealand's other tribunals should function similarly.

Disputes Tribunal

108. The Disputes Tribunal hears civil complaints that concern amounts less than $15,000. Parties subject to proceedings are generally required to represent themselves. However, the Tribunal may permit a representative to appear on a party's behalf under certain special circumstances. Representatives may only appear with specific authorization from the Tribunal and cannot be lawyers.

Directions

109. In order to ensure smooth, consistent, uniform and unvarying functioning of the National Commission, the State Commissions and the District Forums, we deem it appropriate to direct the National Commission to frame comprehensive rules regarding appearances of the agents, representatives, registered organizations and/or non-advocates appearing before the National Commission, the State Commissions and the District Forums governing their qualifications, conduct and ethical behaviour of agents/non-advocates/representatives, registered organizations and/or agents appearing before the consumer forums.

The National Commission may consider following suggestions while framing rules

110. The Commission may consider non-advocates appearing without accreditation - A party may appoint a non-advocate as its representative provided that the representative–

(1) is appearing on an individual case basis

(2) has a pre-existing relationship with the complainant (e.g., as a relative, neighbour, business associate or personal friend)

(3) is not receiving any form of direct or indirect remuneration for appearing before the Forum and files a written declaration to that effect

(4) demonstrates to the presiding officer of the Forum that he or she is competent to represent the party.

Accreditation Process

(a) The National Commission may consider creating a process through which non-advocates may be

accredited to practice as representatives before a Forum.

(b) Non-advocates who are accredited through this process shall be allowed to appear before a Forum on a regular basis

(c) The accreditation process may consist of –

(1) an written examination that tests an applicant's knowledge of relevant law and ability to make legal presentations and arguments

(2) an inspection of the applicant's educational and professional background

(3) an inspection of the applicant's criminal record

(d) the National Commission may prescribe additional requirements for accreditation at its discretion provided that the additional requirements are not arbitrary and do not violate existing law or the Constitution.

Fees

(a) A representative who wishes to receive a fee must file a written request before the Forum

(b) The presiding officer will decide the amount of the fee, if any, a representative may charge or receive

(c) When evaluating a representative's request for a fee, the presiding officer may consider the following factors :

(1) the extent and type of services the representative performed

(2) the complexity of the case

(3) the level of skill and competence required of the representative in giving the services

(4) the amount of time the representative spent on the case; and

(5) the ability of the party to pay the fee

(d) If a party is seeking monetary damages, its representative may not seek more a fee of more than 20% of the damages

Code of Conduct for representatives

The National Commission to create a code of conduct which would apply to non-advocates, registered organizations and agents appearing before a Forum.

Disciplinary Powers of a Forum

(a) The presiding officer of a Forum may be given specific power to discipline non-advocates, agents, authorized organizations and representatives for violating the code of conduct or other behaviour that is unfitting in a Forum

(b) In exercising its disciplinary authority, the presiding officer may –

(1) revoke a representative's privilege to appear before the instant case

(2) suspend a representative's privilege to appear before the Forum

(3) ban a representative from appearing before the forum

(4) impose a monetary fine on the representative

111. We direct the National Commission to frame comprehensive Rules as expeditiously as possible, in any event, within three months from the date of communication of this order. The copy of this judgment be sent to the National Commission.

112. On consideration of totality of the facts and circumstances, the view taken by the Division Bench of the Bombay High Court in the impugned judgment cannot be said to be erroneous and unsustainable in law. Consequently, these appeals being devoid of any merit are accordingly dismissed.

113. In the facts and circumstances of the case, we direct the parties to bear their own costs.

114. Before we part, we would like to observe that we had requested Shri Jawahar Lal Gupta, a distinguished Senior Advocate to assist the court as amicus curiae. He graciously agreed and provided excellent assistance to this court. Shri Gupta also submitted written submissions. We record our deep appreciation for his valuable assistance provided by him to this court.

B.B.B. Appeals dismissed.

M/S. AIR LIQUIDE NORTH INDIA PVT. LTD.
v.
COMMISSIONER, CENTRAL EXCISE, JAIPUR-I
(Civil Appeal No. 43 of 2005)

AUGUST 30, 2011

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

Central Excise Tariff Act, 1985 – Chapter 28 – Manufacture – Appellant purchased Helium gas from the market in bulk and repacked the same into smaller cylinders after giving different grades to it and then sold the same in the open market – Whether the treatment given or the process undertaken by the appellant to Helium gas purchased by it from the open market amounted to manufacture, rendering the goods liable to duty under Chapter Note 10 of Chapter 28 of the Act – Held: If a product/commodity, after some process is undertaken or treatment is given, assumes a distinct marketability, different than its original marketability, then it can be said that such process undertaken or treatment given to confer such distinct marketability would amount to "manufacture" in terms of Chapter note 10 to Chapter 28 of the Act – Appellant purchased Helium gas under a generic description but after the tests and analysis, sold it to different customers based on their specific requirements at profit margin ranging from 40% to 60% in different cylinders –The various tests resulted into categorization of the gas into different grades – The appellant supplied the gas not as such and under the grade and style of the original manufacturer but under its own grade and standard – Further, while selling the gas, different cylinders were given separate certificates with regard to the pressure, moisture, purification and quality of the gas – This explains the high price at which the appellant was selling the gas – The Tribunal rightly observed that if no

treatment was given to the gas purchased by the appellant, customers of the appellant would not have been purchasing Helium from the appellant at a price 40% to 60% above the price at which the appellant was purchasing – Appellant is liable to pay excise duty for the reason that it manufactured Helium within the meaning of the term 'manufacture' as explained in terms of Chapter Note 10 of Chapter 28 of the Act – Though the Helium purchased by the appellant was in a marketable state but by giving different treatment and purifying the gas, the appellant was manufacturing a commercially different type of gas or a new type of commodity which would suit a particular purpose – Thus, the treatment given by the appellant to the gas sold by it would make a different commercial product and, therefore, it can surely be said that the appellant was engaged in a manufacturing activity.

The appellant is engaged in the manufacture of Oxygen, Nitrogen, Carbon-di-oxide and other gases classifiable under Chapter 28 of the Central Excise Tariff Act, 1985. The appellant purchased Helium gas from the market in bulk and repacked the same into smaller cylinders after giving different grades to it and then sold the same in the open market. The adjudicating authorities held that the processes undertaken by the appellants amounted to manufacture and consequently confirmed demand with penalty. The order was set aside by the Commissioner (Appeals). Thereafter, the respondent-Department filed appeal before the Customs, Excise & Service Tax Appellate Tribunal which allowed the same holding that the process undertaken or the treatment given by the appellant amounted to "manufacture" in terms of Chapter Note 10 of Chapter 28 of the Act.

In the instant appeal, the appellant contended that it had only conducted various tests like moisture test, etc. to determine quality and quantity of Helium gas in the

cylinders; and that even after the activity of testing, Helium gas remained as Helium gas only and no new product, other than Helium gas came into existence and, therefore, it cannot be said that the appellant had carried on any manufacturing activity. The appellant further contended that the gas, when purchased by the appellant, was already marketable and, therefore, the process of testing of the gas by the appellant cannot be said to be a manufacturing process, rendering the product marketable.

The appellant claimed that the issuance of certificate along with the cylinder at the time of sale did not amount to re-labelling and also that as there was no suppression of facts of any sort on the part of the appellant, extended period of limitation could not have been invoked.

Per contra, the respondent submitted that the testing of Helium gas came under the category of "treatment" as mentioned in Chapter Note 10 of Chapter 28 of the Act and the Tribunal clearly gave a finding to that effect; that issuance of a separate certificate along with cylinder at the time of sale containing all the details regarding moisture, purification, etc. amounted to re-labelling of the gas cylinders; and also that the revenue authorities were fully justified in invoking the extended period of limitation as there had been willful suppression of facts on the part of the appellant with an intent to evade payment of duty.

The issue that therefore arose for consideration in the instant appeal was whether the treatment given or the process undertaken by the appellant to Helium gas purchased by it from the open market amounted to manufacture, rendering the goods liable to duty under Chapter Note 10 of Chapter 28 of the Central Excise Tariff Act, 1985.

Dismissing the appeal, the Court

HELD: 1.1. In view of Chapter Note 10 to Chapter 28 of the Central Excise Tariff Act, 1985, the manufacturing activity would mean either; a) labelling or re-labelling of containers and repacking from bulk packs to retail packs; or b) an adoption of any other treatment to render the product marketable to the consumer. Thus, either an activity of labelling or relabelling of containers and repacking from bulk packs to retail packs or adoption of any treatment so as to render the product marketable to the consumer would amount to "manufacture". [Paras 8, 9] [876-D-E]

1.2. The appellant had purchased Helium gas from the open market and its quality control officer had conducted various tests and issued analysis report/quality test report stating the results of the tests carried out. The appellant issued certificates of quality at the time of sale on the basis of tests carried out by it to the effect that the gas supplied by it confirmed a level of purity and specifications in conformation with the orders of the customers. The appellant had purchased Helium gas under a generic description but after the tests and analysis, it was sold to different customers based on their specific requirements at profit margin ranging from 40% to 60% in different cylinders. [Para 10] [876-F-H; 877-A]

1.3. When the appellant was asked about the process which was being carried out on Helium gas before selling it to its customers, the representative of the appellant had refused to give any detail with regard to the process because, according to him, that process was a trade secret and he would not like to reveal the same. Thus, the respondent or his subordinate authorities were not informed as to what was being done by the appellant to Helium gas purchased or what treatment was given to the

said gas before selling the same to different customers at different rates with different certifications in different containers/cylinders. [Para 11] [877-B-D]

1.4. From the facts, it is clear that the gas cylinders were not sold as such but they were sold only after certain tests or processes as specified by the customers of the appellant. It is also clear that only after the analysis and tests, it could be ascertained as to whom the gas was to be supplied and at what rate. The various tests resulted into categorization of the gas into different grades namely, Helium label 4, high purity Helium and Helium of technical grade. Helium label 4 was sold at higher rate as it matched superior standards. [Para 12] [877-E-F]

1.5. In the instant case, Helium gas was having different marketability, which it did not possess earlier and hence the gas sold by the appellant was a distinct commercial commodity in the trade, rendering it liable to duty under Chapter Note 10 of Chapter 28 of the Act. If the product/commodity, after some process is undertaken or treatment is given, assumes a distinct marketability, different than its original marketability, then it can be said that such process undertaken or treatment given to confer such distinct marketability would amount to "manufacture" in terms of Chapter note 10 to Chapter 28 of the Act. [Para 13] [877-G-H; 878-A]

1.6. The tests and "process" conducted by the appellant would amount to "treatment" in terms of Chapter Note 10 of Chapter 28 of the Act. The fact that the gas was not sold as such is further established from the fact that the gas, after the tests and treatment, was sold at a profit of 40% to 60%. If it was really being sold as such, then the customers of the appellants could have purchased the same from the appellant's suppliers. When this question was put to the officer of the appellant, he

could not offer any cogent answer but merely stated that it was the customers' preference. Further, he did not give proper answer as to how the profit margin was so high. The appellant had supplied the gas not as such and under the grade and style of the original manufacturer but under its own grade and standard. Further, while selling the gas, different cylinders were given separate certificates with regard to the pressure, moisture, purification and quality of the gas. This explains the high price at which the appellant was selling the gas. The Tribunal rightly observed that if no treatment was given to the gas purchased by the appellant, customers of the appellant would not have been purchasing Helium from the appellant at a price 40% to 60% above the price at which the appellant was purchasing. In the circumstances, it cannot be said that no treatment was given to the gas purchased by the appellant. For the said reasons, it cannot be said that the appellant was not carrying out any manufacturing activity within the meaning of Chapter Note 10 of Chapter 28 of the Act. [Paras 14, 15, 17] [878-B-F-H; 879-A]

1.7. It is also pertinent to elucidate on the phrase "marketable to the consumer". The word "consumer" in this clause refers to the person who purchases the product for his consumption, as distinct from a purchaser who trades in it. The marketability of the product to "the purchaser trading in it" is distinguishable from the marketability of the product to "the purchaser purchasing the same for final consumption" as in the latter case, the person purchases the product for his own consumption and in that case, he expects the product to be suitable for his own purpose and the consumer might purchase a product having marketability, which it did not possess earlier. Therefore, the phrase "marketable to the consumer" would naturally mean the marketability of the product to "the person who purchases the product for

his own consumption". Hence, the argument of the appellant that as the product was already marketable, the provisions of Chapter Note 10 of Chapter 28 of the Act would not be attracted, will have to be rejected. [Paras 18, 19] [879-B-E]

1.8. The appellant is liable to pay excise duty for the reason that it has manufactured Helium within the meaning of the term 'manufacture' as explained in terms of Chapter Note 10 of Chapter 28 of the Act. [Para 20] [879-F]

CCE v. Lupin Laboratories **2004 (166) A116 (SC) and** *Lakme Lever Ltd. v. CCE* **2001 (127) ELT 790 (T) – cited.**

2. So far as the issue with regard to re-labelling is concerned, the Tribunal rightly held that re-labelling would not mean mere fixing of another label. When the appellant was selling different cylinders with different marking or different certificates to its different customers, the appellant was virtually giving different marks or different labels to different cylinders having different quality and quantity of gas. Though the Helium purchased by the appellant was in a marketable state but by giving different treatment and purifying the gas, the appellant was manufacturing a commercially different type of gas or a new type of commodity which would suit a particular purpose. Thus, the treatment given by the appellant to the gas sold by it would make a different commercial product and, therefore, it can surely be said that the appellant was engaged in a manufacturing activity. [Paras 21, 22] [879-G-H; 880-A-B]

BOC (I) Ltd. v. CCE **2003 (160) ELT 864 – cited.**

3. So far as the issue with regard to limitation is concerned, the Tribunal rightly arrived at the finding that the appellant did not disclose details about the activities

or treatment given to the gas by the appellant. No duty was ever paid by the appellant on the Helium sold by it after giving some treatment so as to make it a different commercial product. Therefore, there is no reason to interfere with the finding with regard to limitation also. [Para 23] [880-C-D]

Case Law Reference:

2004 (166) A116 (SC)	**cited**	**Para 5**
2001 (127) ELT 790 (T)	**cited**	**Para 5**
2003 (160) ELT 864	**cited**	**Para 6**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 43 of 2005.

From the Judgment & Order dated 31.8.2004 of the Customs, Excise New Delhi in Appeal No. E/247/04-NB (C).

Alok Yadav for the Appellant.

R.P. Bhatt, Sunita Rani Singh, B.K. Prasad, Rajiv Nanda, Anil Katiyar for the Respondent.

The Judgment of the Court was delivered by

ANIL R. DAVE, J. 1. This appeal has been filed against the Judgment and Order dated 31.8.2004 passed in Final Order No 595/2004-NB(C) by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi in Appeal No. E/247/2004-NB(C), whereby the Tribunal has allowed the appeal filed by the Department and reversed the findings of the Commissioner(Appeals).

2. The issue which falls for consideration in the present appeal is whether the treatment given or the process undertaken by the appellant to Helium gas purchased by it from the open market would amount to manufacture, rendering the goods liable to duty under Chapter Note 10 of Chapter 28 of

the Central Excise Tariff Act, 1985 (hereinafter referred to as 'the Act'). Chapter Note 10 of Chapter 28 of the Act, in relation to 'manufacture', reads as under:

> "10. In relation to products of this chapter, labelling or relabelling of containers and repacking from bulk packs to retail packs or adoption of any other treatment to render the product marketable to the consumer shall amount to manufacture."

In order to answer the aforesaid issue which arises for our consideration, it would be necessary to set out some facts giving rise to the present appeal. The appellant is engaged in the manufacture of Oxygen, Nitrogen, Carbon-di-oxide and other gases classifiable under Chapter 28 of the Act. The appellant had purchased Helium gas during the period commencing from December, 1998 to 31st March, 2001, from the market in bulk and repacked the same into smaller cylinders after giving different grades to it and then sold the same in the open market. The appellant purchased the said gas for Rs.520/- per Cum. Various tests were conducted on the gas so purchased and on the basis of the tests and some treatment given, the gas was segregated into different grades having distinct properties and sold at different rates to different customers.

3. The adjudicating authorities held that these processes undertaken by the appellants amounted to manufacture and consequently confirmed the demand with penalty. An appeal filed by the appellant before the Commissioner (Appeals) was allowed. Thereafter, an appeal was filed by the Department before the Tribunal and the Tribunal, by its impugned judgment held that the process undertaken or the treatment given by the appellant amounted to "manufacture" in terms of Chapter Note 10 of Chapter 28 of the Act. The aforesaid conclusion arrived at by the Tribunal is under challenge in this appeal.

4. On behalf of the appellant it was vehemently argued that

the appellant had only conducted various tests like moisture test, etc. to determine quality and quantity of Helium gas in the cylinders. It was further submitted that even after the activity of testing, Helium gas remained as Helium gas only and there was no change in the chemical or physical properties. No new product, other than Helium gas came into existence and, therefore, it cannot be said that the appellant had carried on any manufacturing activity.

5. It was further submitted that the gas, when purchased by the appellant, was already marketable and, therefore, it cannot be said that the testing of the gas by the appellant had rendered the product marketable. In the circumstances, the process of testing cannot be said to be a manufacturing process, rendering the product marketable. It was also submitted that the crucial requirement for the application of the last portion of Chapter Note 10 of Chapter 28 of the Act is that by adoption of some treatment, the product should become marketable to the consumer. According to the learned counsel, the product, i.e. Helium gas was already in a marketable state when it was purchased by the appellant and, therefore, it cannot be said that the appellant made it marketable. To substantiate his claim, the learned counsel for the appellant relied on the cases of *CCE v. LUPIN LABORATORIES* 2004 (166) A116 (SC) and *LAKME LEVER LTD. v. CCE* 2001 (127) ELT 790 (T).

6. The learned counsel for the appellant brought to our attention a decision of this Court rendered in the case of *BOC (I) Ltd. v. CCE* 2003 (160) ELT 864 to substantiate his claim that the issuance of certificate along with the cylinder at the time of sale does not amount to re-labelling. He also contended that as there was no suppression of facts of any sort on the part of the appellant, extended period of limitation could not have been invoked in the present case.

7. Per contra, the learned counsel for the respondent

submitted that the testing of Helium gas comes under the category of "treatment" as mentioned in Chapter Note 10 of Chapter 28 of the Act and that the Tribunal has clearly given a finding to that effect. He also submitted that issuance of a separate certificate along with cylinder at the time of sale containing all the details regarding moisture, purification, etc. amounted to re-labelling of the gas cylinders. He also submitted that the revenue authorities were fully justified in invoking the extended period of limitation as there had been willful suppression of facts on the part of the appellant with an intent to evade payment of duty.

8. We have heard the learned counsel for the parties and perused the records. In view of Chapter Note 10 to Chapter 28 of the Act, the manufacturing activity would mean either;

(a) Labelling or re-labelling of containers and repacking from bulk packs to retail packs; OR

(b) An adoption of any other treatment to render the product marketable to the consumer.

9. Thus, either an activity of labelling or relabelling of containers and repacking from bulk packs to retail packs OR adoption of any treatment so as to render the product marketable to the consumer would amount to "manufacture".

10. It is not in dispute that the appellant had purchased Helium gas from the open market and that its quality control officer had conducted various tests and issued analysis report/ quality test report stating the results of the tests carried out. It is also not in dispute that the appellant issued certificates of quality at the time of sale on the basis of tests carried out by it to the effect that the gas supplied by it confirmed a level of purity and specifications in conformation with the orders of the customers. Another undisputed fact is that the appellant had purchased Helium gas under a generic description but after the tests and analysis, it was sold to different customers based on

their specific requirements at profit margin ranging from 40% to 60% in different cylinders.

11. It is pertinent to note that when the appellant was asked about the process which was being carried out on Helium gas before selling it to its customers, the representative of the appellant had refused to give any detail with regard to the process because, according to him, that process was a trade secret and he would not like to reveal the same. Thus, the respondent or his subordinate authorities were not informed as to what was being done by the appellant to Helium gas purchased or what treatment was given to the said gas before selling the same to different customers at different rates with different certifications in different containers/cylinders. It is also pertinent to note that the gas which was purchased at the rate of about Rs.520/- per Cum. was sold by the appellant at three different rates namely Rs.700/-, Rs.826/- and Rs.1000/- per Cum. and thereby the appellant used to get 40% to 60% profit.

12. From the above undisputed facts, it is clear that the gas cylinders were not sold as such but they were sold only after certain tests or processes as specified by the customers of the appellant. It is also clear that only after the analysis and tests, it could be ascertained as to whom the gas was to be supplied and at what rate. The various tests resulted into categorization of the gas into different grades namely, Helium label 4, high purity Helium and Helium of technical grade. Helium label 4 was sold at higher rate as it matched superior standards.

13. In the instant case, Helium gas was having different marketability, which it did not possess earlier and hence the gas sold by the appellant was a distinct commercial commodity in the trade, rendering it liable to duty under Chapter Note 10 of Chapter 28 of the Act. If the product/commodity, after some process is undertaken or treatment is given, assumes a distinct marketability, different than its original marketability, then it can be said that such process undertaken or treatment given to confer such distinct marketability would amount to

"manufacture" in terms of Chapter note 10 to Chapter 28 of the Act.

14. The only conclusion from the above is that the tests and "process" conducted by the appellant would amount to "treatment" in terms of Chapter Note 10 of Chapter 28 of the Act. The fact that the gas was not sold as such is further established from the fact that the gas, after the tests and treatment, was sold at a profit of 40% to 60%. If it was really being sold as such, then the customers of the appellants could have purchased the same from the appellant's suppliers. When this question was put to the officer of the appellant, he could not offer any cogent answer but merely stated that it was the customers' preference. Further, he did not give proper answer as to how the profit margin was so high. The appellant had supplied the gas not as such and under the grade and style of the original manufacturer but under its own grade and standard. Further, while selling the gas, different cylinders were given separate certificates with regard to the pressure, moisture, purification and quality of the gas. This explains the high price at which the appellant was selling the gas.

15. Therefore, in our opinion, the Tribunal has rightly observed that if no treatment was given to the gas purchased by the appellant, customers of the appellant would not have been purchasing Helium from the appellant at a price 40% to 60% above the price at which the appellant was purchasing.

16. As stated hereinabove, it is clear that the appellant was purchasing Helium at the rate of Rs.520/- per Cum. and was selling the same after adding 40% to 60% profit. Further, the gas was segregated in different cylinders with different properties and, therefore, the rate at which the gas was purchased by the appellant and the rate at which it was sold to its customers was substantially different.

17. In the circumstances, it cannot be said that no treatment was given to the gas purchased by the appellant. For the said

reasons, it cannot be said that the appellant was not carrying out any manufacturing activity within the meaning of Chapter Note 10 of Chapter 28 of the Act.

18. It is also pertinent to elucidate on the phrase "marketable to the consumer". The word "consumer" in this clause refers to the person who purchases the product for his consumption, as distinct from a purchaser who trades in it. The marketability of the product to "the purchaser trading in it" is distinguishable from the marketability of the product to "the purchaser purchasing the same for final consumption" as in the latter case, the person purchases the product for his own consumption and in that case, he expects the product to be suitable for his own purpose and the consumer might purchase a product having marketability, which it did not possess earlier.

19. Therefore, the phrase "marketable to the consumer" would naturally mean the marketability of the product to "the person who purchases the product for his own consumption". Hence, the argument of the appellant that as the product was already marketable, the provisions of Chapter Note 10 of Chapter 28 of the Act would not be attracted, will have to be rejected.

20. For the aforetasted reasons, we agree with the Tribunal in holding that the appellant is liable to pay excise duty for the reason that it has manufactured Helium within the meaning of the term 'manufacture' as explained in terms of Chapter Note 10 of Chapter 28 of the Act.

21. So far as the issue with regard to relabelling is concerned, we are in agreement with the view expressed by the Tribunal that relabelling would not mean mere fixing of another label. When the appellant was selling different cylinders with different marking or different certificates to its different customers, we can say that the appellant was virtually giving different marks or different labels to different cylinders having different quality and quantity of gas.

22. It can be very well said that the Helium purchased by the appellant was in a marketable state but it is equally true that by giving different treatment and purifying the gas, the appellant was manufacturing a commercially different type of gas or a new type of commodity which would suit a particular purpose. Thus, the treatment given by the appellant to the gas sold by it would make a different commercial product and, therefore, it can surely be said that the appellant was engaged in a manufacturing activity.

23. So far as the issue with regard to limitation is concerned, we are in agreement with the findings arrived at by the Tribunal to the effect that the appellant did not disclose details about the activities or treatment given to the gas by the appellant. No duty was ever paid by the appellant on the Helium sold by it after giving some treatment so as to make it a different commercial product. We, therefore, do not see any reason to interfere with the finding with regard to limitation also.

24. For the reasons stated hereinabove, we are in agreement with the order passed by the Tribunal and dismiss the appeal but without any order as to costs.

B.B.B. Appeal dismissed.