YOGRAJ INFRASTRUCTURE LTD.

v.

SSANG YONG ENGINEERING AND CONSTRUCTION CO. LTD.

(Civil Appeal No.7562 of 2011)

SEPTEMBER 01, 2011

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

International Arbitration Act, 2002:

International Commercial Arbitration – Held: Where the arbitration agreement provides that the seat of arbitration is Singapore and arbitration proceedings are to be conducted in accordance with the Singapore International Arbitration Centre Rules (SIAC Rules) then the International Arbitration Act, 2002 of Singapore will be the law of arbitration as is provided in rule 32 of SIAC Rules – Once the arbitrator is appointed and the arbitral proceedings are commenced, the SIAC Rules become applicable shutting out the applicability of s.42 of Arbitration and Conciliation Act, 1996 and for that matter Part I of the 1996 Act, including the right of appeal u/s.37 thereof – Arbitration and Conciliation Act, 1996 – ss.2, 9, 42 – Singapore International Arbitration Centre Rules – r.32.

Proper law and Curial law – Distinction between – Discussed.

Arbitral Tribunal – Applicable law – Held: While the proper law is the law which governs the agreement itself, in the absence of any other stipulation in the arbitration clause as to which law would apply in respect of the arbitral proceedings, it is the law governing the contract which would also be the law applicable to the Arbitral Tribunal itself.

On 12th April, 2006, the National Highways Authority

of India, New Delhi (NHAI) awarded a work contract to a Korean company (respondent) for upgrading the laning system. On 13th August, 2006, the respondent entered into a sub-contract with an Indian company (appellant) for carrying out the entire project. Clauses 27 and 28 provided for arbitration and the governing law agreed to was the Arbitration and Conciliation Act, 1996. The appellant furnished Bank Guarantees to the Respondent and it also invested huge amount in the project. On 22nd September, 2009, the respondent issued a notice of termination of the agreement, *inter alia*, on the ground of delay in performing the work under the agreement. The settlement talks between the parties failed and the respondent invoked arbitration clause in accordance with the Singapore International Arbitration Centre Rules (SIAC Rules). A sole arbitrator was appointed by SIAC. Before the arbitrator, the respondent filed a Statement of Claim. Both the parties filed applications before the arbitrator seeking interim relief under Rule 17 of the SIAC Rules. In their application for interim relief, the respondent prayed for release of plants, machineries and equipment belonging to the respondent; injunction against the appellant from removing all plants, machineries, equipment, materials, aggregates, etc., owned by the respondent from the work site; a restraint order against the appellant from creating any third party interest or otherwise sell, lease, charge the plants, machineries, equipment, materials (PME)etc., at the work site and to permit the respondent to use the PMEs and materials, aggregates, etc.

The arbitrator directed the appellant to release all plants, machineries and equipment for use by the respondent. The appellant was also restrained from creating any third party interest, or otherwise to deal with the properties at the work site and/or camp site. He also recorded that the interim orders were being made with the

object of allowing the construction work on the project to continue.

Aggrieved, the appellant filed appeal before the District Court under Section 37 of the Arbitration and Conciliation Act, 1996 which was dismissed on the ground of non-maintainability and lack of jurisdiction.

The revision petition filed against the said order was dismissed by the High Court. While dismissing the revision petition, the High Court observed that under Clause 27.1 of the Agreement, the parties had agreed to resolve their dispute under the provisions of SIAC Rules which expressly or, in any case, impliedly also adopted Rule 32 of the said Rules which categorically indicated that the law of arbitration under the said Rules would be the International Arbitration Act, 2002, of Singapore. As far as applicability of Section 42 of the 1996 Act is concerned, the High Court held that by express agreement parties had ousted the jurisdiction of the Indian Courts, while the arbitration proceedings were subsisting. The instant appeal was filed challenging the order of the High Court.

Dismissing the appeal, the Court

HELD: 1. A perusal of Clause 27.1 of the arbitration agreement would showed that the arbitration proceedings were to be conducted in Singapore in accordance with the SIAC Rules as in force at the time of signing of the agreement. There was, therefore, no ambiguity that the procedural law with regard to the arbitration proceedings was the International Arbitration Law of Singapore. Clause 27.2 made it clear that the seat of arbitration would be Singapore. Clause 28 indicated that the governing law of the agreement would be the law of India, i.e., the Arbitration and Conciliation Act, 1996. While the proper law is the law which governs the

agreement itself, in the absence of any other stipulation in the arbitration clause as to which law would apply in respect of the arbitral proceedings, it is the law governing the contract which would also be the law applicable to the Arbitral Tribunal itself. Clause 27.1 made it quite clear that the Curial law which regulates the procedure to be adopted in conducting the arbitration would be the SIAC Rules. There is, therefore, no ambiguity that the SIAC Rules would be the Curial law of the arbitration proceedings. [paras 33-35]

2. The parties had categorically agreed that the arbitration proceedings, if any, would be governed by the SIAC Rules as the Curial law, which included Rule 32. Having agreed to that it was no longer available to the appellant to contend that the "proper law" of the agreement would apply to the arbitration proceedings. Rule 32 of the SIAC Rules provides that the law of arbitration would be the International Arbitration Act, 2002, where the seat of arbitration is in Singapore. Section 2(2) of the 1996 Act, in fact, indicates that Part I would apply only in cases where the seat of arbitration is in India. Section 42 of the Arbitration and Conciliation Act, 1996 was applicable at the pre-arbitral stage, when the Arbitrator had not also been appointed. Once the Arbitrator was appointed and the arbitral proceedings were commenced, the SIAC Rules became applicable shutting out the applicability of Section 42 and for that matter Part I of the 1996 Act, including the right of appeal under Section 37 thereof. [Paras 37-39]

Bhatia International v. Bulk Trading S.A. **(2002) 4 SCC 105: 2002 (2) SCR 411;** *Venture Global Engg. v. Satyam Computer Services Ltd.* **(2008) 4 SCC 190: 2008 (1) SCR 501;** *Citation Infowares Ltd. v. Equinox Corporation* **(2009) 7 SCC 220: 2009 (6) SCR 737 – held inapplicable.**

Sumitomo Heavy Industries Ltd. v. ONGC **(1998) 1 SCC 305: 1997(6) Suppl. SCR 186;** *NTPC v. Singer* **(1992) 3 SCC 551: 1992 (3) SCR 106 – referred to.**

Case law reference:

2002 (2) SCR 411	**held inapplicable**	**Paras 12, 36, 38**
2008 (1) SCR 501	**held inapplicable**	**Paras 12, 38**
2009 (6) SCR 737	**held inapplicable**	**Paras 12, 38**
1997 (6) Suppl. SCR 186	**referred to**	**Paras 16, 24**
1992 (3) SCR 106	**referred to**	**Paras 16, 28**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7562 of 2011.

From the Judgment & Order dated 31.8.2010 of the High Court of Madhya Pradesh, Principal Seat at Jabalpur in Civil Revision No. 304 of 2010.

Indu Malhotra, Gagan Gupta, Sidharth Khattar, Mohit Gupta for the Appellant.

Meenakshi Arora, Dharmendra Rautray, Ankit Khushu for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. The Appellant is a company incorporated under the Companies Act, 1956, while the Respondent is a company incorporated under the laws of the Republic of Korea with its registered office at Seoul in Korea and its project office at New Delhi.

3. On 12th April, 2006, the National Highways Authority of

India, New Delhi (NHAI) awarded a contract to the Respondent, SSang Yong Engineering and Construction Co. Ltd., hereinafter referred to as "SSY", for the National Highways, Sector II Project, Package: ABD-II/C-8, for upgradation to Four Laning of Jhansi-Lakhnadon Section, KM 297 to KM 351 of NH 26 in the State of Madhya Pradesh. The total contract amount was Rs. 2,19,01,16,805/-. On 13th August, 2006, SSY entered into a Sub-Contract with the Appellant Company for carrying out the work in question. The Work Order of the entire project was granted to the Appellant by the Respondent on back-to-back basis. Clause 13 of the Agreement entered into between the Respondent and the Appellant provided that 92% of all payments for the work done received by the Respondent from NHAI, would be passed on to the Appellant. Clauses 27 and 28 provided for arbitration and the governing law agreed to was the Arbitration and Conciliation Act, 1996. On 31st October, 2006, the Appellant furnished a Performance Bank Guarantee for Rs. 6,05,00,000/- to the Respondent and it also invested about 88.15 crores in the project. Three more Bank Guarantees, totaling Rs. 5,00,00,000/-, for release of mobilization advance were also furnished by the Appellant on 29th May, 2009. On 22nd September, 2009, the Respondent Company issued a notice of termination of the Agreement, inter alia, on the ground of delay in performing the work under the Agreement.

4. On account of the above, the Appellant filed an application before the District and Sessions Judge, Narsinghpur, Madhya Pradesh, under Section 9 of the Arbitration and Conciliation Act, 1996, praying for interim reliefs. A similar application under Section 9 of the above Act was filed by the Appellant before the same Court on 30th December, 2009, also for interim reliefs. Ultimately, on 20th May, 2010, the dispute between the parties was referred to arbitration in terms of the Agreement and a Sole Arbitrator, Mr. G.R. Easton, was appointed by the Singapore International Arbitration Centre on 20th May, 2010. On 4th June, 2010, the Appellant filed an

application before the Sole Arbitrator under Section 17 of the aforesaid Act being SIAC Arbitration No.37 of 2010, inter alia, for the following reliefs :

"a. restrain the SSY from encashing Performance Bank Guarantee No.101BGPGO63040001 dated 31.10.06 of Syndicate Bank, Nehru Place, Delhi of Rs. 6.05 crores;

b. restrain the SSY from enchashing three Bank Guarantees furnished towards the mobilization advance bearing numbers 101 BGFG 091490001 of Rs. 1 Crore, 101 BGFG 091490002 of Rs. 1 Crore and 101 BGFG 091490003 of Rs. 3 Crores, totaling to Rs. 5 Crores;

c. direct SSY to release a sum of Rs. 144,42,25,884/- along with the interest @ 36% till realization of nationalized bank of India for the aforesaid amount and keep it alive till passing of the final Award.

d. restrain SSY from removing, shifting, alienating or transferring in any manner either itself or through any of its agents/employees, the plant, machineries, equipments, vehicles and materials, in other words maintain status-quo, till the passing of the final arbitral award;

e. grant any other appropriate interim measures of protection in favour of the Cross-Claimant/applicant, which in the esteemed opinion of this Hon'ble Tribunal are just and proper in the facts and circumstance of the case;"

5. The Respondent also filed an application under Section 17 of the above Act before the Sole Arbitrator on 5th June, 2010, for interim reliefs. After considering both the applications, the Arbitrator passed an interim order on 29th June, 2010, in the following manner :

"1. The respondent is to immediately release, for use by the Claimant, the items of plant, machinery and equipment (PME) numbered 1,5,7,8,10,19,20,21,22,23 and 32, as listed in Annexure A (Machinery Details) of the Claimant's Application dated 5 June 2010.

2. The respondent is restrained from creating any third party interest in, or otherwise selling, leasing or charging, the PME or other assets presently located at the work site and/or the camp site and which are owned by the respondent, without the permission of this Tribunal.

3(i). The claimant is permitted to use the aggregates, which have been identified in Annexure D (engineer's Statement of Materials at Site for September 2009) of the Claimant's Application dated 5 June 2010 as a total quantity of 274,580 cubic metres, for the carrying out of the works in accordance with the terms and conditions of the Main Agreement and the Agreement dated 13 August, 2006 between the parties.

3(ii) The respondent is to give the Claimant access to the aggregate stockpiles where the abovementioned quantity of material is currently held.

The above interim orders are made with the objective of enabling the construction work on the project to continue while the disputes between the parties are resolved in these arbitration proceedings (ref. Terms or Reference dated 23 June 2010).

The parties have liberty at short notice, if any of the above directions require clarification or amendment in order to ensure proper implementation.

The respondent has leave (until 6 July 2010) to make a further application for the provision of security by the claimant in relation to the PME and aggregates."

6. Aggrieved by the aforesaid interim order passed by the learned Arbitrator, the Appellant herein, which was the respondent before the learned Arbitrator, filed Appeal No.2 of 2010 on 2nd July, 2010 before the learned District Judge, Narsinghpur, under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996, for setting aside the same. On behalf of the respondent it was contended in the said appeal that the same was not maintainable before the learned District Judge, Narsinghpur, since the seat of the arbitration proceedings was in Singapore and the said proceedings were governed by the laws of Singapore. Accepting the submissions advanced on behalf of the respondent, the learned District Judge dismissed the appeal as not maintainable on 23rd July, 2010, without deciding the matter on merits.

7. The appellant then moved Civil Revision No.304 of 2010, before the High Court on 26th July, 2010. The same was dismissed by the High Court on 31st August, 2010, against which the Special Leave Petition (now appeal) has been filed.

8. Appearing for the Company, Ms. Indu Malhotra, learned Senior Advocate, submitted that the stand taken on behalf of the respondent that the PMEs had to remain on site even in case of termination of the Agreement, was without any basis, since after the Agreement dated 13th August, 2006, the parties had agreed in the Meeting held on 23rd September, 2006 that in case of termination of the Agreement between the parties, the respondent would transfer the PMEs to the appellant. Ms. Malhotra further clarified that Clause 4 of the Agreement related only to the PMEs and not to the aggregates, since it had been admitted by the respondent that in case the aggregates were not made available to them, they could buy the same from the open market. It was further clarified that there were only two machines out of 35 machines which formed the subject matter of the interim application, i.e., Hotmix Plant and Crusher, which were in the possession of the appellant and the value thereof would be approximately Rs. 7 crores and a sum of Rs. 7.20

crores had already been deducted by the respondent towards the repayment of the Arab Bank Loan for the said PMEs. Ms. Malhotra submitted that it was incorrect to say that the Project was stopped because of the Stay Order passed by this Court as the respondent had further subcontracted the work to Khara and Tarakunde Infrastructure Pvt. Ltd., Ramdin Ultratech Pvt. Ltd. and others. Ms. Malhotra contended that apart from the Hotmix Plant and Crusher all the remaining PMEs had been removed by the respondent after the passing of the order 29th June, 2010.

9. On the question of the applicable law in respect of the arbitral proceedings, Ms. Malhotra contended that the Arbitration and Conciliation Act, 1996, enacted in India is the applicable law of arbitration. Ms. Malhotra submitted that in terms of the Agreement arrived at between the parties, it is only the Indian laws to which the Agreement would be subjected. She pointed out that Clause 28 of the Agreement provides that the Agreement would be subject to the laws of India and that during the period of arbitration, the performance of the Agreement would be carried out without interruption and in accordance with its terms and provisions. Accordingly, having explicitly agreed that the Agreement would be subject to the laws of India, from the very commencement of the arbitration till its conclusion, the law applicable to the arbitration would be the Indian law. In other words, all interim measures sought to be enforced would necessarily have to be in accordance with Sections 9 and 37(2)(b) of the 1996 Act.

10. Ms. Malhotra submitted that Clause 27.1, which forms part of Clause 27 of the agreement, which is the arbitration clause, provides that the proceedings of arbitration shall be conducted in accordance with the SIAC Rules. In other words, the provisions of SIAC Rules would apply only to the arbitration proceedings, but not to appeals from such proceedings. Ms. Malhotra submitted that the right to appeal from an interim order under Section 37(2)(b) is a substantive right provided under the 1996 Act and was not governed by the SIAC Rules.

11. Ms. Malhotra also urged that Rule 1.1 of the SIAC Rules, which, inter alia, provides that where the parties agreed to refer their disputes to the SIAC for arbitration, it would be deemed that the parties had agreed that such arbitration would be conducted in accordance with the SIAC Rules. If, however, any of the SIAC Rules was in conflict with a mandatory provision of the applicable law of arbitration from which the parties could not derogate, that provision from the applicable law of the arbitration shall prevail. Ms. Malhotra submitted that Rule 32 of the SIAC Rules is one of such Rules which provides that if the seat of arbitration is Singapore, then the applicable law of arbitration under the Rules would be the International Arbitration Act, 2002, of Singapore. However, Section 37(2)(b) of the 1996 Act being a substantive and non-derogable provision, providing a right of appeal to parties from a denial of an interim measure, such a provision protects the interest of parties during the continuance of arbitration and as a consequence, Rule 32 of the SIAC Rules which does not provide for an appeal, is in direct conflict with a mandatory non-derogable provision contained in Section 37(2)(b) of the 1996 Act.

12. Ms. Malhotra then went on to submit that Part I of the 1996 Act had not been excluded by Clause 27 of the Agreement and the 1996 Act would, therefore, apply to the said Agreement. Ms. Malhotra submitted that in the decision of this Court in *Bhatia International Vs. Bulk Trading S.A.* [(2002) 4 SCC 105], which was reiterated in *Venture Global Engg. Vs. Satyam Computer Services Ltd.* [(2008) 4 SCC 190] and *Citation Infowares Ltd. Vs. Equinox Corporation* [(2009) 7 SCC 220], it has been clearly held that where the operation of Part I of the 1996 Act is not expressly excluded by the arbitration clause, the said Act would apply. In any event, in the instant case, Clause 28 of the Agreement expressly provides that the Agreement would be subject to the laws of India and that during the period of arbitration the parties to the Agreement would carry on in accordance with the terms and conditions contained therein. Accordingly, on account of the application of Part I of

the 1996 Act, the International Arbitration Act, 2002 of Singapore would have no application to the facts of this case, though, the conduct of the proceedings of arbitration would be governed by the SIAC Rules.

13. Ms. Malhotra urged that the High Court had erred in coming to the conclusion that since under Clause 27 of the Agreement, the parties had agreed that the arbitral proceedings would be conducted in accordance with the SIAC Rules and by virtue of Rule 32 thereof, the jurisdiction of the Indian Courts stood ousted. Ms. Malhotra urged that the High Court had failed to appreciate the provisions of Clause 28 of the Agreement while arriving at such a conclusion. Ms. Malhotra reiterated her earlier submissions that Rule 32 of the SIAC Rules is subject to Rule 1.1 thereof which provides that if any of the said Rules was in conflict with the mandatory provision of the applicable law of the arbitration, from which the parties could not derogate, that provision shall prevail. Ms. Malhotra submitted that the finding of the High Court being contrary to the provisions agreed upon by the parties, such finding was liable to be set aside. Ms. Malhotra submitted that the very fact that the respondents had approached the District Court, Narsinghpur, in India and had filed an application under Section 9 of the 1996 Act therein, indicated that the respondent also accepted the applicability of the 1996 Act. Ms. Malhotra pointed out that in the application the respondent has indicated as follows :

> "That, the work of Contract, which was executed between the petitioner and respondent is well within the jurisdiction of this Hon'ble Court at Narsinghpur. Thus, this Hon'ble Court has jurisdiction to pass an order on this application under Section 9 of the Arbitration and Conciliation Act, 1996."

14. Ms. Malhotra urged that having regard to Section 42 of the 1996 Act, it is in the District Court of Narsinghpur where the application under Section 9 of the Arbitration and

Conciliation Act, has been filed which has jurisdiction over the arbitral proceedings at all stages. Ms. Malhotra pointed out that the High Court had erroneously held that Section 42 was not applicable to an appeal and was applicable only for filing an application, without appreciating the wordings of Section 42 which provides that Courts shall have jurisdiction over the arbitral proceedings also. Ms. Malhotra urged that with regard to the said findings of the High Court, the order impugned was liable to be set aside.

15. Ms. Malhotra submitted that the stand of the respondent that in view of clause 27 of the Agreement, the law governing the arbitral proceedings would be the SIAC Rules, was not tenable, in view of Clause 28 which without any ambiguity provides that the Agreement would be subject to the laws of India and that during the period of arbitration the parties to the Agreement would carry on, in accordance with the terms and conditions contained therein. Accordingly, it is the Arbitration and Conciliation Act, 1996, which would be the proper law or the law governing the arbitration.

16. Ms. Malhotra submitted that apparently there was a misconception in the minds of the learned Judges of the High Court as to the concept of the 'proper law', of the Arbitration Agreement and the 'Curial Law' governing the conduct and procedure of the reference. Ms. Malhotra submitted that while the proper law of the Arbitration Agreement governs the law which would be applicable in deciding the disputes referred to arbitration, the Curial law is the law which governs the procedural aspect of the conduct of the arbitration proceedings. It was urged that in the instant case while the proper law of the arbitration would be the Arbitration and Conciliation Act, 1996, the Curial law would be the SIAC Rules of Singapore. Ms. Malhotra submitted that the said difference in the two concepts had been considered by this Court in *Sumitomo Heavy Industries Ltd. Vs. ONGC* [(1998) 1 SCC 305] and *NTPC Vs. Singer* [(1992) 3 SCC 551], in which the question for decision was what would be the law governing the arbitration when the

proper law of the contract and the Curial law were agreed upon between the parties. In the said cases this Court observed that in many circumstances the applicable law would be the same as that of the proper law of contract and the Curial law, but it was not uncommon to encounter the incumbent Curial law in cases where the parties had made an express choice of arbitration in a jurisdiction which was different from the jurisdiction with which the contract had the closest real connection.

17. Ms. Malhotra submitted that in the absence of any express choice, the proper law of the contract would be the proper law of the Arbitration Agreement. Ms. Malhotra submitted that in the instant case, admittedly the proper law of contract is the law of India and since the parties have not expressly made any choice regarding the law governing the Arbitration Agreement, the proper law of contract, namely, the Arbitration and Conciliation Act, 1996, would be the proper law of the Arbitration Agreement. Ms. Malhotra urged that ultimately the right to appeal which is a substantive right under the 1996 Act would be governed by the said Act and the instant appeal, is therefore, liable to be allowed, and the order of the High Court, impugned in the appeal, was liable to be set aside.

18. Within the fact situation indicated on behalf of the appellant, Mr. Dharmendra Rautray, learned Advocate, appearing for the respondent Company, submitted that the issues involved in the present appeal were (i) whether the Indian Courts would have jurisdiction to entertain an appeal under Section 37 of the Arbitration and Conciliation Act, 1996, against an interim order passed by the Arbitral Tribunal with its seat in Singapore; (ii) Whether the "law of arbitration" would be the International Arbitration Act, 2002, of Singapore; and (iii) whether the "Curial law" would be the laws of Singapore?

19. Mr. Rautray submitted that apparently on the alleged failure of the appellant to complete the work awarded under the contract within the stipulated period of 30 months from the date

of commencement of the work, the respondent had to give an undertaking to the National Highways Authority of India by way of a Supplementary Agreement dated 11th February, 2009, to achieve a monthly rate of progress of work, failing which the aforesaid authority would be entitled to exercise all its rights under the main agreement and even to terminate the same with immediate effect. Mr. Routray submitted that on account of the failure of the appellant to live up to its commitments, the respondent who had suffered heavy financial loss and damages on account of such breach, issued notice of termination on 22nd September, 2009, pursuant to Clause 23.2 of the Agreement.

20. Thereafter, the parties entered into settlement talks, as provided for in Clause 26 of the Agreement and signed the minutes of the meeting dated 28th September, 2009. The settlement talks between the parties having failed, the respondent/claimant, invoked Clause 27 of the Agreement for reference of the disputes to arbitration in accordance with the Singapore International Arbitration Centre Rules (SIAC Rules). The respondent/claimant filed a Statement of Claim on 16th August, 2010, before the Sole Arbitrator, Mr. Graham Easton, claiming a sum of Rs. 221,36,91,097/- crores from the appellant. Both the parties filed applications before the learned Arbitrator seeking interim relief under Rule 24 of the SIAC Rules on 5th June, 2010. In their application for interim relief under Rule 24 of the SIAC Rules, the respondent, inter alia, prayed for release of all plants, machineries and equipment belonging to the respondent; injunction against the appellant from removing all plants, machineries, equipment, materials, aggregates, etc., owned by the respondent from the work site and/or camp site; a restraint order against the appellant from creating any third party interest or otherwise sell, lease, charge the plants, machineries, equipment, materials, etc., at the work site and/or camp site and to permit the respondent to use the PMEs and materials, aggregates, etc., for carrying out the works in accordance with the terms and conditions of the main Agreement and the Supplementary Agreement dated 13th August, 2006.

21. The Sole Arbitrator appointed by the SIAC by its order dated 29th June, 2010, directed the appellant to, inter alia, release for use by the respondent all plants and equipment. The appellant was also restrained from creating any third party interest, or otherwise to deal with the properties at the work site and/or camp site and permit the respondent to use the aggregates of a total quantity of 27,580 cubic metres for carrying out the works. The Sole Arbitrator, while dealing with the applications filed by both the parties under Rule 24 of the SIAC Rules, also recorded that the interim orders were being made with the object of allowing the construction work on the project to continue while the dispute between the parties were resolved in these arbitration proceedings and in order to ensure that the progress of the project was not hampered, while the parties waited for the outcome of the arbitration proceedings.

22. Mr. Routray submitted that the appeal filed by the appellant before the District Court, Narasinghpur, under Section 37 of the Arbitration and Conciliation Act, 1996, against the abovementioned order of the learned Arbitrator dated 29th June, 2010, was dismissed on 23rd July, 2010, on the ground of maintainability and lack of jurisdiction. The Civil Revision filed against the said order was dismissed by the Madhya Pradesh High Court by its order dated 31st August, 2010. While dismissing the Revision, the High Court, inter alia, observed that under Clause 27.1 of the Agreement, the parties had agreed to resolve their dispute under the provisions of SIAC Rules which expressly or, in any case, impliedly also adopted Rule 32 of the said Rules which categorically indicates that the law of arbitration under the said Rules would be the International Arbitration Act, 2002, of Singapore. The Special Leave Petition, out of which the present appeal arises, has been filed by the appellant against the said order dated 31st August, 2010.

23. Mr. Routray further submitted that the parties had, inter alia, agreed that the seat of arbitration would be Singapore and that the arbitration proceedings would be continued in accordance with the SIAC Rules, as per Clause 27.1 of the

Agreement. It was also agreed that the proper law of the agreement/contract dated 13th August, 2006, between the appellant and the respondent would be the Indian law and the proper law of the arbitration would be the Singapore law.

24. Mr. Routray submitted that an application under Section 9 of the 1996 Act was filed before the District Court on 30th December, 2009, prior to the date of invocation of the arbitration proceedings and before the Curial law, i.e., the Singapore law, became operative. On the said application, the District Judge by his order dated 10th March, 2010, directed the applicant to submit its case before the Arbitrator at Singapore. Mr. Routray pointed out that in the present case, the parties had expressly chosen the applicable laws to each legal disposition while entering into the Agreement dated 13th August, 2006. Mr. Routray submitted that the parties had expressly agreed that the proper law of the contract would be the Indian Law, the proper law of the arbitration would be the Singapore International Arbitration Act, 2002 and the Curial law would be Singapore law, since the seat of arbitration was in Singapore. Mr. Routray submitted that as observed by this Court in *Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd. & Ors.* [(1998) 1 SCC 305], the Curial law, besides determining the procedural powers and duties of the Arbitrators, would also determine what judicial remedies are available to the parties, who wished to apply for security for costs or for discovery or who wished to challenge the Award once it had been rendered and before it was enforced.

25. As to the filing of Application under Section 9 by the appellant before the District Court at Narsinghpur, Mr. Routray submitted that the High Court had correctly held that the proceedings had been initiated by the parties in the Court of District Judge, Narasinghpur, before the matter was referred to the Arbitrator and the same was decided taking into consideration such circumstances. However, once the dispute was referred to the Arbitrator, the parties could not be permitted to deviate from the express terms of the Agreement under which

the SIAC Rules came into operation.

26. Mr. Routray submitted that the Section 9 application had been filed before the Curial law became operative and in view of the agreement between the parties the Indian Arbitration and Conciliation Act, 1996, would not apply to the arbitration proceedings and the same would be governed by the Singapore laws.

27. Mr. Routray then proceeded to the next important question as to whether choice of the "seat of arbitration" by the parties confers exclusive jurisdiction on the Courts of the seat of arbitration to entertain matters arising out of the contract. Learned counsel submitted that choice of the seat of arbitration empowered the courts within the seat of arbitration to have supervisory jurisdiction over such arbitration. Mr. Routray has referred to various decisions of English Courts which had laid down the proposition that even if the arbitration was governed by the law of another country, it would not entitle the objector to mount a challenge to the Award in a country other than the seat of arbitration. It is not necessary to refer to the said judgments for a decision in this case.

28. Mr. Routray submitted that the decision of this Court in *NTPC Vs. Singer* (supra) relates to the applicability of the Indian Arbitration Act, 1940, and the Foreign Awards (Recognition and Enforcement) Act, 1961, to a foreign award sought to be set aside in India under the provisions of the 1940 Act. It was submitted that the said decisions have no relevance to the question raised in the present case which raises the question as to whether the Indian Courts would have jurisdiction to entertain an appeal under Section 37 of the 1996 Act against an interim order of the Arbitral Tribunal, despite the parties having expressly agreed that the seat of arbitration would be in Singapore and the Curial law of the arbitration proceedings would be the laws of Singapore. Once again referring to the decision in the NTPC case, Mr. Routray submitted that in paragraph 46 of the judgment, this Court had, inter alia,

observed that Courts would give effect to the choice of a procedural law other than the proper law of contract only where the parties had agreed that the matters of procedure should be governed by a different system of law. Mr. Routray submitted that in the above-mentioned case, this Court was dealing with a challenge to a "domestic award" and not a "foreign award". Section 9(b) of the Foreign Awards (Recognition and Enforcement) Act, 1961, provides that the said Act would not apply to an award, although, made outside India, but which is governed by the laws of India. Accordingly, all such awards were treated as domestic awards by the 1961 Act and any challenge to the said award, could, therefore, be brought only under the provisions of the 1940 Act. Mr. Routray further submitted that the law of arbitration in the NTPC case (supra) was Indian law as opposed to the facts of the present case, where the parties had agreed that the law of arbitration would be the International Arbitration Act, 2002, of Singapore.

29. Mr. Routray urged that by virtue of Clause 27 of the Agreement dated 13th August, 2006, and by accepting the SIAC Rules, the parties had agreed that Part I of the Arbitration and Conciliation Act, 1996, would not apply to the arbitration proceedings taking place in Singapore. According to Mr. Routray, the said decision was reiterated in the Terms of Reference that the arbitration proceedings would be governed by the laws of Singapore. Mr. Routray further urged that even in the decision relied upon by the appellant in the case of Bhatia International, this Court had held that parties by agreement, express or implied, could exclude all or any of the provisions of Part I of the 1996 Act. Consequently, in Bhatia International this Court had held that exclusion of Part I of the 1996 Act could be by virtue of the Rules chosen by the parties to govern the arbitration proceedings.

30. As far as applicability of Section 42 of the 1996 Act is concerned, the Jabalpur Bench of the Madhya Pradesh High Court had held that by express agreement parties had ousted the jurisdiction of the Indian Courts, while the arbitration

proceedings were subsisting. Accordingly, the jurisdiction of the Indian Courts stood ousted during the subsistence of the arbitration proceedings and, accordingly, it is only the laws of arbitration as governed by the SIAC Rules which would govern the arbitration proceedings along with the procedural law, which is the law of Singapore.

31. In order to appreciate the controversy that has arisen regarding the applicability of the provisions of Part I of the Arbitration and Conciliation Act, 1996, to the proceedings being conducted by the Arbitrator in Singapore in accordance with the SIAC Rules, it would be necessary to look at the arbitration clause contained in the agreement entered into between the parties on 13th August, 2006. Clause 27 of the Agreement provides for arbitration and reads as follows :

"27. Arbitration.

27.1 All disputes, differences arising out of or in connection with the Agreement shall be referred to arbitration. The arbitration proceedings shall be conducted in English in Singapore in accordance with the Singapore International Arbitration Centre (SIAC) Rules as in force at the time of signing of this Agreement. The arbitration shall be final and binding.

27.2 The arbitration shall take place in Singapore and be conducted in English language.

27.3 None of the Party shall be entitled to suspend the performance of the Agreement merely by reason of a dispute and/or a dispute referred to arbitration."

32. Clause 28 of the Agreement describes the governing law and provides as follows :

"This agreement shall be subject to the laws of India. During the period of arbitration, the performance of this agreement shall be carried on without interruption and in

accordance with its terms and provisions."

33. As will be seen from Clause 27.1, the arbitration proceedings are to be conducted in Singapore in accordance with the SIAC Rules as in force at the time of signing of the agreement. There is, therefore, no ambiguity that the procedural law with regard to the arbitration proceedings, is the SIAC Rules.

34. Clause 27.2 makes it clear that the seat of arbitration would be Singapore.

35. What we are, therefore, left with to consider is the question as to what would be the law on the basis whereof the arbitral proceedings were to be decided. In our view, Clause 28 of the Agreement provides the answer. As indicated hereinabove, Clause 28 indicates that the governing law of the agreement would be the law of India, i.e., the Arbitration and Conciliation Act, 1996. The learned counsel for the parties have quite correctly spelt out the distinction between the "proper law" of the contract and the "curial law" to determine the law which is to govern the arbitration itself. While the proper law is the law which governs the agreement itself, in the absence of any other stipulation in the arbitration clause as to which law would apply in respect of the arbitral proceedings, it is now well-settled that it is the law governing the contract which would also be the law applicable to the Arbitral Tribunal itself. Clause 27.1 makes it quite clear that the Curial law which regulates the procedure to be adopted in conducting the arbitration would be the SIAC Rules. There is, therefore, no ambiguity that the SIAC Rules would be the Curial law of the arbitration proceedings. It also happens that the parties had agreed to make Singapore the seat of arbitration. Clause 27.1 indicates that the arbitration proceedings are to be conducted in accordance with the SIAC Rules. The immediate question which, therefore, arises is whether in such a case the provisions of Section 2(2), which indicates that Part I of the above Act would apply, where the place of arbitration is in India, would be a bar to the invocation

of the provisions of Sections 34 and 37 of the Act, as far as the present arbitral proceedings, which are being conducted in Singapore, are concerned.

36. In *Bhatia International* (supra), wherein while considering the applicability of Part I of the 1996 Act to arbitral proceedings where the seat of arbitration was in India, this Court was of the view that Part I of the Act did not automatically exclude all foreign arbitral proceedings or awards, unless the parties specifically agreed to exclude the same.

37. As has been pointed out by the learned Single Judge in the order impugned, the decision in the aforesaid case would not have any application to the facts of this case, inasmuch as, the parties have categorically agreed that the arbitration proceedings, if any, would be governed by the SIAC Rules as the Curial law, which included Rule 32, which categorically provides as follows :

> "Where the seat of arbitration is Singapore, the law of the arbitration under these Rules shall be the International Arbitration Act (Cap. 143A, 2002 Ed, Statutes of the Republic of Singapore) or its modification or re-enactment thereof."

38. Having agreed to the above, it was no longer available to the appellant to contend that the "proper law" of the agreement would apply to the arbitration proceedings. The decision in *Bhatia International Vs. Bulk Trading S.A.* [(2002) 4 SCC 105], which was applied subsequently in the case of *Venture Global Engg. Vs. Satyam Computer Services Ltd.* [(2008) 4 SCC 190] and *Citation Infowares Ltd. Vs. Equinox Corporation* [(2009) 7 SCC 220], would have no application once the parties agreed by virtue of Clause 27.1 of the Agreement that the arbitration proceedings would be conducted in Singapore, i.e., the seat of arbitration would be in Singapore, in accordance with the Singapore International Arbitration Centre Rules as in force at the time of signing of the

Agreement. As noticed hereinabove, Rule 32 of the SIAC Rules provides that the law of arbitration would be the International Arbitration Act, 2002, where the seat of arbitration is in Singapore. Although, it was pointed out on behalf of the appellant that in Rule 1.1 it had been stated that if any of the SIAC Rules was in conflict with the mandatory provision of the applicable law of the arbitration, from which the parties could not derogate, the said mandatory provision would prevail, such is not the case as far as the present proceedings are concerned. In the instant case, Section 2(2) of the 1996 Act, in fact, indicates that Part I would apply only in cases where the seat of arbitration is in India. This Court in *Bhatia International* (supra), while considering the said provision, held that in certain situations the provision of Part I of the aforesaid Act would apply even when the seat of arbitration was not in India. In the instant case, once the parties had specifically agreed that the arbitration proceedings would be conducted in accordance with the SIAC Rules, which includes Rule 32, the decision in Bhatia International and the subsequent decisions on the same lines, would no longer apply in the instant case where the parties had willingly agreed to be governed by the SIAC Rules.

39. With regard to the effect of Section 42 of the Arbitration and Conciliation Act, 1996, the same, in our view was applicable at the pre-arbitral stage, when the Arbitrator had not also been appointed. Once the Arbitrator was appointed and the arbitral proceedings were commenced, the SIAC Rules became applicable shutting out the applicability of Section 42 and for that matter Part I of the 1996 Act, including the right of appeal under Section 37 thereof.

40. We are not, therefore, inclined to interfere with the judgment under appeal and the appeal is accordingly dismissed and all interim orders are vacated.

41. There will be no order as to costs.

D.G. Appeal dismissed.

YOGRAJ INFRASTRUCTURE LTD.

v.

SSANG YONG ENGINEERING AND CONSTRUCTION CO. LTD.

I.A. No.3 of 2011

Civil Appeal No.7562 of 2011

DECEMBER 15, 2011

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

International Arbitration Act, 2002:

International application – Clarification/corretion of clerical errors in the judgment – In para 35 of the judgment rendered in Civil Appeal No. 7562 of 2011 on 1st September 2011, it was indicated that the SIAC Rules would be the Curial law of the arbitration proceedings – Held: It is clarified that the Curial law is the International Arbitration law of Singapore and not the SIAC Rules.

CIVIL APPELLATE JURISDICTION

I.A. No. 3 of 2011

In

Civil Appeal No. 7562 of 2011.

From the Judgment & Order dated 31.8.2010 of the High Court of Madhya Pradesh, Principal Seat at Jabalpur in Civil Reivision No. 34 of 2010.

Sidharth Khattar, Faisal Zafar, Tarun Shanker, Gagan Gupta for the Appellant.

Dharmendra Rautray, Ankit Khushu, Tara Shahani, Meenakshi for the Respondent.

The following Order of the Court was delivered

O R D E R

ALTAMAS KABIR, J. 1. Interlocutory Application No.3 of 2011 has been filed by SSANGYONG Engineering & Construction Company Limited in disposed of Civil Appeal No.7562 of 2011, seeking clarification and correction of certain clerical errors in the judgment passed by this Court on 1st September, 2011, under Order XIII Rule 3 of the Supreme Court Rules, 1966.

2. Mr. Dharmendra Rautray, learned Advocate-on-Record, who had earlier appeared for SSANGYONG Engineering & Construction Company Limited, submitted that in paragraph 5 of the aforesaid judgment it had been mentioned that his clients had filed an application before the Sole Arbitrator on 5th June, 2010, for interim relief under Section 17 of the Arbitration and Conciliation Act, 1996. Mr. Rautray pointed out that the said application had been made not under Section 17 of the above Act, but under Rule 24 of the SIAC Rules and the same would be evident from the application made before the sole Arbitrator in SIAC Arbitration No.37 of 2010, by the Respondent, being Annexure-B to the present application.

3. Mr. Rautray then submitted that through inadvertence, in paragraph 35 of the judgment, it has been indicated that there was no ambiguity that the SIAC Rules would be the Curial law of the arbitration proceedings and that the same had been subsequently clarified in paragraph 37, wherein while indicating that the arbitration proceedings would be governed by the SIAC Rules as the Curial law, which included Rule 32, which made it clear that where the seat of arbitration is Singapore, the law of the arbitration under the SIAC Rules would be the International Arbitration Act (Cap. 143A, 2002 Ed, Statutes of the Republic of Singapore). Mr. Rautray submitted that it was a clear case of inadvertence in paragraph 35 that needs to be clarified by indicating that the Curial law is the International Arbitration law of Singapore and not the SIAC rules.

4. It was also pointed out that in paragraph 36 of the judgment in the sentence beginning with the words "In Bhatia International (supra)…", it had been indicated that while considering the applicability of Part I of the 1996 Act to arbitral proceedings where the seat of arbitration was in India, this Court was of the view that Part I of the Act did not automatically exclude all foreign arbitral proceedings or awards. Mr. Rautray submitted that as would be evident from reading the judgment as a whole, this Court had intended to indicate that where the seat of arbitration was "outside" and not "in" India, the said portion of the sentence should read "where the seat of arbitration was outside India".

5. It was lastly submitted by Mr. Rautray that in paragraph 4 of the judgment it had been mentioned that an application had been filed by the Appellant under Section 9 of the 1996 Act before the District and Sessions Judge, Narsinghpur, Madhya Pradesh, whereas such an application had been made by the Respondent.

6. Mr. Rautray submitted that the aforesaid clarification and corrections are required to be made in the final judgment.

7. However, on behalf of Yograj Infrastructure Limited it was urged that except for the clarification sought for with regard to the Rules applicable to the arbitral proceedings, the other clarifications could be made.

8. Having regard to the submissions made on behalf of the respective parties, we are inclined to agree with Mr. Rautray that the corrections and clarifications sought for have to be allowed. In particular, the observations made in paragraphs 35 and 37, if read together, indicate that, although, when the seat of arbitration was in Singapore, the SIAC Rules would apply, the same included Rule 32 which provides that it is the International Arbitration Act, 2002, which would be the law of the arbitration. Accordingly, it is clarified that while mention had been made in paragraph 35 that the Curial law of the arbitration

would be the SIAC Rules, what has been subsequently indicated in paragraph 37 of the judgment is that International Arbitration Act of Singapore would be the law of the arbitration.

9. The judgment and order dated 1st September, 2011, be read and understood on the basis of the corrections and clarifications hereby made in this order.

10. The interlocutory application filed on behalf of SSANGYONG Engineering & Construction Company Limited, is allowed and disposed of accordingly.

D.G. Interlocutory Application disposed of.

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

v.

SHAUNAK H.SATYA & ORS.

(Civil Appeal No. 7571 of 2011)

SEPTEMBER 2, 2011

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

Right to Information Act, 2005 – s.8(1)(d) – Examination of candidates for enrolment as Chartered Accountants – Examination held by appellant-Institute of Chartered Accountants of India (ICAI) – Whether the instructions and solutions to questions (if any) given by ICAI to examiners and moderators, are intellectual property of the ICAI, disclosure of which would harm the competitive position of third parties and therefore exempted under s.8(1)(d) of the RTI Act – Held: The question papers, solutions to questions and instructions are the intellectual properties of ICAI – However, what is exempted from disclosure at one point of time may cease to be exempted at a later point of time, depending upon the nature of exemption – The appellant examining body is not liable to give to any citizen any information relating to question papers, solutions/model answers and instructions relating to a particular examination before the date of such examination – But the position will be different once the examination is held – Disclosure of the question papers, model answers and instructions in regard to any particular examination, would not harm the competitive position of any third party once the examination is held – In fact the question papers are disclosed to everyone at the time of examination – The appellant voluntarily publishes the "suggested answers" in regard to the question papers in the form of a book for sale every year, after the examination – Therefore s.8(1)(d) of the RTI Act does not bar or prohibit the disclosure of

question papers, model answers (solutions to questions) and instructions if any given to the examiners and moderators after the examination and after the evaluation of answerscripts is completed, as at that stage they will not harm the competitive position of any third party.

Right to Information Act, 2005 – s.9 – Examination of candidates for enrolment as Chartered Accountants – Examination held by appellant-Institute of Chartered Accountants of India (ICAI) – Whether providing access to the information sought (that is instructions and solutions to questions issued by ICAI to examiners and moderators) would involve an infringement of the copyright and therefore the request for information is liable to be rejected under s.9 of the RTI Act – Held: The word 'State' used in s.9 of RTI Act refers to the Central or State Government, Parliament or Legislature of a State, or any local or other authorities as described under Article 12 of the Constitution – The reason for using the word 'State' and not 'public authority' in s.9 of RTI Act is apparently because the definition of 'public authority' in the Act is wider than the definition of 'State' in Article 12, and includes even non-government organizations financed directly or indirectly by funds provided by the appropriate government – An application for information would be rejected under s.9 of RTI Act, only if information sought involves an infringement of copyright subsisting in a person other than the State – ICAI being a statutory body created by the Chartered Accountants Act, 1948 is 'State' – The information sought is a material in which ICAI claims a copyright – It is not the case of ICAI that anyone else has a copyright in such material – In fact it has specifically pleaded that even if the question papers, solutions/model answers, or other instructions are prepared by any third party for ICAI, the copyright therein is assigned in favour of ICAI – Providing access to information in respect of which ICAI holds a copyright, does not involve infringement of a copyright subsisting in a person other than the State –

Therefore ICAI is not entitled to claim protection against disclosure under s.9 of the RTI Act –There is yet another reason why s.9 of RTI Act will be inapplicable – The words 'infringement of copyright' have a specific connotation – A combined reading of ss. 51 and 52(1)(a) of Copyright Act shows that furnishing of information by an examining body, in response to a query under the RTI Act may not be termed as an infringement of copyright.

Right to Information Act, 2005 – s.8(1)(e) – Examination of candidates for enrolment as Chartered Accountants – Examination held by appellant-Institute of Chartered Accountants of India (ICAI) – Whether the instructions and solutions to questions are information made available to examiners and moderators in their fiduciary capacity and therefore exempted under s.8(1)(e) of the RTI Act – Held: The instructions and solutions to questions are given by the ICAI to the examiners and moderators to be held in confidence – The examiners and moderators are in the position of agents and ICAI is in the position of principal in regard to such information which ICAI gives to the examiners and moderators to achieve uniformity, consistency and exactness of evaluation of the answer scripts – When anything is given and taken in trust or in confidence, requiring or expecting secrecy and confidentiality to be maintained in that behalf, it is held by the recipient in a fiduciary relationship – S.8(1)(e) uses the words "information available to a person in his fiduciary relationship – Significantly s.8(1)(e) does not use the words "information available to a public authority in its fiduciary relationship" – The use of the words "person" shows that the holder of the information in a fiduciary relationship need not only be a 'public authority' as the word 'person' is of much wider import than the word 'public authority' – Therefore the exemption under s.8(1)(e) is available not only in regard to information that is held by a public authority (in this case the examining body) in a fiduciary capacity, but also to any information that is given or made available by a public

authority to anyone else for being held in a fiduciary relationship – Consequently, the instructions and solutions to questions communicated by the examining body to the examiners, head-examiners and moderators, are information available to such persons in their fiduciary relationship and therefore exempted from disclosure under s.8(1)(d) of RTI Act.

Right to Information Act, 2005 – s.4(1)(b) and (c) – Information to which RTI Act applies – Two categories – A) Information which promotes transparency and accountability in the working of every public authority, disclosure of which helps in containing or discouraging corruption, enumerated in clauses (b) and (c) of s.4(1) of RTI Act; and B) other information held by public authorities not falling under s.4(1)(b) and (c) of RTI Act – Held: In regard to information falling under the first category, the public authorities owe a duty to disseminate the information widely suo moto to the public so as to make it easily accessible to the public – But in regard to the second category, there is a need to proceed with circumspection as it is necessary to find out whether they are exempted from disclosure – In dealing with information not falling under s.4(1)(b) and (c), the competent authorities under the RTI Act will not read the exemptions in s.8 in a restrictive manner but in a practical manner so that the other public interests are preserved and the RTI Act attains a fine balance between its goal of attaining transparency of information and safeguarding the other public interests.

Right to Information Act, 2005 – ss. 3, 4, 8, 9, 10 and 11 – Object of the RTI Act – Held: The object of RTI Act is to harmonize the conflicting public interests, that is, ensuring transparency to bring in accountability and containing corruption on the one hand, and at the same time ensure that the revelation of information, in actual practice, does not harm or adversely affect other public interests which include efficient functioning of the governments, optimum use of limited fiscal resources and preservation of confidentiality of

sensitive information, on the other hand – While ss. 3 and 4 seek to achieve the first objective, ss. 8, 9, 10 and 11 seek to achieve the second objective.

Right to Information Act, 2005 – s.8 – Categories of information which are exempted from disclosure under s.8 – Held: Among the ten categories of information which are exempted from disclosure under s.8 of RTI Act, six categories which are described in clauses (a), (b), (c), (f), (g) and (h) carry absolute exemption – Information enumerated in clauses (d), (e) and (j) on the other hand get only conditional exemption, that is the exemption is subject to the overriding power of the competent authority under the RTI Act in larger public interest, to direct disclosure of such information. The information referred to in clause (i) relates to an exemption for a specific period, with an obligation to make the said information public after such period. The information relating to intellectual property and the information available to persons in their fiduciary relationship, referred to in clauses (d) and (e) of s.8(1) do not enjoy absolute exemption. Though exempted, if the competent authority under the Act is satisfied that larger public interest warrants disclosure of such information, such information will have to be disclosed. The competent authority will have to record reasons for holding that an exempted information should be disclosed in larger public interest. In this case the Chief Information Commissioner rightly held that the information sought under queries (3) and (5) were exempted under s.8(1)(e) and that there was no larger public interest requiring denial of the statutory exemption regarding such information. The High Court fell into an error in holding that the information sought under queries (3) and (5) was not exempted.

Right to Information Act, 2005 – Examination of candidates for enrolment as Chartered Accountants – Examination held by appellant-Institute of Chartered Accountants of India (ICAI) – Query of the first respondent

required the appellant to disclose information on: (i) number of times ICAI had revised the marks of any candidate or any class of candidates under Regulation 39(2) of the Chartered Accountants Regulations; (ii) criteria used for exercising such discretion for revising the marks; (iii) quantum of such revisions; (iv) authority who decides the exercise of discretion to make such revision; and (v) number of students (with particulars of quantum of revision) affected by such revision held in the last five examinations at all levels – Whether the High Court was justified in directing the appellant to furnish to the first respondent the five items of information sought (in the query) – Held: Regulation 39(2) of the Chartered Accountants Regulations provides for what is known as 'moderation', which is a necessary concomitant of evaluation process of answer scripts where a large number of examiners are engaged to evaluate a large number of answer scripts – Each examining body will have its own standards of 'moderation', drawn up with reference to its own experiences and the nature and scope of the examinations conducted by it – ICAI shall have to disclose the standards of moderation followed by it, if it has drawn up the same, in response to part (ii) of first respondent's query – In its communication, ICAI had informed the first respondent that under Regulation 39(2), its Examining Committee had the authority to revise the marks based on the findings of the Head Examiners and any incidental information in its knowledge – This answers part (iv) of query as to the authority which decides the exercise of the discretion to make the revision under Regulation 39(2) – As the information sought under parts (i), (iii) and (v) of the query are not maintained and is not available in the form of data with the appellant in its records, ICAI is not bound to furnish the same – Chartered Accountants Regulations, 1988 – Regulation 39(2).

Right to Information Act, 2005 – Examination of candidates for enrolment as Chartered Accountants –

Examination held by appellant-Institute of Chartered Accountants of India (ICAI) – Held: On facts, it cannot be said that first respondent had indulged in improper use of RTI Act – His application was intended to bring about transparency and accountability in the functioning of ICAI – However, how far he was entitled to the information was a different issue.

Right to Information Act, 2005 – New regime of disclosure of maximum information – Duty of competent authorities under the RTI Act to maintain a proper balance – Held: Examining bodies like Institute of Chartered Accountants of India (ICAI) should change their old mindsets and tune them to the new regime – Accountability and prevention of corruption is possible only through transparency – In its wisdom, the Parliament has chosen to exempt only certain categories of information from disclosure and certain organizations from the applicability of the Act – As the examining bodies have not been exempted, and as the examination processes of examining bodies have not been exempted, the examining bodies will have to gear themselves to comply with the provisions of the RTI Act – Additional workload is not a defence – If there are practical insurmountable difficulties, it is open to the examining bodies to bring them to the notice of the government for consideration so that any changes to the Act can be deliberated upon – However, it is necessary to make a distinction in regard to information intended to bring transparency, to improve accountability and to reduce corruption, falling under s.4(1)(b) and (c) and other information which may not have a bearing on accountability or reducing corruption – The competent authorities under the RTI Act will have to maintain a proper balance so that while achieving transparency, the demand for information does not reach unmanageable proportions affecting other public interests, which include efficient operation of public authorities and government, preservation of confidentiality of sensitive information and optimum use of limited fiscal resources.

Words and Phrases – Term 'intellectual property' – Meaning of.

The appellant Institute of Chartered Accountants of India ('ICAI') is a body corporate established under section 3 of the Chartered Accountants Act, 1949. One of the functions of the appellant council is to conduct the examination of candidates for enrolment as Chartered Accountants. The first respondent appeared in the Chartered Accountants' final examination conducted by ICAI. The results were declared. The first respondent who was not successful in the examination applied for verification of marks. The appellant carried out the verification in accordance with the provisions of the Chartered Accountants Regulations, 1988 and found that there was no discrepancy in evaluation of answerscripts. The appellant informed the first respondent accordingly. Subsequently, the appellant submitted an application seeking information under 13 heads, under the Right to Information Act, 2005 ('RTI Act). The appellant gave responses/ information in response to the 13 queries. Not being satisfied with the same, the respondent filed an appeal before the appellate authority. The appellate authority dismissed the appeal, concurring with the order of the Chief Public Information Officer of the appellant. The first respondent thereafter filed a second appeal before the Central Information Commission ('CIC') in regard to queries (1) to (5) and (7) to (13). CIC rejected the appeal in regard to queries 3, 5 and 13 (as also Query 2) while directing the disclosure of information in regard to the other questions.

Feeling aggrieved by the rejection of information sought under items 3, 5 and 13, the first respondent approached the High Court by filing a writ petition. The High Court allowed the said petition and directed the appellant to supply the information in regard to queries

3, 5 and 13. The said order of the High Court is challenged in the instant appeal.

The appellant submitted that the information sought as per queries (3) and (5) - that is, instructions and model answers, if any, issued to the examiners and moderators by ICAI could not be disclosed as they were exempted from disclosure under clauses (d) and (e) of sub-section (1) of Section 8 of RTI Act and that the request for information was also liable to be rejected under section 9 of the Act. They also contended that in regard to query No.(13), information available had been furnished, apart from generally invoking section 8(1)(e) to claim exemption.

On the said contentions, the following questions arose for consideration:

(i) Whether the instructions and solutions to questions (if any) given by ICAI to examiners and moderators, are intellectual property of the ICAI, disclosure of which would harm the competitive position of third parties and therefore exempted under section 8(1)(d) of the RTI Act?

(ii) Whether providing access to the information sought (that is instructions and solutions to questions issued by ICAI to examiners and moderators) would involve an infringement of the copyright and therefore the request for information is liable to be rejected under section 9 of the RTI Act?

(iii) Whether the instructions and solutions to questions are information made available to examiners and moderators in their fiduciary capacity and therefore exempted under section 8(1)(e) of the RTI Act?

(iv) Whether the High Court was justified in directing the appellant to furnish to the first respondent five items of information sought (in query No.13) relating to Regulation 39(2) of Chartered Accountants Regulations, 1988?

Partly allowing the appeal, the Court

HELD: 1. The term 'intellectual property' refers to a category of intangible rights protecting commercially valuable products of human intellect comprising primarily trade mark, copyright and patent right, as also trade secret rights, publicity rights, moral rights and rights against unfair competition. Question papers, instructions regarding evaluation and solutions to questions (or model answers) which are furnished to examiners and moderators in connection with evaluation of answer scripts, are literary works which are products of human intellect and therefore subject to a copyright. The paper setters and authors thereof (other than employees of ICAI), who are the first owners thereof are required to assign their copyright in regard to the question papers/ solutions in favour of ICAI. Standard communication is sent by ICAI in this behalf. In response to it, the paper setters/authors give declarations of assignment, assigning their copyrights in the question papers and solutions prepared by them, in favour of ICAI. Insofar as instructions prepared by the employees of ICAI, the copyright vests in ICAI. Consequently, the question papers, solutions to questions and instructions are the intellectual properties of ICAI. [Para 10]

1.2. Information can be sought under the RTI Act at different stages or different points of time. What is exempted from disclosure at one point of time may cease to be exempted at a later point of time, depending upon the nature of exemption. For example, any information which is exempted from disclosure under section 8, is

liable to be disclosed if the application is made in regard to the occurrence or event which took place or occurred or happened twenty years prior to the date of the request, vide section 8(3) of the RTI Act. In other words, information which was exempted from disclosure, if an application is made within twenty years of the occurrence, may not be exempted if the application is made after twenty years. Similarly, if information relating to the intellectual property, that is the question papers, solutions/model answers and instructions, in regard to any particular examination conducted by the appellant cannot be disclosed before the examination is held, as it would harm the competitive position of innumerable third parties who are taking the said examination. Therefore it is obvious that the appellant examining body is not liable to give to any citizen any information relating to question papers, solutions/model answers and instructions relating to a particular examination before the date of such examination. But the position will be different once the examination is held. Disclosure of the question papers, model answers and instructions in regard to any particular examination, would not harm the competitive position of any third party once the examination is held. In fact the question papers are disclosed to everyone at the time of examination. The appellant voluntarily publishes the "suggested answers" in regard to the question papers in the form of a book for sale every year, after the examination. Therefore section 8(1)(d) of the RTI Act does not bar or prohibit the disclosure of question papers, model answers (solutions to questions) and instructions if any given to the examiners and moderators after the examination and after the evaluation of answerscripts is completed, as at that stage they will not harm the competitive position of any third party. It cannot be said that if an information is exempt at any given point of time, it continues to be exempt for all time to come. [Para 12]

Black's Law Dictionary, **7th Edition, page 813 – referred to.**

2.1. Section 9 of the RTI Act provides that a Central or State Public Information Officer may reject a request for information where providing access to such information would involve an infringement of copyright subsisting in a person other than the State. The word 'State' used in section 9 of RTI Act refers to the Central or State Government, Parliament or Legislature of a State, or any local or other authorities as described under Article 12 of the Constitution. The reason for using the word 'State' and not 'public authority' in section 9 of RTI Act is apparently because the definition of 'public authority' in the Act is wider than the definition of 'State' in Article 12, and includes even non-government organizations financed directly or indirectly by funds provided by the appropriate government. An application for information would be rejected under section 9 of RTI Act, only if information sought involves an infringement of copyright subsisting in a *person other than the State*. ICAI being a statutory body created by the Chartered Accountants Act, 1948 is 'State'. The information sought is a material in which ICAI claims a copyright. It is not the case of ICAI that anyone else has a copyright in such material. In fact it has specifically pleaded that even if the question papers, solutions/model answers, or other instructions are prepared by any third party for ICAI, the copyright therein is assigned in favour of ICAI. Providing access to information in respect of which ICAI holds a copyright, does not involve infringement of a copyright subsisting in a *person other than the State.* Therefore ICAI is not entitled to claim protection against disclosure under section 9 of the RTI Act. [Para 13]

2.2. There is yet another reason why section 9 of RTI Act will be inapplicable. The words 'infringement of copyright' have a specific connotation. Section 51 of the Copyright Act, 1957 provides when a copyright in a work shall be deemed to be infringed. Section 52 of the Act enumerates the acts which are not infringement of a copyright. A combined reading of sections 51 and 52(1)(a) of Copyright Act shows that furnishing of information by an examining body, in response to a query under the RTI Act may not be termed as an infringement of copyright. [Para 14]

3.1. The instructions and 'solutions to questions' issued to the examiners and moderators in connection with evaluation of answer scripts is the intellectual property of ICAI. These are made available by ICAI to the examiners and moderators to enable them to evaluate the answer scripts correctly and effectively, in a proper manner, to achieve uniformity and consistency in evaluation, as a large number of evaluators and moderators are engaged by ICAI in connection with the evaluation. The instructions and solutions to questions are given by the ICAI to the examiners and moderators to be held in confidence. The examiners and moderators are required to maintain absolute secrecy and cannot disclose the answer scripts, the evaluation of answer scripts, the instructions of ICAI and the solutions to questions made available by ICAI, to anyone. The examiners and moderators are in the position of agents and ICAI is in the position of principal in regard to such information which ICAI gives to the examiners and moderators to achieve uniformity, consistency and exactness of evaluation of the answer scripts. When anything is given and taken in trust or in confidence, requiring or expecting secrecy and confidentiality to be maintained in that behalf, it is held by the recipient in a *fiduciary relationship*.[Para 16]

3.2. Section 8(1)(e) uses the words "*information available to a person in his fiduciary relationship.* Significantly section 8(1)(e) does not use the words "*information available to a public authority in its fiduciary relationship*". The use of the words "*person*" shows that the holder of the information in a fiduciary relationship need not only be a 'public authority' as the word 'person' is of much wider import than the word 'public authority'. Therefore the exemption under section 8(1)(e) is available not only in regard to information that is held by a public authority (in this case the examining body) in a fiduciary capacity, but also to any information that is given or made available by a public authority to anyone else for being held in a fiduciary relationship. In other words, anything given and taken in confidence expecting confidentiality to be maintained will be information available to a person in fiduciary relationship. As a consequence, it has to be held that the instructions and solutions to questions communicated by the examining body to the examiners, head-examiners and moderators, are information available to such persons in their fiduciary relationship and therefore exempted from disclosure under section 8(1)(d) of RTI Act. [Para 17]

3.3. The information to which RTI Act applies falls into two categories, namely, (i) information which promotes *transparency and accountability* in the working of every public authority, disclosure of which helps in containing or discouraging corruption, enumerated in clauses (b) and (c) of section 4(1) of RTI Act; and (ii) other information held by public authorities not falling under section 4(1)(b) and (c) of RTI Act. In regard to information falling under the first category, the public authorities owe a duty to disseminate the information widely *suo moto* to the public so as to make it easily accessible to the public. In regard to information enumerated or required to be enumerated under section 4(1)(b) and (c) of RTI Act,

necessarily and naturally, the competent authorities under the RTI Act, will have to act in a pro-active manner so as to ensure accountability and ensure that the fight against corruption goes on relentlessly. But in regard to other information which do not fall under Section 4(1)(b) and (c) of the Act, there is a need to proceed with circumspection as it is necessary to find out whether they are exempted from disclosure. One of the objects of democracy is to bring about transparency of information to contain corruption and bring about accountability. But achieving this object does not mean that other equally important public interests including efficient functioning of the governments and public authorities, optimum use of limited fiscal resources, preservation of confidentiality of sensitive information, etc. are to be ignored or sacrificed. The object of RTI Act is to harmonize the conflicting public interests, that is, ensuring transparency to bring in accountability and containing corruption on the one hand, and at the same time ensure that the revelation of information, in actual practice, does not harm or adversely affect other public interests which include efficient functioning of the governments, optimum use of limited fiscal resources and preservation of confidentiality of sensitive information, on the other hand. While sections 3 and 4 seek to achieve the first objective, sections 8, 9, 10 and 11 seek to achieve the second objective. Therefore when section 8 exempts certain information from being disclosed, it should not be considered to be a fetter on the right to information, but as an equally important provision protecting other public interests essential for the fulfilment and preservation of democratic ideals. Therefore in dealing with information not falling under section 4(1)(b) and (c), the competent authorities under the RTI Act will not read the exemptions in section 8 in a restrictive manner but in a practical manner so that the other public interests are preserved and the RTI Act attains a fine balance between its goal

of attaining transparency of information and safeguarding the other public interests. [Para 18]

3.4. Among the ten categories of information which are exempted from disclosure under section 8 of RTI Act, six categories which are described in clauses (a), (b), (c), (f), (g) and (h) carry absolute exemption. Information enumerated in clauses (d), (e) and (j) on the other hand get only conditional exemption, that is the exemption is subject to the overriding power of the competent authority under the RTI Act in larger public interest, to direct disclosure of such information. The information referred to in clause (i) relates to an exemption for a specific period, with an obligation to make the said information public after such period. The information relating to intellectual property and the information available to persons in their fiduciary relationship, referred to in clauses (d) and (e) of section 8(1) do not enjoy absolute exemption. Though exempted, if the competent authority under the Act is satisfied that larger public interest warrants disclosure of such information, such information will have to be disclosed. The competent authority will have to record reasons for holding that an exempted information should be disclosed in larger public interest. [Para 19]

3.5. In this case the Chief Information Commissioner rightly held that the information sought under queries (3) and (5) were exempted under section 8(1)(e) and that there was no larger public interest requiring denial of the statutory exemption regarding such information. The High Court fell into an error in holding that the information sought under queries (3) and (5) was not exempted. [Para 20]

Central Board of Secondary Education & Anr. v. Aditya Bandopadhyay & Ors. **2011 (8) SCALE 645 – referred to.**

4.1. Query (13) of the first respondent required the appellant to disclose the following information: (i) The number of times ICAI had revised the marks of any candidate or any class of candidates under Regulation 39(2); (ii) the criteria used for exercising such discretion for revising the marks; (iii) the quantum of such revisions; (iv) the authority who decides the exercise of discretion to make such revision; and (v) the number of students (with particulars of quantum of revision) affected by such revision held in the last five examinations at all levels. [Para 21]

4.2. Regulation 39(2) of the Chartered Accountants Regulations, 1988 provides that the council may in its discretion, revise the marks obtained by all candidates or a section of candidates in a particular paper or papers or in the aggregate, in such manner as may be necessary for maintaining its standards of pass percentage provided in the Regulations. Regulation 39(2) thus provides for what is known as 'moderation', which is a necessary concomitant of evaluation process of answer scripts where a large number of examiners are engaged to evaluate a large number of answer scripts. Each examining body will have its own standards of 'moderation', drawn up with reference to its own experiences and the nature and scope of the examinations conducted by it. ICAI shall have to disclose the said standards of moderation followed by it, if it has drawn up the same, in response to part (ii) of first respondent's query (13). [Para 22]

4.3. In its communication dated 22.2.2008, ICAI informed the first respondent that under Regulation 39(2), its Examining Committee had the authority to revise the marks based on the findings of the Head Examiners and any incidental information in its knowledge. This answers part (iv) of query (13) as to the authority which decides

the exercise of the discretion to make the revision under Regulation 39(2). As the information sought under parts (i), (iii) and (v) of query (13) are not maintained and is not available in the form of data with the appellant in its records, ICAI is not bound to furnish the same. [Paras 23, 24]

Sanjay Singh v. U.P. Public Service Commission - **2007 (3) SCC 720: 2007 (1) SCR 235 – referred to.**

5. It cannot be said that first respondent had indulged in improper use of RTI Act. His application is intended to bring about transparency and accountability in the functioning of ICAI. How far he is entitled to the information is a different issue. Examining bodies like ICAI should change their old mindsets and tune them to the new regime of disclosure of maximum information. Public authorities should realize that in an era of transparency, previous practices of unwarranted secrecy have no longer a place. Accountability and prevention of corruption is possible only through transparency. Attaining transparency no doubt would involve additional work with reference to maintaining records and furnishing information. Parliament has enacted the RTI Act providing access to information, after great debate and deliberations by the Civil Society and the Parliament. In its wisdom, the Parliament has chosen to exempt only certain categories of information from disclosure and certain organizations from the applicability of the Act. As the examining bodies have not been exempted, and as the examination processes of examining bodies have not been exempted, the examining bodies will have to gear themselves to comply with the provisions of the RTI Act. Additional workload is not a defence. If there are practical insurmountable difficulties, it is open to the examining bodies to bring them to the notice of the government for

consideration so that any changes to the Act can be deliberated upon. [Para 25]

6. However, it is necessary to make a distinction in regard to information intended to bring transparency, to improve accountability and to reduce corruption, falling under section 4(1)(b) and (c) and other information which may not have a bearing on accountability or reducing corruption. The competent authorities under the RTI Act will have to maintain a proper balance so that while achieving transparency, the demand for information does not reach unmanageable proportions affecting other public interests, which include efficient operation of public authorities and government, preservation of confidentiality of sensitive information and optimum use of limited fiscal resources. [Para 26]

7. In view of the above, the order of the High Court is set aside and the order of the CIC is restored, subject to one modification in regard to query (13): *ICAI to disclose to the first respondent, the standard criteria, if any, relating to moderation, employed by it, for the purpose of making revisions under Regulation 39(2).* **[Para 27]**

Case Law Reference:

2011 (8) SCALE 645	**referred to**	**Para 15**
2007 (1) SCR 235	**referred to**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7571 of 2011.

From the Judgment & Order dated 30.11.2010 of the High Court of Judicature at Bombay in Writ Petition No. 378 of 2009.

K.K. Venugopal, Ramji Srinivasan, Pramod Dayal, Nikunj Dayal, Rakesh Agarwal for the Appellant.

Rohan Rajadyaksha, Ranjeeta Rohtagi for the Respondents.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J. 1. Leave granted.

2. The appellant Institute of Chartered Accountants of India (for short 'ICAI') is a body corporate established under section 3 of the Chartered Accountants Act, 1949. One of the functions of the appellant council is to conduct the examination of candidates for enrolment as Chartered Accountants. The first respondent appeared in the Chartered Accountants' final examination conducted by ICAI in November, 2007. The results were declared in January 2008. The first respondent who was not successful in the examination applied for verification of marks. The appellant carried out the verification in accordance with the provisions of the Chartered Accountants Regulations, 1988 and found that there was no discrepancy in evaluation of answerscripts. The appellant informed the first respondent accordingly.

3. On 18.1.2008 the appellant submitted an application seeking the following information under 13 heads, under the Right to Information Act, 2005 ('RTI Act' for short) :

"1) Educational qualification of the examiners & Moderators with subject wise classifications. (you may not give me the names of the examiners & moderators).

2) Procedure established for evaluation of exam papers.

3) Instructions issued to the examiners, and moderators oral as well as written if any.

4) Procedure established for selection of examiners & moderators.

5) Model answers if any given to the examiners &

moderators if any.

6) Remuneration paid to the examiners & moderators.

7) Number of students appearing for exams at all levels in the last 2 years (i.e. PE1/PE2/PCC/CPE/Final with break up)

8) Number of students that passed at the 1st attempt from the above.

9) From the number of students that failed in the last 2 years (i.e. PE1/PE2/PCC/CPE/Final with break up) from the above, how many students opted for verification of marks as per regulation 38.

10) Procedure adopted at the time of verification of marks as above.

11) Number of students whose marks were positively changed out of those students that opted for verification of marks.

12) Educational qualifications of the persons performing the verification of marks under Regulation 38 & remuneration paid to them.

13) Number of times that the council has revised the marks of any candidate, or any class of candidates, in accordance with regulation 39(2) of the Chartered Accountants Regulations, 1988, the criteria used for such discretion, the quantum of such revision, the quantum of such revision, the authority that decides such discretion, and the number of students along with the quantum of revision affected by such revision in the last 5 exams, held at all levels (i.e. PE1/ PE2/PCC/CPE/Final with break up)."

(emphasis supplied)

4. The appellant by its reply dated 22.2.2008 gave the following responses/information in response to the 13 queries :

"1. Professionals, academicians and officials with relevant academic and practical experience and exposure in relevant and related fields.

2&3. Evaluation of answer books is carried out in terms of the guidance including instructions provided by Head Examiners appointed for each subject(s). Subsequently, a review thereof is undertaken for the purpose of moderators.

4. In terms of (1) above, a list of examiners is maintained under Regulation 42 of the Chartered Accountants Regulations, 1988. Based on the performance of the examiners, moderators are appointed from amongst the examiners.

5. Solutions are given in confidence of examiners for the purpose of evaluation. Services of moderators are utilized in our context for paper setting.

6. Rs.50/- per answer book is paid to the examiner while Rs.10,000/- is paid to the moderator for each paper.

7. The number of students who appeared in the last two years is as follow:

Month & Year	Number of students Appeared				
	PE-I	PE-II	PCC	CPE*	FINAL
Nov.,2005	16228	47522	Not held	Not held	28367
May,2006	32215	49505	Not held	Not held	26254
Nov.,2006	16089	49220	Not held	27629	24704
May,2007	6194	56624	51	42910	23490

*CPE is read as Common Proficiency Test (CPT).

8. Since such a data is not compiled, it is regretted that the number of students who passed Final Examination at the 1st attempt cannot be made available.

9. The number of students who applied for the verification of answer books is as follows:-

Month & Year	Number of students who applied for verification from among the failed candidates*				
	PE-I	PE-II	PCC	CPE	FINAL
Nov.,2005	598	4150	Not held	Not held	4432
May,2006	1607	4581	Not held	Not held	4070
Nov.,2006	576	4894	Not held	205	3352
May,2007	204	5813	07	431	3310

*This figure may contain some pass candidates also.

10. Each request for verification is processed in accordance with Regulation 39(4) of the Chartered Accountants Regulation, 1988 through well laid down scientific and meticulous procedure and a comprehensive checking is done before arriving at any conclusion. The process of verification starts after declaration of result and each request is processed on first come first served basis. The verification of the answer books, as requested, is done by two independent persons separately and then, reviewed by an Officer of the Institute and upon his satisfaction, the letter informing the outcome of the verification exercise is issued after the comprehensive check has been satisfactorily completed.

11. The number of students who were declared passed consequent to the verification of answer books is as given below:-

Month & Year	Number of students who applied for verification from among the failed candidates*				
	PE-I	PE-II	PCC	CPE	FINAL
Nov.,2005	14	40	Not held	Not held	37
May,2006	24	86	Not held	Not held	30
Nov.,2006	07	61	Not held	02	35
May,2007	03	56	Nil	Nil	27

* This figure may contain some pass candidates also.

12. Independent persons such as retired Govt. teachers/ Officers are assigned the task of verification of answer books work. A token honorarium of Rs.6/- per candidate besides lump sum daily conveyance allowance is paid.

13. **The Examination Committee in terms of Regulation 39(2) has the authority to revise the marks based on the findings of the Head Examiners and incidental information in the knowledge of the Examination Committee, in its best wisdom. Since the details sought are highly confidential in nature and there is no larger public interest warrants disclosure, the same is denied under Section 8(1)(e) of the Right to Information Act, 2005."**

(emphasis supplied)

5. Not being satisfied with the same, the respondent filed an appeal before the appellate authority. The appellate authority dismissed the appeal, by order dated 10.4.2008, concurring with the order of the Chief Public Information Officer of the appellant. The first respondent thereafter filed a second appeal before the Central Information Commission (for short 'CIC') in regard to queries (1) to (5) and (7) to (13). CIC by order dated 23.12.2008 rejected the appeal in regard to queries 3, 5 and 13 (as also Query 2) while directing the disclosure of

information in regard to the other questions. We extract below the reasoning given by the CIC to refuse disclosure in regard to queries 3,5 and 13.

"Re: Query No.3.

Decision:

This request of the Appellant cannot be without seriously and perhaps irretrievably compromising the entire examination process. An instruction issued by a public authority – in this case, examination conducting authority – to its examiners is strictly confidential. There is an implied contract between the examiners and the examination conducting public authority. It would be inappropriate to disclose this information. This item of information too, like the previous one, attracts section 8(1)(d) being the intellectual property of the public authority having being developed through careful empirical and intellectual study and analysis over the years. I, therefore, hold that this item of query attracts exemption under section 8(1)(e) as well as section 8(1)(d) of the RTI Act.

Re : Query No.5.

Decision**:**

Respondents have explained that what they provide to the examiners is "solutions" and not "model answers" as assumed by the appellant. For the aid of the students and examinees, "suggested answers" to the questions in an exam are brought out and sold in the market.

It would be wholly inappropriate to provide to the students the solutions given to the questions only for the exclusive use of the examiners and moderators. Given the confidentiality of interaction between the public authority holding the examinations and the examiners, the "solutions" qualifies to be items barred by section 8(1)(e)

of the RTI Act. This item of information also attracts section 8(1)(d) being the exclusive intellectual property of the public authority. Respondents have rightly advised the appellant to secure the "suggested answers" to the questions from the open market, where these are available for sale.

Re : Query No.13.

Decision:

I find no infirmity in the reply furnished to the appellant. It is a categorical statement and must be accepted as such. Appellant seems to have certain presumptions and assumptions about what these replies should be. Respondents are not obliged to cater to that. It is therefore held that there shall be no further disclosure of information as regards this item of query."

6. Feeling aggrieved by the rejection of information sought under items 3, 5 and 13, the first respondent approached the Bombay High Court by filing a writ petition. The High Court allowed the said petition by order dated 30.11.2010 and directed the appellant to supply the information in regard to queries 3, 5 and 13, on the following reasoning :

"According to the Central Information Commission the solutions which have been supplied by the Board to the examiners are given in confidence and therefore, they are entitled to protection under Section 8(1)(e) of the RTI Act. Section 8(1)(e) does not protect confidential information and the claim of intellectual property has not made by the respondent No.2 anywhere. In the reply it is suggested that the suggested answers are published and sold in open market by the Board. Therefore, there can be no confidentiality about suggested answers. It is no where explained what is the difference between the suggested answers and the solutions. In our opinion, the orders of both Authorities in this respect also suffer from non-application

of mind and therefore they are liable to be set aside. We find that the right given under the Right to Information Act has been dealt with by the Authorities under that Act in most casual manner without properly applying their minds to the material on record. In our opinion, therefore, information sought against queries Nos.3,5 and 13 could not have been denied by the Authorities to the petitioner. The principal defence of the respondent No.2 is that the information is confidential. Till the result of the examination is declared, the information sought by the petitioner has to be treated as confidential, but once the result is declared, in our opinion, that information cannot be treated as confidential. We were not shown anything which would even indicate that it is necessary to keep the information in relation to the examination which is over and the result is also declared as confidential."

7. The said order of the High Court is challenged in this appeal by special leave. The appellant submitted that it conducts the following examinations: (i) the common proficiency test; (ii) professional education examination-II (till May 2010); (iii) professional competence examination; (iv) integrated professional competence examination; (v) final examination; and (vi) post qualification course examinations. A person is enrolled as a Chartered Accountant only after passing the common proficiency test, professional educational examination-II/professional competence examination and final examination. The number of candidates who applied for various examinations conducted by ICAI were 2.03 lakhs in 2006, 4.16 lakhs in 2007; 3.97 lakh candidates in 2008 and 4.20 lakhs candidates in 2009. ICAI conducts the examinations in about 343 centres spread over 147 cities throughout the country and abroad. The appellant claims to follow the following elaborate system with established procedures in connection with its examinations, taking utmost care with regard to valuation of answer sheets and preparation of results and also in carrying out verification in case a student applies for the same in accordance with the following Regulations:

"Chartered Accountants with a standing of minimum of 5-7 years in the profession or teachers with a minimum experience of 5-7 years in university education system are empanelled as examiners of the Institute. The eligibility criteria to be empanelled as examiner for the examinations held in November, 2010 was that a chartered accountant with a minimum of 3 years' standing, if in practice, or with a minimum of 10 yeas standing, if in service and University lecturers with a minimum of 5 years' teaching experience at graduate/post graduate level in the relevant subjects with examiner ship experience of 5 years. The said criteria is continued to be followed. The bio-data of such persons who wish to be empanelled are scrutinized by the Director of Studies of the Institute in the first instance. Thereafter, Examination Committee considers each such application and takes a decision thereon. The examiners, based on their performance and experience with the system of the ICAI, are invited to take up other assignments of preparation of question paper, suggested solution, marking scheme, etc. and also appointed as Head Examiners to supervise the evaluation carried out by the different examiners in a particular subject from time to time.

A question paper and its solution are finalized by different experts in the concerned subject at 3 stages. In addition, the solution is also vetted by Director of Studies of the Institute after the examination is held and before the evaluation of the answer sheets are carried out by examiners. All possible alternate solutions to a particular question as intimated by different examiners in a subject are also included in the solution. Each examiner in a particular subject is issued detailed instructions on marking scheme by the Head Examiners and general guidelines for evaluation issued by the ICAI. In addition, performance of each examiner, to ascertain whether the said examiner has complied with the instructions issued as also the general guidelines of the Institute, is assessed by the Head

Examiner at two stages before the declaration of result. The said process has been evolved based on the experience gained in the last 60 years of conducting examinations and to ensure all possible uniformity in evaluation of answer sheets carried out by numerous examiners in a particular subject and to provide justice to the candidates.

The examination process/procedure/systems of the ICAI are well in place and have been evolved over several decades out of experience gained. The said process/ procedure/systems have adequate checks to ensure fair results and also ensure that due justice is done to each candidate and no candidate ever suffers on any count."

8. The appellant contends that the information sought as per queries (3) and (5) - that is, instructions and model answers, if any, issued to the examiners and moderators by ICAI cannot be disclosed as they are exempted from disclosure under clauses (d) and (e) of sub-section (1) of Section 8 of RTI Act. It is submitted that the request for information is also liable to be rejected under section 9 of the Act. They also contended that in regard to query No.(13), whatever information available had been furnished, apart from generally invoking section 8(1)(e) to claim exemption.

9. On the said contentions, the following questions arise for our consideration:

(i) Whether the instructions and solutions to questions (if any) given by ICAI to examiners and moderators, are intellectual property of the ICAI, disclosure of which would harm the competitive position of third parties and therefore exempted under section 8(1)(d) of the RTI Act?

(ii) Whether providing access to the information sought (that is instructions and solutions to questions issued by

ICAI to examiners and moderators) would involve an infringement of the copyright and therefore the request for information is liable to be rejected under section 9 of the RTI Act?

(iii) Whether the instructions and solutions to questions are information made available to examiners and moderators in their fiduciary capacity and therefore exempted under section 8(1)(e) of the RTI Act?

(iv) Whether the High Court was justified in directing the appellant to furnish to the first respondent five items of information sought (in query No.13) relating to Regulation 39(2) of Chartered Accountants Regulations, 1988?

Re: Question (i)

10. The term 'intellectual property' refers to a category of intangible rights protecting commercially valuable products of human intellect comprising primarily trade mark, copyright and patent right, as also trade secret rights, publicity rights, moral rights and rights against unfair competition (vide Black's Law Dictionary, 7th Edition, page 813). Question papers, instructions regarding evaluation and solutions to questions (or model answers) which are furnished to examiners and moderators in connection with evaluation of answer scripts, are literary works which are products of human intellect and therefore subject to a copyright. The paper setters and authors thereof (other than employees of ICAI), who are the first owners thereof are required to assign their copyright in regard to the question papers/solutions in favour of ICAI. We extract below the relevant standard communication sent by ICAI in that behalf:

"The Council is anxious to prevent the unauthorized circulation of Question Papers set for the Chartered Accountants Examinations as well as the solutions thereto. With that object in view, the Council proposes to reserve

all copy-rights in the question papers as well as solutions. In order to enable the Council to retain the copy-rights, it has been suggested that it would be advisable to obtain a specific assignment of any copy-rights or rights of publication that you may be deemed to possess in the questions set by you for the Chartered Accountants Examinations and the solutions thereto in favour of the Council. I have no doubt that you will appreciate that this is merely a formality to obviate any misconception likely to arise later on."

In response to it, the paper setters/authors give declarations of assignment, assigning their copyrights in the question papers and solutions prepared by them, in favour of ICAI. Insofar as instructions prepared by the employees of ICAI, the copyright vests in ICAI. Consequently, the question papers, solutions to questions and instructions are the intellectual properties of ICAI. The appellant contended that if the question papers, instructions or solutions to questions/model answers are disclosed before the examination is held, it would harm the competitive position of all other candidates who participate in the examination and therefore the exemption under section 8(1)(d) is squarely attracted.

11. The first respondent does not dispute that the appellant is entitled to claim a copyright in regard to the question papers, solutions/model answers, instructions relating to evaluation and therefore the said material constitute intellectual property of the appellant. But he contends that the exemption under section 8(1)(d) will not be available if the information is merely an intellectual property. The exemption under section 8(1)(d) is available only in regard to such intellectual property, the disclosure of which would harm the competitive position of any third party. It was submitted that the appellant has not been able to demonstrate that the disclosure of the said intellectual property (instructions and solutions/model answers) would harm the competitive position of any third party.

12. Information can be sought under the RTI Act at different stages or different points of time. What is exempted from disclosure at one point of time may cease to be exempted at a later point of time, depending upon the nature of exemption. For example, any information which is exempted from disclosure under section 8, is liable to be disclosed if the application is made in regard to the occurrence or event which took place or occurred or happened twenty years prior to the date of the request, vide section 8(3) of the RTI Act. In other words, information which was exempted from disclosure, if an application is made within twenty years of the occurrence, may not be exempted if the application is made after twenty years. Similarly, if information relating to the intellectual property, that is the question papers, solutions/model answers and instructions, in regard to any particular examination conducted by the appellant cannot be disclosed before the examination is held, as it would harm the competitive position of innumerable third parties who are taking the said examination. Therefore it is obvious that the appellant examining body is not liable to give to any citizen any information relating to question papers, solutions/model answers and instructions relating to a particular examination before the date of such examination. But the position will be different once the examination is held. Disclosure of the question papers, model answers and instructions in regard to any particular examination, would not harm the competitive position of any third party once the examination is held. In fact the question papers are disclosed to everyone at the time of examination. The appellant voluntarily publishes the "suggested answers" in regard to the question papers in the form of a book for sale every year, after the examination. Therefore section 8(1)(d) of the RTI Act does not bar or prohibit the disclosure of question papers, model answers (solutions to questions) and instructions if any given to the examiners and moderators after the examination and after the evaluation of answerscripts is completed, as at that stage they will not harm the competitive position of any third

party. We therefore reject the contention of the appellant that if an information is exempt at any given point of time, it continues to be exempt for all time to come.

Re : Question (ii)

13. Section 9 of the RTI Act provides that a Central or State Public Information Officer may reject a request for information where providing access to such information would involve an infringement of copyright subsisting in a person other than the State. The word 'State' used in section 9 of RTI Act refers to the Central or State Government, Parliament or Legislature of a State, or any local or other authorities as described under Article 12 of the Constitution. The reason for using the word 'State' and not 'public authority' in section 9 of RTI Act is apparently because the definition of 'public authority' in the Act is wider than the definition of 'State' in Article 12, and includes even non-government organizations financed directly or indirectly by funds provided by the appropriate government. Be that as it may. An application for information would be rejected under section 9 of RTI Act, only if information sought involves an infringement of copyright subsisting in a *person other than the State*. ICAI being a statutory body created by the Chartered Accountants Act, 1948 is 'State'. The information sought is a material in which ICAI claims a copyright. It is not the case of ICAI that anyone else has a copyright in such material. In fact it has specifically pleaded that even if the question papers, solutions/model answers, or other instructions are prepared by any third party for ICAI, the copyright therein is assigned in favour of ICAI. Providing access to information in respect of which ICAI holds a copyright, does not involve infringement of a copyright subsisting in a *person other than the State.* Therefore ICAI is not entitled to claim protection against disclosure under section 9 of the RTI Act.

14. There is yet another reason why section 9 of RTI Act will be inapplicable. The words 'infringement of copyright' have

a specific connotation. Section 51 of the Copyright Act, 1957 provides when a copyright in a work shall be deemed to be infringed. Section 52 of the Act enumerates the acts which are not infringement of a copyright. A combined reading of sections 51 and 52(1)(a) of Copyright Act shows that furnishing of information by an examining body, in response to a query under the RTI Act may not be termed as an infringement of copyright. Be that as it may.

Re : Question (iii)

15. We will now consider the third contention of ICAI that the information sought being an *information available to a person in his fiduciary relationship,* is exempted under section 8(1)(e) of the RTI Act. This Court in *Central Board of Secondary Education & Anr. v. Aditya Bandopadhyay & Ors*. [2011 (8) SCALE 645] considered the meaning of the words *information available to a person in his fiduciary capacity* and observed thus:

> "But the words 'information available to a person in his fiduciary relationship' are used in section 8(1)(e) of RTI Act in its normal and well recognized sense, that is to refer to persons who act in a fiduciary capacity, with reference to a specific beneficiary or beneficiaries who are to be expected to be protected or benefited by the actions of the fiduciary – a trustee with reference to the beneficiary of the trust, a guardian with reference to a minor/physically/infirm/mentally challenged, a parent with reference to a child, a lawyer or a chartered accountant with reference to a client, a doctor or nurse with reference to a patient, an agent with reference to a principal, a partner with reference to another partner, a director of a company with reference to a shareholder, an executor with reference to a legatee, a receiver with reference to the parties to a lis, an employer with reference to the confidential information relating to the employee, and an employee with reference to business dealings/transaction of the employer."

16. The instructions and 'solutions to questions' issued to the examiners and moderators in connection with evaluation of answer scripts, as noticed above, is the intellectual property of ICAI. These are made available by ICAI to the examiners and moderators to enable them to evaluate the answer scripts correctly and effectively, in a proper manner, to achieve uniformity and consistency in evaluation, as a large number of evaluators and moderators are engaged by ICAI in connection with the evaluation. The instructions and solutions to questions are given by the ICAI to the examiners and moderators to be held in confidence. The examiners and moderators are required to maintain absolute secrecy and cannot disclose the answer scripts, the evaluation of answer scripts, the instructions of ICAI and the solutions to questions made available by ICAI, to anyone. The examiners and moderators are in the position of agents and ICAI is in the position of principal in regard to such information which ICAI gives to the examiners and moderators to achieve uniformity, consistency and exactness of evaluation of the answer scripts. When anything is given and taken in trust or in confidence, requiring or expecting secrecy and confidentiality to be maintained in that behalf, it is held by the recipient in a *fiduciary relationship*.

17. It should be noted that section 8(1)(e) uses the words "*information available to a person in his fiduciary relationship.* Significantly section 8(1)(e) does not use the words "*information available to a public authority in its fiduciary relationship*". The use of the words "*person*" shows that the holder of the information in a fiduciary relationship need not only be a 'public authority' as the word 'person' is of much wider import than the word 'public authority'. Therefore the exemption under section 8(1)(e) is available not only in regard to information that is held by a public authority (in this case the examining body) in a fiduciary capacity, but also to any information that is given or made available by a public authority

to anyone else for being held in a fiduciary relationship. In other words, anything given and taken in confidence expecting confidentiality to be maintained will be information available to a person in fiduciary relationship. As a consequence, it has to be held that the instructions and solutions to questions communicated by the examining body to the examiners, head-examiners and moderators, are information available to such persons in their fiduciary relationship and therefore exempted from disclosure under section 8(1)(d) of RTI Act.

18. The information to which RTI Act applies falls into two categories, namely, (i) information which promotes *transparency and accountability* in the working of every public authority, disclosure of which helps in containing or discouraging corruption, enumerated in clauses (b) and (c) of section 4(1) of RTI Act; and (ii) other information held by public authorities not falling under section 4(1)(b) and (c) of RTI Act. In regard to information falling under the first category, the public authorities owe a duty to disseminate the information widely *suo moto* to the public so as to make it easily accessible to the public. In regard to information enumerated or required to be enumerated under section 4(1)(b) and (c) of RTI Act, necessarily and naturally, the competent authorities under the RTI Act, will have to act in a pro-active manner so as to ensure accountability and ensure that the fight against corruption goes on relentlessly. But in regard to other information which do not fall under Section 4(1)(b) and (c) of the Act, there is a need to proceed with circumspection as it is necessary to find out whether they are exempted from disclosure. One of the objects of democracy is to bring about transparency of information to contain corruption and bring about accountability. But achieving this object does not mean that other equally important public interests including efficient functioning of the governments and public authorities, optimum use of limited fiscal resources, preservation of confidentiality of sensitive information, etc. are to be ignored or sacrificed. The object of RTI Act is to harmonize the conflicting public interests, that is, ensuring

transparency to bring in accountability and containing corruption on the one hand, and at the same time ensure that the revelation of information, in actual practice, does not harm or adversely affect other public interests which include efficient functioning of the governments, optimum use of limited fiscal resources and preservation of confidentiality of sensitive information, on the other hand. While sections 3 and 4 seek to achieve the first objective, sections 8, 9, 10 and 11 seek to achieve the second objective. Therefore when section 8 exempts certain information from being disclosed, it should not be considered to be a fetter on the right to information, but as an equally important provision protecting other public interests essential for the fulfilment and preservation of democratic ideals. Therefore in dealing with information not falling under section 4(1)(b) and (c), the competent authorities under the RTI Act will not read the exemptions in section 8 in a restrictive manner but in a practical manner so that the other public interests are preserved and the RTI Act attains a fine balance between its goal of attaining transparency of information and safeguarding the other public interests.

19. Among the ten categories of information which are exempted from disclosure under section 8 of RTI Act, six categories which are described in clauses (a), (b), (c), (f), (g) and (h) carry absolute exemption. Information enumerated in clauses (d), (e) and (j) on the other hand get only conditional exemption, that is the exemption is subject to the overriding power of the competent authority under the RTI Act in larger public interest, to direct disclosure of such information. The information referred to in clause (i) relates to an exemption for a specific period, with an obligation to make the said information public after such period. The information relating to intellectual property and the information available to persons in their fiduciary relationship, referred to in clauses (d) and (e) of section 8(1) do not enjoy absolute exemption. Though exempted, if the competent authority under the Act is satisfied

that larger public interest warrants disclosure of such information, such information will have to be disclosed. It is needless to say that the competent authority will have to record reasons for holding that an exempted information should be disclosed in larger public interest.

20. In this case the Chief Information Commissioner rightly held that the information sought under queries (3) and (5) were exempted under section 8(1)(e) and that there was no larger public interest requiring denial of the statutory exemption regarding such information. The High Court fell into an error in holding that the information sought under queries (3) and (5) was not exempted.

Re : Question (iv)

21. Query (13) of the first respondent required the appellant to disclose the following information: (i) The number of times ICAI had revised the marks of any candidate or any class of candidates under Regulation 39(2); (ii) the criteria used for exercising such discretion for revising the marks; (iii) the quantum of such revisions; (iv) the authority who decides the exercise of discretion to make such revision; and (v) the number of students (with particulars of quantum of revision) affected by such revision held in the last five examinations at all levels.

22. Regulation 39(2) of the Chartered Accountants Regulations, 1988 provides that the council may in its discretion, revise the marks obtained by all candidates or a section of candidates in a particular paper or papers or in the aggregate, in such manner as may be necessary for maintaining its standards of pass percentage provided in the Regulations. Regulation 39(2) thus provides for what is known as 'moderation', which is a necessary concomitant of evaluation process of answer scripts where a large number of examiners are engaged to evaluate a large number of answer scripts. This Court explained the standard process of moderation in *Sanjay Singh v. U.P. Public Service*

Commission - 2007 (3) SCC 720 thus:

> "When a large number of candidates appear for an examination, it is necessary to have uniformity and consistency in valuation of the answer- scripts. Where the number of candidates taking the examination are limited and only one examiner (preferably the paper-setter himself) evaluates the answer-scripts, it is to be assumed that there will be uniformity in the valuation. But where a large number of candidates take the examination, it will not be possible to get all the answer-scripts evaluated by the same examiner. It, therefore, becomes necessary to distribute the answer-scripts among several examiners for valuation with the paper-setter (or other senior person) acting as the Head Examiner. When more than one examiner evaluate the answer-scripts relating to a subject, the subjectivity of the respective examiner will creep into the marks awarded by him to the answer- scripts allotted to him for valuation. Each examiner will apply his own yardstick to assess the answer-scripts. Inevitably therefore, even when experienced examiners receive equal batches of answer scripts, there is difference in average marks and the range of marks awarded, thereby affecting the merit of individual candidates. This apart, there is 'Hawk- Dove' effect. Some examiners are liberal in valuation and tend to award more marks. Some examiners are strict and tend to give less marks. Some may be moderate and balanced in awarding marks. Even among those who are liberal or those who are strict, there may be variance in the degree of strictness or liberality. This means that if the same answer-script is given to different examiners, there is all likelihood of different marks being assigned. If a very well written answer-script goes to a strict examiner and a mediocre answer-script goes to a liberal examiner, the mediocre answer-script may be awarded more marks than the excellent answer-script. In other words, there is 'reduced

valuation' by a strict examiner and 'enhanced valuation' by a liberal examiner. This is known as 'examiner variability' or 'Hawk-Dove effect'. Therefore, there is a need to evolve a procedure to ensure uniformity inter se the Examiners so that the effect of 'examiner subjectivity' or 'examiner variability' is minimised. The procedure adopted to reduce examiner subjectivity or variability is known as moderation. The classic method of moderation is as follows:

xxx xxx xxx

(ii) To achieve uniformity in valuation, where more than one examiner is involved, a meeting of the Head Examiner with all the examiners is held soon after the examination. They discuss thoroughly the question paper, the possible answers and the weightage to be given to various aspects of the answers. They also carry out a sample valuation in the light of their discussions. The sample valuation of scripts by each of them is reviewed by the Head Examiner and variations in assigning marks are further discussed. After such discussions, a consensus is arrived at in regard to the norms of valuation to be adopted. On that basis, the examiners are required to complete the valuation of answer scripts. But this by itself, does not bring about uniformity of assessment inter se the examiners. In spite of the norms agreed, many examiners tend to deviate from the expected or agreed norms, as their caution is overtaken by their propensity for strictness or liberality or eroticism or carelessness during the course of valuation. Therefore, certain further corrective steps become necessary.

(iii) After the valuation is completed by the examiners, the Head Examiner conducts a random sample survey of the corrected answer scripts to verify whether the norms evolved in the meetings of examiner have actually been followed by the examiners…….

(iv) After ascertaining or assessing the standards adopted by each examiner, the Head Examiner may confirm the award of marks without any change if the examiner has followed the agreed norms, or suggest upward or downward moderation, the quantum of moderation varying according to the degree of liberality or strictness in marking. In regard to the top level answer books revalued by the Head Examiner, his award of marks is accepted as final. As regards the other answer books below the top level, to achieve maximum measure of uniformity inter se the examiners, the awards are moderated as per the recommendations made by the Head Examiner.

(v) If in the opinion of the Head Examiner there has been erratic or careless marking by any examiner, for which it is not feasible to have any standard moderation, the answer scripts valued by such examiner are revalued either by the Head Examiner or any other Examiner who is found to have followed the agreed norms.

(vi) Where the number of candidates is very large and the examiners are numerous, it may be difficult for one Head Examiner to assess the work of all the Examiners. In such a situation, one more level of Examiners is introduced. For every ten or twenty examiners, there will be a Head Examiner who checks the random samples as above. The work of the Head Examiners, in turn, is checked by a Chief Examiner to ensure proper results.

The above procedure of 'moderation' would bring in considerable uniformity and consistency. It should be noted that absolute uniformity or consistency in valuation is impossible to achieve where there are several examiners and the effort is only to achieve maximum uniformity."

Each examining body will have its own standards of 'moderation', drawn up with reference to its own experiences and the nature and scope of the examinations conducted by it.

ICAI shall have to disclose the said standards of moderation followed by it, if it has drawn up the same, in response to part (ii) of first respondent's query (13).

23. In its communication dated 22.2.2008, ICAI informed the first respondent that under Regulation 39(2), its Examining Committee had the authority to revise the marks based on the findings of the Head Examiners and any incidental information in its knowledge. This answers part (iv) of query (13) as to the authority which decides the exercise of the discretion to make the revision under Regulation 39(2).

24. In regard to parts (i), (iii) and (v) of query (13), ICAI submits that such data is not maintained. Reliance is placed upon the following observations of this Court in *Aditya Bandopadhyay*:

> "The RTI Act provides access to all information *that is available and existing*. This is clear from a combined reading of section 3 and the definitions of 'information' and 'right to information' under clauses (f) and (j) of section 2 of the Act. If a public authority has any information in the form of data or analysed data, or abstracts, or statistics, an applicant may access such information, subject to the exemptions in section 8 of the Act. But where the information sought is not a part of the record of a public authority, and where such information is not required to be maintained under any law or the rules or regulations of the public authority, the Act does not cast an obligation upon the public authority, to collect or collate such non-available information and then furnish it to an applicant."

As the information sought under parts (i), (iii) and (v) of query (13) are not maintained and is not available in the form of data with the appellant in its records, ICAI is not bound to furnish the same.

General submissions of ICAI

25. The learned counsel of ICAI submitted that there are several hundred examining bodies in the country. With the aspirations of young citizens to secure seats in institutions of higher learning or to qualify for certain professions or to secure jobs, more and more persons participate in more and more examinations. It is quite common for an examining body to conduct examinations for lakhs of candidates that too more than once per year. Conducting examinations involving preparing the question papers, conducting the examinations at various centres all over the country, getting the answer scripts evaluated and declaring results, is an immense task for examining bodies, to be completed within fixed time schedules. If the examining bodies are required to frequently furnish various kinds of information as sought in this case to several applicants, it will add an enormous work load and their existing staff will not be able to cope up with the additional work involved in furnishing information under the RTI Act. It was submitted by ICAI that it conducts several examinations every year where more than four lakhs candidates participate; that out of them, about 15-16% are successful, which means that more than three and half lakhs of candidates are unsuccessful; that if even one percent at those unsuccessful candidates feel dissatisfied with the results and seek all types of unrelated information, the working of ICAI will come to a standstill. It was submitted that for every meaningful user of RTI Act, there are several abusers who will attempt to disrupt the functioning of the examining bodies by seeking huge quantity of information. ICAI submits that the application by the first respondent is a classic case of improper use of the Act, where a candidate who has failed in an examination and who does not even choose to take the subsequent examination has been engaging ICAI in a prolonged litigation by seeking a bundle of information none of which is relevant to decide whether his answer script was properly evaluated, nor have any bearing on accountability or reducing corruption. ICAI submits that there should be an effective control and screening of applications for information

by the competent authorities under the Act. We do not agree that first respondent had indulged in improper use of RTI Act. His application is intended to bring about transparency and accountability in the functioning of ICAI. How far he is entitled to the information is a different issue. Examining bodies like ICAI should change their old mindsets and tune them to the new regime of disclosure of maximum information. Public authorities should realize that in an era of transparency, previous practices of unwarranted secrecy have no longer a place. Accountability and prevention of corruption is possible only through transparency. Attaining transparency no doubt would involve additional work with reference to maintaining records and furnishing information. Parliament has enacted the RTI Act providing access to information, after great debate and deliberations by the Civil Society and the Parliament. In its wisdom, the Parliament has chosen to exempt only certain categories of information from disclosure and certain organizations from the applicability of the Act. As the examining bodies have not been exempted, and as the examination processes of examining bodies have not been exempted, the examining bodies will have to gear themselves to comply with the provisions of the RTI Act. Additional workload is not a defence. If there are practical insurmountable difficulties, it is open to the examining bodies to bring them to the notice of the government for consideration so that any changes to the Act can be deliberated upon. Be that as it may.

26. We however agree that it is necessary to make a distinction in regard to information intended to bring transparency, to improve accountability and to reduce corruption, falling under section 4(1)(b) and (c) and other information which may not have a bearing on accountability or reducing corruption. The competent authorities under the RTI Act will have to maintain a proper balance so that while achieving transparency, the demand for information does not reach unmanageable proportions affecting other public interests, which include efficient operation of public authorities

and government, preservation of confidentiality of sensitive information and optimum use of limited fiscal resources.

27. In view of the above, this appeal is allowed in part and the order of the High Court is set aside and the order of the CIC is restored, subject to one modification in regard to query (13): *ICAI to disclose to the first respondent, the standard criteria, if any, relating to moderation, employed by it, for the purpose of making revisions under Regulation 39(2).*

B.B.B Appeal partly allowed.

KOLKATA METROPOLITAN DEVELOPMENT AUTHORITY
v.
GOBINDA CHANDRA MAKAL & ANR.
(Civil Appeal No. 5938 of 2007)

SEPTEMBER 2, 2011

[R.V. RAVEENDRAN AND MARKANDEY KATJU, JJ.]

Land Acquisition Act, 1894 – s.23 – Acquisition of land falling under Mouza Madurdaha, District 24 Parganas (South) within the limits of Kolkata Municipal Corporation – Three plot of lands- plot/dag nos. 62 and 42, admeasuring 1.94 acres and 0.61 acres respectively, and classified as Sali land (agricultural land) and plot no.242, admeasuring 0.22 acres, and classified as beel land (marsh land) – Determination of compensation – Collector made award determining the market value of the acquired lands as Rs.2386 per cottah for sali land (agricultural land) and Rs.1193 per cottah for beel land (marsh land) – Reference Court awarded Rs.1,20,000 per cottah for sali plots (plot nos.62 and 42) and Rs.60,000 per cottah for beel plot (plot no.272) with statutory benefits – High Court affirmed the compensation awarded by the Reference Court – Held: On facts and circumstances, compensation for plot nos.62 and 42 reduced to Rs. 67,000/- per cottah while compensation in regard to plot no.272 maintained at the rate of Rs. 60,000/- per cottah.

Land Acquisition Act, 1894 – s.23 – Acquisition of land – Determination of compensation – Addition towards appreciation in value between the date of exemplar sale and the date of preliminary notification as regards the acquisition in question – Held: Unless the difference is more than one year, normally no addition should be made towards appreciation in value, unless there is special evidence to show some specific increase within a short period.

Land Acquisition Act, 1894 – s.23 – Acquisition of land – Determination of compensation – Addition of percentages for advantageous frontage – Held: Advantage of a better frontage is considered to be a plus factor while assessing the value of two similar properties, particularly in any commercial or residential area, when one has a better frontage than the other – However where the value of large tracts of undeveloped agricultural land situated on the periphery of a city in an area which is yet to be developed is being determined with reference to value of nearby small residential plot, the question of adding any percentage for the advantage of frontage to the acquired lands, does not arise.

Land Acquisition Act, 1894 – s.23 – Acquisition of land – Determination of compensation – Deductions from value of small developed plots to arrive at the value of acquired lands – Deduction for development – Held: The prices fetched for small plots cannot form safe basis for valuation of large tracts of land and cannot be directly adopted in valuation of large tracts of land as the two are not comparable properties – The former reflects the 'retail' price of land and the latter the 'wholesale' price – However, if it is shown that the large extent to be valued does admit of and is ripe for use for building purposes; that building lots that could be laid out on the land would be good selling propositions and that valuation on the basis of the method of a hypothetical layout could with justification be adopted, then in valuing such small laid out sites the valuation indicated by sale of comparable small sites in the area at or about the time of the notification would be relevant – In such a case, necessary deductions for the extent of land required for the formation of roads and other civic amenities; expenses of development of the sites by laying out roads, drains, sewers, water and electricity lines, and the interest on the outlays for the period of deferment of the realization of the price; the profits on the venture etc., are to be made – On facts, the Reference Court after considering

the facts found that 33.33% (one-third of the value of the small developed plot) should be deducted towards development/ development cost, to arrive at the value of the acquired lands – The High Court did not interfere with the said percentage of deduction – In the circumstances, no reason to alter the percentage of deduction of 33.33%.

Land Acquisition Act, 1894 – ss. 4 & 23 – Acquisition of land – Determination of compensation – Relevant date – Adjustment of advance payment – Held: The relevant date for determination of compensation would be the date of publication of the preliminary notification under s.4(1) of the LA Act –However if in anticipation of acquisition the Land Acquisition Officer had made any payment to the land owner they will be entitled to credit therefor with interest at 15% per annum from the date of payment to date of publication of preliminary notification – Though solatium and additional amount will be calculated on the entire compensation amount, statutory interest payable to land owner will be calculated only after adjusting the advance payment with interest therein towards the compensation amount.

Land Acquisition Act, 1894 – ss.4 and 23 – Acquisition of land – Determination of compensation – Relevant date for determining compensation – The notification under section 4(1) of the LA Act was dated 13.9.2000 – It was published in the gazette dated 13.9.2000 – Thereafter it was published in two newspapers – Lastly, the Collector caused public notice of the substance of such notification to be given at convenient places in the locality on 16.11.2000 – Whether the relevant date for determination of compensation is 13.9.2000 or 16.11.2000 – Held: One of the principles in regard to determination of market value under s.23(1) is that the rise in market value after the publication of the notification under s.4(1) of the Act should not be taken into account for the purpose of determination of market value – If the words 'publication of the notification' in s.23(1) (clause firstly) should

be construed as referring to the last of the dates of publication and public notice, and the date of public notice in the locality is to be considered as the date of publication, the landowners can legitimately claim that the sales which took place till the date of public notice should be taken into account for the purpose of determination of compensation, leading to disastrous results – In s.23(1), the words "the date of publication of the notification under section 4(1)" would refer to the date of publication of the notification in the gazette – Therefore, '13.9.2000' will be the relevant date for the purpose of determination of compensation and not 16.11.2000.

Interpretation of Statutes – Same words having different meanings in different provisions of the same enactment – Permissibility – Held: The same words used in different parts of a statute should normally bear the same meaning – But depending upon the context, the same words used in different places of a statue may also have different meaning – The use of the words 'publication of the notification' in ss.4(1) and 6 on the one hand and in s.23(1) on the other, in the LA Act, is a classic example, where the same words have different meanings in different provisions of the same enactment – The words 'publication of the notification under s.4(1)', are used in s.23(1) for fixing the relevant date for determination of market value – The words "the last of the date of such publication and giving of such public notice being hereinafter referred to as the publication of the date of notification" in section 4(1) and the words 'one year from the date of the publication of the notification" in the first proviso to section 6, refer to the special deeming definition of the said words, for determining the period of one year for issuing the declaration under s.6, which is counted from the date of 'publication of the notification' – The context in which the words are used in ss.4(1) and 6, and the context in which the same words are used in s.23(1) are completely different – Land Acquisition Act, 1894 – ss.4, 6 and 23.

Three plot of lands- plot/dag nos. 62 and 42, admeasuring 1.94 acres and 0.61 acres respectively, and classified as sali land (agricultural land) and - plot no.242, admeasuring 0.22 acres, and classified as beel land (marsh land), falling under Mouza Madurdaha, District 24 Parganas (South) within the limits of Kolkata Municipal Corporation and belonging to the first respondent along with surrounding lands were requisitioned by the State Government under section 3(1) of the West Bengal Land (Requisition & Acquisition) Act, 1948 [WB Requisition Act] on 27.4.1978. The possession of the land was taken by the Collector in pursuance of such requisition. In anticipation of the acquisition, the value of the land was assessed under section 8B of the said Act and 80% of the estimated compensation was paid to the first respondent. On 7.4.1987, the Collector issued a notification under section 4(1a) of the said Act, to acquire the land, but did not make an award under section 7 of the said Act. WB Requisition Act was a temporary Act and remained in force only till 31.3.1997. The Land Acquisition Act 1894 ('LA Act') was amended by West Bengal Act 7 of 1997 (with effect from 2.5.1997) inserting sub-sections (3A) and (3B) in section 9 of LA Act and thereby the acquisition proceedings under the WB Requisition Act were converted into acquisition proceedings under the LA Act. But as no award was made within a period of two years, the said acquisition lapsed under section 11A of LA Act. Therefore, fresh acquisition proceedings were initiated by issue of a notification dated 13.9.2000 under section 4(1) of the LA Act (Gazetted on 13.9.2000 and thereafter published in the newspapers and pubic notice of the substance of notification was notified in the locality on 16.11.2000) followed by a notification dated 27.11.2000 issued under section 6 of the LA Act (gazetted on 28.11.2000).

The Collector made award determining the market

value of the acquired lands as Rs.2386 per cottah [1 acre = 60 cottahs] for sali (agricultural) land and Rs.1193 per cottah for beel (marsh) land. For this purpose, the Collector took the average of the value disclosed by the sale of small plots bearing Dag Nos. 417 and 455 under deeds dated 15.1.1982, 20.1.1982 and 15.2.1982 and by providing appreciation at the rate of 5% per year from 1982 to 2000, arrived at the value of Rs.144,353/- per acre or Rs.2386/- per cottah for sali land and Rs.1193/- per cottah (half of the value of sali land) as the value of beel land. Feeling aggrieved, the first respondent sought reference to civil court claiming enhancement in regard to the three lands.

The first respondent examined an expert valuer as RCW-1 and also produced and relied upon sale deeds pertaining to plot nos. 417, 445 and 192 to prove the market value. The Expert Valuer assessed the value of the acquired lands with reference to the sale of Sali plot No.192, measuring 1.5 cottah sold under a deed dated 10.3.2000 at a price of Rs.1 lakh per cottah. Being of the view that the acquired plots had a more advantageous position when compared to plot no.192, the valuer made several additions to the value disclosed by sale of plot no.192. He thereafter made a cut in the value in view of the larger size of the acquired plots. The valuer assessed the value of plot No.62 at Rs.143,000 per cottah, plot No.42 at Rs.135,000 per cottah and plot No.272 at Rs.108,000 per cottah.

The Reference Court found that the valuer had deducted only 15% and 10% from the price of a small developed plot, to determine the market value of plot no.62 and plot no.42. He accepted the submission of appellants that having regard to situation and nature of land, to arrive at the value of the acquired lands (large undeveloped lands) from the value of a small developed

plot (plot no.192), the deduction should be one-third (that is 33.33%). By making such deduction (instead of 15% for plot no.62 and 10% for plot no.42 applied by the valuer) the Reference Court arrived at the market value as Rs.125,000 per cottah for plot no.62 and Rs.112,000 per cottah for plot No.42. He took the average thereof as Rs.118,000 and by rounding it off fixed the compensation as Rs.120,000/- per cottah for sali plots No.62 and No. 42.

The Reference Court also attempted an alternative method of determining the market value with reference to the four sale-deeds in regard to beel Plots Nos.417 and 445 and held that the valuation of acquired lands with reference to the said sales statistics would be approximately Rs.134,000 per cottah. The Reference Court found that Plot Nos. 417 and 445 were sold in the years 1999 and 2000 under four sale-deeds and assumed the sale price in the year 2000 to be Rs. 80,000/- per cottah. On the ground that the exemplar plot (No.192) did not have ingress and egress, 25% was added to that value to arrive at the value of the acquired lands which had better ingress and egress. Having arrived at a figure of Rs.1 lakh per cottah, the Reference Court applied a cut of 33.3% towards development cost and arrived at the price for beel plots as Rs. 67,000/- per cottah; and as the value of sali plots were double that of beel plots, he doubled the said figure and arrived at the market value of sali plots as Rs.1,34,000/-. In view of the above, he choose to determine the market value of Sali land (plot nos. 62 and 42) as Rs.120,000 per cottah. As the value of beel land was 50% of the value of Sali land, he determined the market value of beel land (plot no.272) as Rs.60,000/-. The Reference Court therefore awarded Rs.120,000 per cottah for Sali plots (plot nos.62 and 42) and Rs.60,000 per cottah for Beel plot (plot no.272) with statutory benefits. The High Court affirmed the compensation awarded by the Reference Court.

The decision of the High Court was challenged in the instant appeals, on the following grounds:

(i) The first respondent had himself relied upon four sale deeds relating to beel lands that is sale deeds dated 8.1.1999, 8.1.1999 and 29.3.2000 relating to plot no.417 and sale deed dated 25.6.1999 relating to plot no.445 disclosing a price of Rs. 70,000, Rs. 70,000, Rs. 65,396 and Rs. 80,000 per cottah. Though the plots were described as beel lands in the sale deeds, qualitatively they were the same as sali lands on account of the fact that the area had been developed into residential plots and fell within the municipal corporation limits. Therefore the market value of the acquired lands ought to have been determined with reference to the price disclosed by the said plots. The Reference Court had wrongly doubled the value worked out with reference to these sale deeds, by applying the thumb rule that the value of sali lands were twice that of the value of beel lands;

(ii) Even if the sale deed dated 10.3.2000 relating to sali plot no.192 should be the basis for determination of market value, making any additions thereto as per the Expert Valuer's report on account of appreciation of price during eight months, or on account of frontage advantage or on account of plots facing east, was not warranted. Therefore the additions of 58% to the value of plot no.62, 45% to the value of plot no.42 and 58% to the value of plot no. 272 was liable to be set aside;

(iii) Having regard to the fact that the acquired lands were large tracts of undeveloped land and their sale price was being determined with reference to value of a small residential plot namely plot no. 192, the cut or deduction towards development and development cost ought to have been at least 50% instead of 33.33%;

(iv) When possession of the lands were taken in

pursuance of the requisition under the WB Requisition Act, 80% of the estimated value of the lands was paid to the first respondent and the first respondent had accepted the same. Therefore what should be paid to the first respondent was only the balance of 20% of the compensation as was to be determined. As the first respondent had the benefit of the said advance amount, from the year 1979, the amount paid as advance with appropriate interest thereon, should be adjusted against the compensation.

Partly allowing the appeals, the Court

HELD:

Re : Contention (i) :

1. It is possible that Beel lands when developed into residential plots, by draining, filling and levelling the land, will cease to be Beel in nature. But it is also possible that the plots sold under sale deeds dated 8.1.1999, 25.6.1999 and 29.3.2000 were really Beel plots without any actual development. There is no evidence to show that these plots were drained, filled, levelled and made into plots similar to Sali plots. The sale deeds refer to these plots as Beel plots. There is no dispute that at the relevant point of time the Sali plots were considered to be more valuable than Beel plots. Therefore this Court rejects the contention of the appellant that the value of these Beel plots should be treated on par with the value of Sali plots and that should form the basis for determining the market value of Sali Plot Nos.62 and 42. But the value of these Beel plots can be a clear indicator for determining the value of acquired Beel plot No.272. [Para 11]

Re : Contention (ii)

2.1. The valuer has added 8% towards appreciation

in value during the period of eight months between the date of the exemplar sale (10.3.2000) and the date of preliminary notification (which was taken as 16.11.2000). The date of publication of the said notification is 13.9.2000. Only about six months had passed from the date of the exemplar sale deed (10.3.2000), when the preliminary notification regarding the acquisition was issued in the same year namely 2000. (The difference would be eight months even if the date of publication of preliminary notification is taken as 16.11.2000). When the relied upon sale transaction and the preliminary notification are in the same year, no provision is made for any appreciation in value. Unless the difference is more than one year, normally no addition should be made towards appreciation in value, unless there is special evidence to show some specific increase within a short period. Therefore, the addition of 8% to the price (Rs.100,000/- per cottah) of plot no.192, was unwarranted. [Paras 12, 13]

2.2. The Expert valuer has added to the basic value of Rs. 1,00,000/- (relating to plot No.192), 20% for plot no.62 for having a frontage to Anandpur main road, 10% for plot no.42 for having a frontage to a kutcha KMC road, and 20% for plot No.272 for having a frontage to a sixty feet wide road, on the ground that these three lands were more advantageously situated when compared to plot No.192 which faces a narrow eight feet common passage. The valuer has made one more addition to the basic value on account of frontage advantage of the acquired plots, that is 25%, 20% and 30% respectively for plot nos.62, 42 and 272 for having a frontage on a wider road thereby giving the advantage of a better FAR (floor area ratio) when undertaking construction. Addition of percentages for advantageous frontage, that too twice was unwarranted. Advantage of a better frontage is considered to be a plus factor while assessing the value of two similar properties, particularly in any commercial

or residential area, when one has a better frontage than the other. However where the value of large tracts of undeveloped agricultural land situated on the periphery of a city in an area which is yet to be developed is being determined with reference to a value of nearby small residential plot, the question of adding any percentage for the advantage of frontage to the acquired lands, does not arise. Therefore, the entire addition for frontage, that is 45%, 30% and 50% respectively for plots 62, 42 and 272, have to be deleted. [Para 14]

2.3. Lastly, the Expert Valuer has added 5% for plot No.62 for the advantage of being an east facing plot and 7% for plot no.42 for the advantage of being an east & east/south facing plots. When a large tract of land is made into several plots, most of the plots will cease to be east facing. Further, addition in value for facing a particular direction cannot be accepted. [Para 15]

2.4.The addition of 58% for plot nos.62 and 272 and addition of 45% for plot no.42 have to be deleted. The market value of plot nos.62 and 42, should be arrived at by making an appropriate cut from the value derived from sale price of plot No.192, namely Rs. 1 lac per cottah. The market value of plot no.272 should be arrived at by making an appropriate cut from the market value of Rs.71,350/- arrived at with reference to sale of beel lands. [Para 16]

ONGC Ltd. vs. Rameshbhai Jivanbhai Patel **(2008) 4 SCC 745 – referred to.**

Re : Contention (iii)

3.1. The prices fetched for small plots cannot form safe basis for valuation of large tracts of land and cannot be directly adopted in valuation of large tracts of land as the two are not comparable properties – the former

reflects the 'retail' price of land and the latter the 'wholesale' price. However, if it is shown that the large extent to be valued does admit of and is ripe for use for building purposes; that building lots that could be laid out on the land would be good selling propositions and that valuation on the basis of the method of a hypothetical layout could with justification be adopted, then in valuing such small laid out sites the valuation indicated by sale of comparable small sites in the area at or about the time of the notification would be relevant. In such a case, necessary deductions for the extent of land required for the formation of roads and other civic amenities; expenses of development of the sites by laying out roads, drains, sewers, water and electricity lines, and the interest on the outlays for the period of deferment of the realization of the price; the profits on the venture etc., are to be made. From the value of small plots which represents what may be called the 'retail' price of land, the 'wholesale' price of land is to be estimated. [Para 17]

3.2. By comparing the situational advantage, existing development and amenities available to the acquired lands and the exemplar sale transactions relating to small plots, and other relevant circumstances, this Court has made cuts or deductions varying from 20% to 75% from the value of the small developed plots to arrive at the value of acquired lands.

3.3. According to the evidence of the Expert Valuer, plot No.192 the sale price of which has furnished the basis for determination of market value lies at a distance (in a straight line, as the crow flies) of 1272 ft. from plot No.62, a distance of 1750 ft. plot No.42 and a distance of 2200 ft. from plot No.272. The water supply lines and electrical lines were already laid in the roads adjoining these plots. The appellants had submitted before the Reference Court and High Court that the cut for

development from the market value of plot No.192 should be 33.33%. The Reference Court after considering the facts found that 33.33% (one-third of the value of the small developed plot) should be deducted towards development/development cost, to arrive at the value of the acquired lands. The High Court has not interfered with the said percentage of deduction. In the circumstances, there is no reason to alter the percentage of deduction of 33.33%. [Para 19]

Administrator General of West Bengal vs. Collector, Varanasi **(1988) 2 SCC 150: 1988 (2) SCR 1025;** *Chimanlal Hargovinddas vs. Special Land Acquisition Officer, Poona* **(1988) 3 SCC 751: 1988 (1) Suppl. SCR 531;** *K. Vasundara Devi vs. Revenue Divisional Officer (LAO)* **(1995) 5 SCC 426: 1995 (2) Suppl. SCR 376;** *Basavva vs. Special Land Acquisition Officer* **(1996) 9 SCC 640: 1996 (3) SCR 500;** *Shaji Kuriakose vs. Indian Oil Corporation Ltd* **(2001) 7 SCC 650: 2001 (1) Suppl. SCR 573;** *Atma Singh Thr. LRs. vs. State of Haryana* **(2008) 2 SCC 568: 2007 (12) SCR 1120;** *Kanta Devi vs. State of Haryana* **(2008) 15 SCC 201: 2008 (10) SCR 367;** *Lal Chand vs. Union of India* **(2009) 15 SCC 769: 2009 (13) SCR 622 – referred to.**

Re : Contention (iv)

4.1. The market value has to be determined with reference to the date of publication of the notification under section 4(1) of LA Act. Though the lands were requisitioned in the year 1978 and possession was taken in pursuance of such requisition in 1978-79 and 80% of estimated value was given as advance under section 8B in pursuance of notification under section 4(1a) of WB Requisition Act, the said acquisition notification was not followed by an award and the acquisition notification was allowed to lapse. What is therefore relevant is the date of notification under section 4(1) of LA Act in pursuance of which the acquisition was completed. The relevant date

for determination of compensation would be the date of publication of the preliminary notification under section 4(1) of the LA Act. However if in anticipation of acquisition the appellant/the Land Acquisition Officer had made any payment to the land owner they will be entitled to credit therefor with interest at 15% per annum from the date of payment to date of publication of preliminary notification. In his counter affidavit filed in this Court, first respondent has alleged that the Collector had paid Rs. 55,875/- for plot no.62 and Rs. 17,458/- for plot no.42. The payment is said to be in 1979. Though solatium and additional amount will be calculated on the entire compensation amount, statutory interest payable to first respondent will be calculated only after adjusting the aforesaid advance payment with interest therein towards the compensation amount. [Para 20]

Re : Relevant date for determining compensation

4.2. The notification under section 4(1) of the LA Act is dated 13.9.2000. It was published in the gazette dated 13.9.2000. Thereafter it was published in two newspapers. Lastly, the Collector caused public notice of the substance of such notification to be given at convenient places in the locality on 16.11.2000. The reference court and the High Court have proceeded on the basis that the relevant date for determining the market value is 16.11.2000. The question is whether the relevant date for determination of compensation is 13.9.2000 or 16.11.2000. [Para 21]

4.3. Sub-section (1) of Section 23 of the LA Act provides the compensation to be awarded shall be determined by the Reference Court, based upon the market value of the acquired land *at the time of publication of the notification under section 4 sub-section (1)*. Section 6 of the LA Act was amended in 1984 providing that no declaration under section 6 in respect

of any land covered by a notification under section 4(1) shall be made after the expiry of one year *from the date of publication of the notification under section 4(1).* In that context, to avoid any confusion as to what would be the date of publication of the notification under section 4(1), section 4(1) was also amended to clarify the position and it was provided that "*the last of the dates of such publication and giving of such public notice being herein referred to as the date of publication of the notification"*. But the words '*publication of the notification under section 4(1)*' occurring in the first clause of section 23(1) have different meaning and connotation from the use of the said words in sections 4(1) and 6 of the LA Act. Prior to the 1984 amendment of section 4, the words *"publication of notification under section 4(1)*" in section 23(1) referred to the date of publication of the notification in the official Gazette. Even after the amendment of section 4(1), the said words in section 23(1) continue to have the same earlier meaning. [Paras 22, 23]

4.4. One of the principles in regard to determination of market value under section 23(1) is that the rise in market value after the publication of the notification under section 4(1) of the Act should not be taken into account for the purpose of determination of market value. If the deeming definition of '*publication of the notification'* in the amended section 4(1) is imported as the meaning of the said words in the first clause of section 23(1), it will lead to anomalous results. Owners of the lands which are the subject matter of the notification and neighbouring lands will come to know about the proposed acquisition, on the date of publication in the gazette or in the newspapers. If the giving of public notice of the substance of the notification is delayed by two or three months, there may be several sale transactions in regard to nearby lands in that period, showing a spurt or hike in value in view of the development contemplated on

account of the acquisition itself. If the words 'publication of the notification' in section 23(1) (clause firstly) should be construed as referring to the last of the dates of publication and public notice, and the date of public notice in the locality is to be considered as the date of publication, the landowners can legitimately claim that the sales which took place till the date of public notice should be taken into account for the purpose of determination of compensation, leading to disastrous results. [Para 24]

4.6. The same words used in different parts of a statute should normally bear the same meaning. But depending upon the context, the same words used in different places of a statue may also have different meaning. The use of the words 'publication of the notification' in sections 4(1) and 6 on the one hand and in section 23(1) on the other, in the LA Act, is a classic example, where the same words have different meanings in different provisions of the same enactment. The words '*publication of the notification under section 4 sub-section (1)'*, are used in section 23(1) for fixing the relevant date for determination of market value. The words "the last of the date of such publication and giving of such public notice being hereinafter referred to as the *publication of the date of notification*" in section 4(1) and the words '*one year from the date of the publication of the notification*" in the first proviso to section 6, refer to the special deeming definition of the said words, for determining the period of one year for issuing the declaration under section 6, which is counted from the date of 'publication of the notification'. Therefore the context in which the words are used in sections 4(1) and 6, and the context in which the same words are used in section 23(1) are completely different. In section 23(1), the words "*the date of publication of the notification under section 4(1)"* would refer to the date of publication of the notification in the

gazette. Therefore, '13.9.2000' will be the relevant date for the purpose of determination of compensation and not 16.11.2000. [Para 25]

Justice G.P. Singh's Principles of Statutory Interpretation **– 12th Edition – Pages 356-358 – referred to.**

Conclusion

5.1. In regard to plots 62 and 42, by adopting a cut of 33.33% from the price of Rs.100,000/- disclosed with reference to the sale of sali plot no.192, the compensation is determined as Rs.66,667/- rounded off to Rs.67,000/- per cottah. [Para 26]

5.2. In regard to plot no.272, it is found that beel land has been sold for Rs.70,000/- per cottah on 8.1.1999 and Rs.80,000/- per cottah on 25.6.1999. Rs.90,000/- per cottah is therefore taken as the market value of small developed plots by providing a 12% appreciation per year with reference to the sale price on 25.6.1999. By deducting 33.33% therefrom, the market value of undeveloped plots in 2000 would be Rs.60,000/- per cottah. [Para 27]

5.3. In view of the above, the compensation for plot nos.62 and 42 is reduced to Rs. 67,000/- per cottah and while the compensation in regard to plot no.272 is maintained at the rate of Rs. 60,000/- per cottah. The first respondent will be entitled to the statutory benefits, that is, solatium, additional amount and interest in accordance with the provisions of the LA Act. The appellants will be entitled to adjust the advance payment made with interest thereon at 15% PA from the date of such payments to 13.9.2000 towards the compensation payable. [Para 28]

Case Law Reference:

(2008) 4 SCC 745	**referred to**	**Para 13**

1988 (2) SCR 1025	**referred to**	**Para 17**
1988 (1) Suppl. SCR 531	**referred to**	**Para 17**
(1995) 5 SCC 426	**referred to**	**Para 17**
1995 (2) Suppl. SCR 376	**referred to**	**Para 18**
1996 (3) SCR 500	**referred to**	**Para 18**
2001 (1) Suppl. SCR 573	**referred to**	**Para 18**
2007 (12) SCR 1120	**referred to**	**Para 18**
2008 (10) SCR 367	**referred to**	**Para 18**
2009 (13) SCR 622	**referred to**	**Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5938 of 2007 etc.

From the Judgment & Order dated 18.05.2007 of the High Court at Calcutta in F.A. No. 15 of 2007.

WITH

C.A. Nos. 1931, 1932, 1933 of 2008 & 6024, 6025 of 2007.

Pradeep Ghosh, Shati Bhushan, Ranjit Kumar, Anindita Gupta, Rajesh Srivastava, Raghavendra Pratap Singh, Dhruv Mehta, Debasis Guin, B.P. Yadav, Sarla Chandra, H.K. Puri, S.K. Puri, V.M. Chauhan, Priya Puri for the appearing parties.

The Judgment of the Court was delivered by

R.V.RAVEENDRAN, J. 1. These appeals by the Kolkata Metropolitan Development Authority (for short KMDA) and the State of West Bengal ('State' for short) relate to determination of compensation for acquisition of the following three lands for East Calcutta Area Development Project, falling under Mouza Madurdaha, (JL No.12), District 24 Parganas (South) within the limits of Kolkata Municipal Corporation :

Dag (Plot) No.	Area in Cottahs/ Chitaks (1 acre=60 cottahs) (1 cottah=16 Chitaks)	Area in Acres	Classification of land
62	117 Cottah	1.94 acres	Sali (Agricultural)
42	37 Cottahs	0.61 acres	Sali (Agricultural)
272	13 Cottahs 5 Chitaks	0.22 acres	Beel (Marsh)

2. The said lands belonging to the first respondent along with surrounding lands were requisitioned by the State Government under section 3(1) of the West Bengal Land (Requisition & Acquisition) Act, 1948 [for short 'WB Requisition Act'] on 27.4.1978. The possession of the land was taken by the Collector in pursuance of such requisition, on 8.5.1978, 16.7.1979 and 16.9.1979. In anticipation of the acquisition, the value of the land was assessed under section 8B of the said Act and 80% of the estimated compensation was paid to the first respondent in or about 1979. On 7.4.1987, the Collector issued a notification under section 4(1a) of the said Act, to acquire the land, but did not make an award under section 7 of the said Act. WB Requisition Act was a temporary Act and remained in force only till 31.3.1997. The Land Acquisition Act 1894 ('LA Act' for short) was amended by West Bengal Act 7 of 1997 (with effect from 2.5.1997) inserting sub-sections (3A) and (3B) in section 9 of LA Act whereby it was provided that in regard to lands possession of which had been taken on requisition under the WB Requisition Act, the proceedings initiated under the WB Requisition Act would stand converted to proceedings under LA Act upon issuance of appropriate notice. Such notice was issued on 10.12.1997 and the acquisition proceedings under the WB Requisition Act were converted into acquisition proceedings under the LA Act. But as no award was made within a period of two years, the said acquisition lapsed under section 11A of LA Act. Therefore,

fresh acquisition proceedings were initiated by issue of a notification dated 13.9.2000 under section 4(1) of the LA Act (Gazetted on 13.9.2000 and thereafter published in the newspapers and pubic notice of the substance of notification was notified in the locality on 16.11.2000) followed by a notification dated 27.11.2000 issued under section 6 of the LA Act (gazetted on 28.11.2000).

3. The Collector made an award dated 13.12.2001 determining the market value of the acquired lands as Rs. 2386 per cottah for sali land and Rs. 1193 per cottah for beel land. For this purpose, the Collector took the average of the value disclosed by the sale of small plots bearing Dag Nos. 417, 417 and 455 under deeds dated 15.1.1982, 20.1.1982 and 15.2.1982 and by providing appreciation at the rate of 5% per year from 1982 to 2000, arrived at the value of Rs. 144,353/- per acre or Rs. 2386/- per cottah for sali land and Rs. 1193/- per cottah (half of the value of sali land) as the value of beel land. Feeling aggrieved, the first respondent sought reference to civil court claiming enhancement in regard to the three lands. The three references were registered as LA Nos.47, 77 and 78 of 2003.

4. The first respondent examined an expert valuer T.C.Roy as RCW-1 and examined himself as RCW-2. The report of the expert with its annexures was marked as Ex. 1 and Ex. 1/A and the map of Mouza Madurdaha was produced as Ex.2. The first respondent produced and relied upon the following five sale deeds (Ex.7 to 11) to prove the market value :

Date of sale	Plot Number	Extent	Price per cottah	Nature of land
8.1.1999	417	5 cottah	Rs. 70000	Beel
8.1.1999	417	5 cottah	Rs. 70000	Beel
29.3.2000	417	3 cottah 1 chitak	Rs. 65,396	Beel
25.6.1999	445	3 cottah 5 sq. ft.	Rs. 80,000	Beel
10.3.2000	192	1.5 cottah	Rs. 100,000	Sali

On behalf of the State Government represented by the Collector, the award was marked as Ex.A, two sale deeds of the year 1988 relied upon by the Collector for determining the market value were marked as Ex.B and B/1, the determination of land value by the Collector as Ex.C, calculation-sheet for payment of 80% *ad hoc* compensation as Ex.D and an area map as Ex.E. KMDA did not lead any evidence.

5. The Expert Valuer assessed the value of the acquired lands with reference to the sale of Sali plot No.192 Mouza Madurdaha, Ward No.108, Kolkata Corporation, measuring 1.5 cottah sold under a deed dated 10.3.2000 at a price of ' 1 lakh per cottah. The access to that plot was through a eight feet wide passage. According to the valuer, plot no.62 was by the side of Anandpur main road of a width of 20 to 25 feet and Plot No.42 adjoined a kutcha road of a width of about 20 feet. Being of the view that the acquired plots had a more advantageous position when compared to plot no.192, the valuer made several additions to the value disclosed by sale of plot no.192. He thereafter made a cut in the value in view of the larger size of the acquired plots. The valuer gave a valuation report dated 20.6.2002 assessing the value of plot No.62 at ' 143,000 per cottah, plot No.42 at '135,000 per cottah and plot No.272 at ' 108,000 per cottah. The abstract of the method of calculation adopted by the valuer is as under :

Description Base rate (Re : Plot No. 192 under deed dated 10.3.2000)	Plot No.62 Rs.100,000 per cottah	Plot No.42 Rs.100,000 per cottah	Plot No.272 Rs.100,000 per cottah
Add for appreciation in market value during a period of 8 months (between 10.3.2000 and 16.11.2000) at the rate of 12% per annum	+8%	+8%	+8%
Add for advantage of frontage towards a road (as against common passage frontage of plot no.192)	+20%	+10%	+20%
Add for FAR advantage on account of frontage to a road	+25%	+20%	+30%
Add for advantage of facing East	+5%	+7%	-
Deduction on account of development cost (small size to big size)	-15%	-10%	-50%
Net addition to be made	+43% (58%-15%)	+35% (45%-35%)	+8% (58%-50%)
Value of plots	Rs.143,000 per cottah	Rs.135,000 per cottah	Rs.108,000 per cottah

6. The Reference Court on considering the evidence was of the view that the valuation by the expert valuer should be accepted subject to one modification. The Reference Court found that the valuer had deducted only 15% and 10% from the price of a small developed plot, to determine the market value of plot no.62 and plot no.42. He accepted the submission of appellants that having regard to situation and nature of land, to arrive at the value of the acquired lands (large undeveloped lands) from the value of a small developed plot (plot no.192), the deduction should be one-third (that is 33.33%). By making such deduction (instead of 15% for plot no.62 and 10% for plot no.42 applied by the valuer) the Reference Court arrived at the market value as Rs. 125,000 per cottah for plot no.62 and Rs. 112,000 per cottah for plot No.42. He took the average thereof as Rs. 118,000 and by rounding it off fixed the compensation as Rs. 120,000/- per cottah for sali plots No.62 and No. 42.

7. The Reference Court also attempted an alternative method of determining the market value with reference to the four sale-deeds in regard to beel Plots Nos.417 and 445 and held that the valuation of acquired lands with reference to the

said sales statistics would be approximately Rs.134,000 per cottah. The Reference Court found that Plot Nos. 417 and 445 were sold in the years 1999 and 2000 under four sale-deeds and assumed the sale price in the year 2000 to be Rs. 80,000/- per cottah. On the ground that the exemplar plot (No.192) did not have ingress and egress, 25% was added to that value to arrive at the value of the acquired lands which had better ingress and egress. Having arrived at a figure of Rs.1 lakh per cottah, the Reference Court applied a cut of 33.3% towards development cost and arrived at the price for beel plots as Rs. 67,000/- per cottah; and as the value of sali plots were double that of beel plots, he doubled the said figure and arrived at the market value of sali plots as Rs. 1,34,000/-.

8. In view of the above, he choose to determine the market value of Sali land (plot nos. 62 and 42) as Rs. 120,000 per cottah. As the value of beel land was 50% of the value of Sali land, he determined the market value of beel land (plot no.272) as Rs. 60,000/-. The Reference Court therefore made an award dated 11.10.2004 awarding Rs. 120,000 per cottah for Sali plots (plot nos.62 and 42) and Rs. 60,000 per cottah for Beel plot (plot no.272) with statutory benefits. Feeling aggrieved, KMDC as well as State of West Bengal have filed appeals. The Calcutta High Court dismissed the appeals by judgment dated 18.5.2007 thereby affirming the compensation awarded by the Reference Court.

9. KMDC and the State of West Bengal have challenged the said decision of the High Court in these appeals by special leave, raising the following four contentions:

(i) The first respondent had himself relied upon the four sale deeds relating to beel lands that is sale deeds dated 8.1.1999, 8.1.1999 and 29.3.2000 relating to plot no.417 and sale deed dated 25.6.1999 relating to plot no.445 disclosing a price of Rs. 70,000, Rs. 70,000, Rs. 65,396 and Rs. 80,000 per cottah. Though the plots were described as beel lands in the sale deeds, qualitatively

they were the same as sali lands on account of the fact that the area had been developed into residential plots and fell within the municipal corporation limits. Therefore the market value of the acquired lands ought to have been determined with reference to the price disclosed by the said plots. The Reference Court had wrongly doubled the value worked out with reference to these sale deeds, by applying the thumb rule that the value of sali lands were twice that of the value of beel lands.

(ii) Even if the sale deed dated 10.3.2000 relating to sali plot no.192 should be the basis for determination of market value, making any additions thereto as per the Expert Valuer's report on account of appreciation of price during eight months, or on account of frontage advantage or on account of plots facing east, was not warranted. Therefore the additions of 58% to the value of plot no.62, 45% to the value of plot no.42 and 58% to the value of plot no. 272 was liable to be set aside.

(iii) Having regard to the fact that the acquired lands were large tracts of undeveloped land and their sale price was being determined with reference to value of a small residential plot namely plot no. 192, the cut or deduction towards development and development cost ought to have been at least 50% instead of 33.33%.

(iv) When possession of the lands were taken in pursuance of the requisition under the WB Requisition Act, 80% of the estimated value of the lands was paid to the first respondent and the first respondent had accepted the same. Therefore what should be paid to the first respondent was only the balance of 20% of the compensation as was to be determined. As the first respondent had the benefit of the said advance amount, from the year 1979, the amount paid as advance with appropriate interest thereon, should be adjusted against the compensation.

Re : Contention (i) :

10. The appellants submitted that the first respondent had produced and relied upon four sale deeds relating to Beel lands, and they ought to have been the basis for determination of compensation for the acquired lands. These sale deeds disclosed that three portions of Plot No.417 measuring 5 cottah, 5 cottah and 3 cottah 1 chitak were sold under sale deeds dated 8.1.1999, 8.1.1999 and 29.3.2000. The price per cottah under the first two sale deeds is Rs. 70,000/- per cottah and under the third sale deed is about Rs. 65,400/- per cottah. The fourth sale deed dated 25.6.1999 relates to sale of 3 cottah and 5 sq.ft. in plot No.445 which discloses the price paid as Rs. 80,000 per cottah. The average of the four sales would be about Rs. 71,350 per cottah. According to the appellant though these plots were described as Beel lands because they were originally classified as 'Beel', they were no longer Beel, but were developed and sold as residential plots, and situated in the limits of Ward No.108 of Kolkata Municipal Corporation. Therefore, they were no different from the plots laid down in Sali lands. Consequently, it was submitted that the value of these residential plots should be treated on par with the plots laid in Sali lands and their value could not be considered as half of the value of Sali lands. The appellants contend that though the Reference Court considered these sale deeds, it erroneously doubled the value disclosed by these plots to arrive at the value of Sali plots merely because they were described as Beel lands. According to the appellant, once the Beel lands are developed into residential plots by drawing, filling and levelling, the value of Sali plots and Beel plots are the same. Therefore, it is contended that on the basis of these sale deeds, the prevailing value of residential plots in the area ought to have been taken as Rs. 71,350 per cottah and by deducting one-third (33.33%) therefrom towards development, the value of the acquired lands irrespective of whether they are Sali or Beel, should be fixed as Rs. 47,570 per cottah.

11. We have carefully considered the said contention. It is possible that Beel lands when developed into residential plots, by draining, filling and levelling the land, will cease to be Beel in nature. But it is also possible that the plots sold under sale deeds dated 8.1.1999, 25.6.1999 and 29.3.2000 were really Beel plots without any actual development. There is no evidence to show that these plots were drained, filled, levelled and made into plots similar to Sali plots. The sale deeds refer to these plots as Beel plots. There is no dispute that at the relevant point of time the Sali plots were considered to be more valuable than Beel plots. Therefore we reject the contention of the appellant that the value of these Beel plots should be treated on par with the value of Sali plots and that should form the basis for determining the market value of Sali Plot Nos.62 and 42. But the value of these Beel plots can be a clear indicator for determining the value of acquired Beel plot No.272.

Re : Contention (ii)

12. The Reference Court and the High Court have not disapproved or rejected the various additions made by the Expert Valuer for 'advantages' possessed by plot nos.62, 42 and 272. We will consider each of these 'advantages' separately.

13. The valuer has added 8% towards appreciation in value during the period of eight months between the date of the exemplar sale (10.3.2000) and the date of preliminary notification (which was taken as 16.11.2000). The date of publication of the said notification is 13.9.2000. Only about six months had passed from the date of the exemplar sale deed (10.3.2000), when the preliminary notification regarding the acquisition was issued in the same year namely 2000. (The difference would be eight months even if the date of publication of preliminary notification is taken as 16.11.2000). When the relied upon sale transaction and the preliminary notification are in the same year, no provision is made for any appreciation in

value. This Court in *ONGC Ltd. vs. Rameshbhai Jivanbhai Patel* – (2008) 4 SCC 745 observed :

> "However, for the purpose of calculation, we have to exclude the year of the relied-upon transaction, which is the base year. If the year of relied-upon transaction is 1987, the increase is applied not from 1987 itself, but only from the next year which is 1988."

Therefore, unless the difference is more than one year, normally no addition should be made towards appreciation in value, unless there is special evidence to show some specific increase within a short period. Therefore, the addition of 8% to the price (Rs.100,000/- per cottah) of plot no.192, was unwarranted.

14. The Expert valuer has added to the basic value of Rs. 1,00,000/- (relating to plot No.192), 20% for plot no.62 for having a frontage to Anandpur main road, 10% for plot no.42 for having a frontage to a kutcha KMC road, and 20% for plot No.272 for having a frontage to a sixty feet wide road, on the ground that these three lands were more advantageously situated when compared to plot No.192 which faces a narrow eight feet common passage. The valuer has made one more addition to the basic value on account of frontage advantage of the acquired plots, that is 25%, 20% and 30% respectively for plot nos.62, 42 and 272 for having a frontage on a wider road thereby giving the advantage of a better FAR (floor area ratio) when undertaking construction. Addition of percentages for advantageous frontage, that too twice was unwarranted. Advantage of a better frontage is considered to be a plus factor while assessing the value of two similar properties, particularly in any commercial or residential area, when one has a better frontage than the other. However where the value of large tracts of undeveloped agricultural land situated on the periphery of a city in an area which is yet to be developed is being determined with reference to a value of nearby small residential plot, the

question of adding any percentage for the advantage of frontage to the acquired lands, does not arise. Therefore, the entire addition for frontage, that is 45%, 30% and 50% respectively for plots 62, 42 and 272, have to be deleted.

15. Lastly, the Expert Valuer has added 5% for plot No.62 for the advantage of being an east facing plot and 7% for plot no.42 for the advantage of being an east & east/south facing plots. When a large tract of land is made into several plots, most of the plots will cease to be east facing. Further, addition in value for facing a particular direction cannot be accepted.

16. Therefore, the addition of 58% for plot nos.62 and 272 and addition of 45% for plot no.42 have to be deleted. The market value of plot nos.62 and 42, should be arrived at by making an appropriate cut from the value derived from sale price of plot No.192, namely ' 1 lac per cottah. The market value of plot no.272 should be arrived at by making an appropriate cut from the market value of Rs.71,350/- arrived at with reference to sale of beel lands.

Re : Contention (iii)

17. In *Administrator General of West Bengal vs. Collector, Varanasi* – (1988) 2 SCC 150, this Court has explained the principle for valuing large extent of undeveloped urban land with reference to the price fetched by a small developed plot. This Court explained that prices fetched for small plots cannot form safe basis for valuation of large tracts of land and cannot be directly adopted in valuation of large tracts of land as the two are not comparable properties – the former reflects the 'retail' price of land and the latter the 'wholesale' price. However, if it is shown that the large extent to be valued does admit of and is ripe for use for building purposes; that building lots that could be laid out on the land would be good selling propositions and that valuation on the basis of the method of a hypothetical layout could with justification be adopted, then in valuing such small

laid out sites the valuation indicated by sale of comparable small sites in the area at or about the time of the notification would be relevant. In such a case, necessary deductions for the extent of land required for the formation of roads and other civic amenities; expenses of development of the sites by laying out roads, drains, sewers, water and electricity lines, and the interest on the outlays for the period of deferment of the realization of the price; the profits on the venture etc., are to be made. From the value of small plots which represents what may be called the 'retail' price of land, the 'wholesale' price of land is to be estimated. In *Chimanlal Hargovinddas vs. Special Land Acquisition Officer, Poona* – (1988) 3 SCC 751, this Court gave the following illustration to arrive at the value of large undeveloped land from the value of a small developed plot :

> "A building plot of land say 500 to 1000 sq.yds cannot be compared with a large tract or block of land of say 10,000 sq.yds or more. Firstly, while a smaller plot is within the reach of many, a large block of land will have to be developed by preparing a lay out, carving out roads, leaving open space, plotting out smaller plots, waiting for purchasers (meanwhile the invested money will be blocked up) and the hazards of an entrepreneur. The factor can be discounted by making a deduction by way of an allowance at an appropriate rate ranging approximately between 20% to 50% to account for land required to be set apart for carving out lands and plotting out small plots. The discounting will to some extent also depend on whether it is a rural area or urban area, whether building activity is picking up, and whether waiting period during which the capital of the entrepreneur would be locked up, will be longer or shorter and the attendant hazards."

18. By comparing the situational advantage, existing development and amenities available to the acquired lands and the exemplar sale transactions relating to small plots, and other

relevant circumstances, this Court has made cuts or deductions varying from 20% to 75% from the value of the small developed plots to arrive at the value of acquired lands. [See : *K. Vasundara Devi vs. Revenue Divisional Officer (LAO)* – (1995) 5 SCC 426; *Basavva vs. Special Land Acquisition Officer* – (1996) 9 SCC 640; *Shaji Kuriakose vs. Indian Oil Corporation Ltd* – (2001) 7 SCC 650; *Atma Singh Thr. LRs. vs. State of Haryana* – (2008) 2 SCC 568 and *Kanta Devi vs. State of Haryana* – (2008) 15 SCC 201], and and *Lal Chand vs. Union of India* – (2009) 15 SCC 769]. In *Lal Chand*, this Court gave the following guidelines as to what should be the deduction for development :

> "The percentage of 'deduction for development' to be made to arrive at the market value of large tracts of undeveloped agricultural land (with potential for development), with reference to the sale price of small developed plots, varies between 20% to 75% of the price of such developed plots, the percentage depending upon the nature of development of the lay out in which the exemplar plots are situated.
>
> The 'deduction for development' consists of two components. The first is with reference to the area required to be utilised for developmental works and the second is the cost of the development works. For example if a residential layout is formed by DDA or similar statutory authority, it may utilise around 40% of the land area in the layout, for roads, drains, parks, play grounds and civic amenities (community facilities) etc.
>
> The Development Authority will also incur considerable expenditure for development of undeveloped land into a developed layout, which includes the cost of levelling the land, cost of providing roads, underground drainage and sewage facilities, laying waterlines, electricity lines and developing parks and civil amenities, which would be

about 35% of the value of the developed plot. The two factors taken together would be the 'deduction for development' and can account for as much as 75% of the cost of the developed plot.

On the other hand, if the residential plot is in an unauthorised private residential layout, the percentage of 'deduction for development' may be far less. This is because in an un-authorized lay outs, usually no land will be set apart for parks, play grounds and community facilities. Even if any land is set apart, it is likely to be minimal. The roads and drains will also be narrower, just adequate for movement of vehicles. The amount spent on development work would also be comparatively less and minimal. Thus the deduction on account of the two factors in respect of plots in unauthorised layouts, would be only about 20% plus 20% in all 40% as against 75% in regard to DDA plots.

The 'deduction for development' with references to prices of plots in authorised private residential layouts may range between 50% to 65% depending upon the standards and quality of the layout. …….

If the acquired land is in a semi-developed urban area, and not an undeveloped rural area, then the deduction for development may be as much less, that is, as little as 25% to 40%, as some basic infrastructure will already be available. (Note: The percentages mentioned above are tentative standards and subject to proof to the contrary).

Therefore the deduction for the 'development factor' to be made with reference to the price of a small plot in a developed lay out, to arrive at the cost of undeveloped land, will be for more than the deduction with reference to the price of a small plot in an unauthorized private lay out or an industrial layout. …….

Some of the layouts formed by statutory Development

Authorities may have large areas earmarked for water/ sewage treatment plants, water tanks, electrical sub-stations etc. in addition to the usual areas earmarked for roads, drains, parks, playgrounds and community/civic amenities. The purpose of the aforesaid examples is only to show that the 'deduction for development' factor is a variable percentage and the range of percentage itself being very wide from 20% to 75%."

19. In this case, the evidence shows that plot nos.62 and 42 are sali (agricultural) lands, and the plot no.272 is a beel (marshy) land. Their extents are 1.94 acres, 0.61 acres and 0.22 acres respectively. Plot No.62 faces a twenty feet wide metalled road. Plot No.42 faces a twenty feet katcha road. Plot No.272 faces a 60 feet road. All are situated within the limits of Ward No.108 of Kolkata Municipal limits and had potential for being developed into residential plots. They were acquired for East Calcutta Area Development Project. According to the evidence of the Expert Valuer, plot No.192 the sale price of which has furnished the basis for determination of market value lies at a distance (in a straight line, as the crow flies) of 1272 ft. from plot No.62, a distance of 1750 ft. plot No.42 and a distance of 2200 ft. from plot No.272. The water supply lines and electrical lines were already laid in the roads adjoining these plots. The appellants had submitted before the Reference Court and High Court that the cut for development from the market value of plot No.192 should be 33.33%. The Reference Court after considering the facts found that 33.33% (one-third of the value of the small developed plot) should be deducted towards development/development cost, to arrive at the value of the acquired lands. The High Court has not interfered with the said percentage of deduction. In the circumstances, we find no reason to alter the percentage of deduction of 33.33%.

Re : Contention (iv)

20. The market value has to be determined with reference

to the date of publication of the notification under section 4(1) of LA Act. Though the lands were requisitioned in the year 1978 and possession was taken in pursuance of such requisition in 1978-79 and 80% of estimated value was given as advance under section 8B in pursuance of notification under section 4(1a) of WB Requisition Act, the said acquisition notification was not followed by an award and the acquisition notification was allowed to lapse. What is therefore relevant is the date of notification under section 4(1) of LA Act in pursuance of which the acquisition was completed.

Therefore, the relevant date for determination of compensation would be the date of publication of the preliminary notification under section 4(1) of the LA Act. However in anticipation of acquisition the appellant/the Land Acquisition Officer had made any payment to the land owner they will be entitled to credit therefor with interest at 15% per annum from the date of payment to date of publication of preliminary notification. In his counter affidavit filed in this Court, first respondent has alleged that the Collector had paid Rs. 55,875/- for plot no.62 and Rs. 17,458/- for plot no.42. The payment is said to be in 1979. Though solatium and additional amount will be calculated on the entire compensation amount, statutory interest payable to first respondent will be calculated only after adjusting the aforesaid advance payment with interest therein towards the compensation amount.

Re : Relevant date for determining compensation

21. The notification under section 4(1) of the Act is dated 13.9.2000. It was published in the gazette dated 13.9.2000. Thereafter it was published in two newspapers. Lastly, the Collector caused public notice of the substance of such notification to be given at convenient places in the locality on 16.11.2000. The reference court and the High Court have proceeded on the basis that the relevant date for determining the market value is 16.11.2000. They have also relied upon the expert valuer's report which assessed the market value as on

16.11.2000. We have noticed above that the Expert Valuer determined the market value with reference to a sale deed dated 10.3.2000, by adding 8% as the increase in prices for the period of eight months between 10.3.2000 and 16.11.2000 (at the rate of 1% per month). The question is whether the relevant date for determination of compensation is 13.9.2000 or 16.11.2000.

22. Sub-section (1) of Section 23 provides the compensation to be awarded shall be determined by the Reference Court, based upon the market value of the acquired land *at the time of publication of the notification under section 4 sub-section (1)*. The first respondent contends that the '*date of publication of notification under section 4(1)'* is statutorily defined in section 4(1) (that is the last of the dates, out of the dates of publication of the notification in the official gazette, publication of the notification in two daily newspapers circulating in that locality of which at least one shall be in regional language, and public notice of the substance of such notification being given at convenient places in the locality), and therefore the said words refer to 16.11.2000 as the date of publication of notification under section 4(1) of the LA Act.

23. Section 6 was amended in 1984 providing that no declaration under section 6 in respect of any land covered by a notification under section 4(1) shall be made after the expiry of one year *from the date of publication of the notification under section 4(1).* In that context, to avoid any confusion as to what would be the date of publication of the notification under section 4(1), section 4(1) was also amended to clarify the position and it was provided that "*the last of the dates of such publication and giving of such public notice being herein referred to as the date of publication of the notification"*. But the words '*publication of the notification under section 4(1)*' occurring in the first clause of section 23(1) have different meaning and connotation from the use of the said words in sections 4(1) and 6 of the LA Act. Prior to the 1984 amendment of section 4, the

words *"publication of notification under section 4(1)*" in section 23(1) referred to the date of publication of the notification in the official Gazette. Even after the amendment of section 4(1), the said words in section 23(1) continue to have the same earlier meaning. We may briefly indicate the reasons for our said conclusion.

24. One of the principles in regard to determination of market value under section 23(1) is that the rise in market value after the publication of the notification under section 4(1) of the Act should not be taken into account for the purpose of determination of market value. If the deeming definition of '*publication of the notification'* in the amended section 4(1) is imported as the meaning of the said words in the first clause of section 23(1), it will lead to anomalous results. Owners of the lands which are the subject matter of the notification and neighbouring lands will come to know about the proposed acquisition, on the date of publication in the gazette or in the newspapers. If the giving of public notice of the substance of the notification is delayed by two or three months, there may be several sale transactions in regard to nearby lands in that period, showing a spurt or hike in value in view of the development contemplated on account of the acquisition itself. If the words 'publication of the notification' in section 23(1) (clause firstly) should be construed as referring to the last of the dates of publication and public notice, and the date of public notice in the locality is to be considered as the date of publication, the landowners can legitimately claim that the sales which took place till the date of public notice should be taken into account for the purpose of determination of compensation, leading to disastrous results. Let us give two illustrations :

Illustration A : The market value of the acquired land on 13.9.2000 is Rs.1,00,000 per acre. A notification under section 4(1) is published in the gazette on 13.9.2000 and in two newspapers on 14.9.2000. But the public notice in the locality is given only two months later on 16.11.2000.

As the land owners in the area come to know about the proposed acquisition and consequential expectations of development in the area, developers and speculators enter the arena and start buying neighbouring lands leading to steep increase in prices. Consequently several sales takes place in October 2000 at rates ranging from Rs.1.5 lakhs to Rs.2 lakhs per acre. If 16.11.2000 should be taken as the date of publication of the notification under section 4(1), the land owners can legitimately contend that the sale deeds executed in October 2000, being prior to the 'date of publication of the preliminary notification' should be taken note of for the purpose of determining the compensation. That would result in compensation being determined between Rs.1,50,000 to Rs.2 lakhs per acre even though the market rate as on 13.9.2000 which is the date of publication of the notification was only Rs.1,00,000.

Illustration B : When large tracts of lands are acquired and the preliminary notification dated 13.9.2000 is published in the Gazette on 13.9.2000 and in the newspapers on 14.9.2000, but public notice of the substance is delayed by more than two months and is given on 16.11.2000, there will be ample time for unscrupulous land owners of acquired lands to create evidence of higher market value by managing nominal sale/s in regard to some neighbouring land which is not the subject of acquisition at a price of Rs.2,00,000/- as against the market price of Rs.1,00,000/- and thereby cause a huge loss to the state.

25. The same words used in different parts of a statute should normally bear the same meaning. But depending upon the context, the same words used in different places of a statue may also have different meaning. [See: *Justice G.P. Singh's Principles of Statutory Interpretation* – 12th Edition – Pages 356-358]. The use of the words 'publication of the notification' in sections 4(1) and 6 on the one hand and in section 23(1) on

the other, in the LA Act, is a classic example, where the same words have different meanings in different provisions of the same enactment. The words '*publication of the notification under section 4 sub-section (1)*, are used in section 23(1) for fixing the relevant date for determination of market value. The words "the last of the date of such publication and giving of such public notice being hereinafter referred to as the *publication of the date of notification*" in section 4(1) and the words '*one year from the date of the publication of the notification*" in the first proviso to section 6, refer to the special deeming definition of the said words, for determining the period of one year for issuing the declaration under section 6, which is counted from the date of 'publication of the notification'. Therefore the context in which the words are used in sections 4(1) and 6, and the context in which the same words are used in section 23(1) are completely different. In section 23(1), the words "*the date of publication of the notification under section 4(1)"* would refer to the date of publication of the notification in the gazette. Therefore, '13.9.2000' will be the relevant date for the purpose of determination of compensation and not 16.11.2000.

Conclusion

26. In regard to plots 62 and 42, by adopting a cut of 33.33% from the price of Rs.100,000/- disclosed with reference to the sale of sali plot no.192, we determine the compensation as Rs.66,667/- rounded off to Rs.67,000/- per cottah.

27. In regard to plot no.272, we find that beel land has been sold for Rs.70,000/- per cottah on 8.1.1999 and Rs.80,000/- per cottah on 25.6.1999. We may therefore, take Rs.90,000/- per cottah as the market value of small developed plots by providing a 12% appreciation per year with reference to the sale price on 25.6.1999. By deducting 33.33% therefrom, the market value of undeveloped plots in 2000 would be Rs.60,000/- per cottah.

28. In view of the above, we allow these appeals in part and reduce the compensation to Rs. 67,000/- per cottah for plot nos.62 and 42 and maintain the compensation at the rate of Rs. 60,000/- per cottah in regard to plot no.272. The first respondent will be entitled to the statutory benefits, that is, solatium, additional amount and interest in accordance with the provisions of the LA Act. The appellants will be entitled to adjust the advance payment made with interest thereon at 15% PA from the date of such payments to 13.9.2000 towards the compensation payable. Parties to bear their respective costs.

B.B.B Appeals partly allowed.

MRINAL DAS & ORS.

v.

THE STATE OF TRIPURA

(CRIMINAL APPEAL NO. 1994 OF 2009)

SEPTEMBER 05, 2011

[P. SATHASIVAM AND H.L. GOKHALE, JJ.]

Penal Code, 1860 – s.302 r/w s.34 – Murder – 13 accused – Prayer of A-12 for grant of 'pardon' and to treat him as an 'approver' allowed by trial court – Disclosure made by approver (A-12), who was examined as PW-6 – Trial Court convicted A-5 and A-11 u/s.302 but acquitted the remaining ten accused – On appeal, High Court set aside acquittal of A-4, A-7, A-9 and A-1 and convicted them u/ss. 302/34 and also affirmed conviction of A-5 & A-11 u/s.302 – Justification of – Held: Justified – The statement of approver (PW-6) was confidence inspiring and as rightly pointed out by the High Court, there was nothing wrong in accepting his entire statement – The analysis of statement of various persons, particularly, eye-witnesses clearly strengthen the case of PW-6, approver, in all aspects including conspiracy, planning to attack the deceased for his statement about the students' movement, actual incident, role played by the assailants and subsequent events after the gunshot till the death of the deceased – As rightly observed by the trial Court and the High Court, the ocular evidence of the approver (PW-6) stood corroborated by the medical evidence of PW-14 (the doctor who conducted post mortem) and the post mortem examination report (Ex.7) – There was common intention among the accused persons including the six persons identified by the eye-witnesses – High Court was right in applying s.34 and basing conviction of six accused persons i.e. A-5, A-11, A-9, A-7, A-4 and A-1.

Evidence Act, 1872 – s.133 r/w Illustration (b) to s.114 –

Evidentiary value of "approver" and its acceptability with or without corroboration – Held: Though a conviction is not illegal merely because it proceeds on the uncorroborated testimony of an approver, yet the universal practice is not to convict upon the testimony of an accomplice unless it is corroborated in material particulars – Insistence upon corroboration is based on the rule of caution and is not merely a rule of law – Corroboration need not be in the form of ocular testimony of witnesses and may even be in the form of circumstantial evidence.

Code of Criminal Procedure, 1973 – ss.306, 307 and 308 – Tender of pardon to approver/accomplice – Power to direct tender of pardon – Held: The principle of tendering pardon to an accomplice is to unravel the truth in a grave offence so that guilt of the other accused persons concerned in commission of crime could be brought home – An accomplice who has been granted pardon u/s.306 or s.307 of the Code gets protection from prosecution – When he is called as a witness for the prosecution, he must comply with the condition of making a full and true disclosure of the whole of the circumstances within his knowledge concerning the offence and to every other person concerned, whether as principal or abettor, in the commission thereof and if he suppresses anything material and essential within his knowledge concerning the commission of crime or fails or refuses to comply with the condition on which the tender was made and the Public Prosecutor gives his certificate u/s.308 of the Code to that effect, the protection given to him can be lifted – Once an accused is granted pardon u/s.306, he ceases to be an accused and becomes witness for the prosecution.

Code of Criminal Procedure, 1973 – ss. 306, 307 and 308 – Tender of pardon to approver/accomplice – Delay in tendering pardon – Effect of – Held: Pardon can be tendered at any time after commitment of a case but before the

judgment is pronounced – In the instant case, the approver - PW-6, submitted his application to become an approver on 16.06.2004 well before the judgment which was delivered on 19.04.2005 – In view of the same, the contention regarding delay on the part of PW-6 is liable to be rejected – Regarding his change of mind, PW-6 asserted that he had decided to disclose the whole incident voluntarily on the advise of the members of his family – In cross-examination, PW-6 explained that since 31.08.2000 (the incident date) till mid of March, 2004, he had been running amok and during the said intervening period, he did not meet any people to express his mental agony – He asserted that he lost his mental peace as the murder took place before his own eyes and he was also directly involved in the killing – He denied that he deposed falsely – He also denied that he was provoked that if he turns to be an approver, he would be given a suitable job – A reading of the entire evidence of PW-6 makes it clear that the reason for change of his mind for tendering pardon is acceptable and in tune with the conditions prescribed in ss.306 and 307 – The trial Judge, who had the liberty of noting his appearance and recorded his evidence, believed his version which was rightly accepted by the High Court.

Criminal trial – Hostile witness – Appreciation of – Held: Merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable – The evidence of hostile witness can be relied upon at least up to the extent, he supported the case of prosecution – The evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution – However, the Court should be slow to act on the testimony of such a witness, normally, it should look for corroboration with other witnesses.

Criminal Trial – Large number of offenders – Necessity

of corroboration – Held: Where a large number of offenders are involved, it is necessary for the Court to seek corroboration, at least, from two or more witnesses as a measure of caution – It is the quality and not the quantity of evidence to be the rule for conviction even where the number of eye witnesses is less than two.

Penal Code, 1860 – s.34 – Applicability of – Held: The existence of common intention amongst the participants in the crime is the essential element for application of s.34 and it is not necessary that the acts of several persons charged with the commission of an offence jointly must be the same or identically similar – In the instant case, from the materials placed by the prosecution, particularly, from the eye-witnesses, the common intention can be inferred among the accused persons including the six persons identified by the eye-witnesses – If the case of the prosecution is considered in the light of the disclosure made by the approver (PW-6), coupled with the statement of eye-witnesses, it is clear that the 13 assailants had planned and remained present on the shore of the river to eliminate the deceased — In view of these materials, the High Court was right in applying s.34 IPC and basing conviction of six accused persons.

Penal Code, 1860 – ss.34 and 149 – Distinction between common intention and common object – Discussed.

Appeal – Appeal against acquittal – Interference in appeal against acquittal – Legal position – Discussed.

According to the prosecution, as 'T' had stood against the students' agitation against kidnapping of three students and one labourer by the extremists, the accused persons developed a grudge againt 'T'; that they planned to eliminate 'T' and for that purpose remained stationed on the river shore and when 'T' and his companions disembarked from a boat, A-12 dragged 'T' down and when he fell on the ground, A-5 and A-11

shot at him causing him severe bullet injuries and which ultimately led to his death. There were in all 13 accused persons- A-7, A-4, A-5, A-2, A-9, A-3, A-10, A-11, A-1, A-6, A-8, A-12 and A-13. The trial court framed charges against all the 13 accused persons under Section 302 read with Section 34/120B IPC and Section 27 of the Arms Act. During the recording of evidence, A-12 filed an application praying for grant of 'pardon' and to treat him as an 'approver' which was granted by the trial Court. The "approver" (A-12) was examined as PW-6. The trial Court acquitted A-1, A-2, A-3, A-4, A-6, A-7, A-8, A-9, A-10 and A-13 and convicted A-5 and A-11 for the offences punishable under Section 302 of the IPC and sentenced them to suffer rigorous imprisonment for life. A-5 and A-11 filed appeal in the High Court. The State also filed appeal against the order of acquittal of ten accused persons by the trial Court. High Court dismissed the appeal filed by the convicted accused persons (A-5 and A-11) and partly allowed the appeal filed by the State by setting aside the acquittal of four persons, namely, A-4, A-9, A-7 and A-1 and convicted them under Sections 302/34 IPC and sentenced them with imprisonment for life. Hence the present appeals.

Dismissing the appeals, the Court

HELD:

Legal position with regard to interference in Appeal against Acquittal:

1. In an appeal against acquittal in the absence of perversity in the judgment and order, interference by this Court exercising its extraordinary jurisdiction, is not warranted. However, if the appeal is heard by an appellate court, being the final court of fact, is fully competent to re-appreciate, reconsider and review the evidence and take its own decision. Law does not prescribe any

limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court. If two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal. There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is found and to come to its own conclusion. The appellate court can also review the conclusion arrived at by the trial Court with respect to both facts and law. While dealing with the appeal against acquittal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and only by giving cogent and adequate reasons set aside the judgment of acquittal. An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference. When the trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts etc., the appellate court is competent to reverse the decision of the trial Court depending on the materials placed. [Para 8]

State of Goa vs. Sanjay Thakran & Anr. **(2007) 3 SCC 755 : 2007 (3) SCR 507;** *Chandrappa and Others vs. State of Karnataka* **(2007) 4 SCC 415 : 2007 (2) SCR 630;** *State of Uttar Pradesh vs. Jagram and Others,* **(2009) 17 SCC 405 : 2008 (2) SCR 721;** *Sidhartha Vashisht alias Manu Sharma vs. State (NCT of Delhi)* **(2010) 6 SCC 1 : 2010 (4) SCR 103;** *Babu vs. State of Kerala,* **(2010) 9 SCC 189 : 2010 (9) SCR 1039;** *Ganpat vs. State of Haryana and Others,* **(2010)**

12 SCC 59 : 2010 (12) SCR 400; *Sunil Kumar Sambhudayal Gupta (Dr.) and Others vs. State of Maharashtra,* **(2010) 13 SCC 657 : 2010 (15) SCR 452;** *State of Uttar Pradesh vs. Naresh and Others,* **(2011) 4 SCC 324 : 2011 (4) SCR 1176;** *State of Madhya Pradesh vs. Ramesh and Another,* **(2011) 4 SCC 786 : 2011 (5) SCR 1 – relied on.**

Evidentiary value of Approver/Accomplice:

2.1. Though a conviction is not illegal merely because it proceeds on the uncorroborated testimony of an approver, yet the universal practice is not to convict upon the testimony of an accomplice unless it is corroborated in material particulars. The evidence of an approver does not differ from the evidence of any other witness save in one particular aspect, namely, that the evidence of an accomplice is regarded ab initio as open to grave suspicion. [Para 11]

2.2. If the suspicion which attaches to the evidence of an accomplice be not removed, that evidence should not be acted upon unless corroborated in some material particulars; but if the suspicion attaching to the accomplice's evidence be removed, then that evidence may be acted upon even though uncorroborated, and the guilt of the accused may be established upon the evidence alone. [Para 12]

2.3. Once the evidence of the approver is held to be trustworthy, it must be shown that the story given by him so far as an accused is concerned, must implicate him in such manner as to give rise to a conclusion of guilt beyond reasonable doubt. Insistence upon corroboration is based on the rule of caution and is not merely a rule of law. Corroboration need not be in the form of ocular testimony of witnesses and may even be in the form of circumstantial evidence. [Para 24]

Bhiva Doulu Patil v. State of Maharahshtra, **AIR 1963 SC 599: (1963) 3 SCR 830;** *Mohd. Husain Umar Kochra etc. v. K. S. Dalipsinghji and Another etc.,* **(1969) 3 SCC 429 : 1969 (3) SCR 130;** *Sarwan Singh S/o Rattan Singh vs. State of Punjab* **AIR 1957 SC 637 : 1957 SCR 953;** *Ravinder Singh v. State of Haryana,* **(1975) 3 SCC 742 : 1975 (3) SCR 453;** *Abdul Sattar v. Union Territory, Chandigarh,* **1985 (Supp) SCC 599;** *Suresh Chandra Bahri v. State of Bihar* **(1995 Supp (1) SCC 80) : 1994 (1) Suppl. SCR 483;** *Ramprasad v. State of Maharashtra,* **: AIR 1999 SC 1969 : (1999 Cri LJ 2889);** *Narayan Chetanram Chaudhary v. State of Maharashtra,* **: (2000) 8 SCC 457 : 2000 (3) Suppl. SCR 104;** *K. Hashim v State of Tamil Nadu,* **(2005) 1 SCC 237 : 2005 Cri LJ 143 : 2004 (6) Suppl. SCR 1;** *Sitaram Sao @ Mungeri v State of Jharkhand,* **(2007) 12 SCC 630: 2007 (11) SCR 997;** *Sheshanna Bhumanna Yadav vs. State of Maharashtra* **(1970) 2 SCC 122 : 1971 (1) SCR 617;** *Dagdu and Ors. vs. State of Maharashtra,* **(1977) 3 SCC 68 : 1977 (3) SCR 636;** *Rampal Pithwa Rahidas and Others vs. State of Maharashtra,* **1994 Supp (2) SCC 73 : 1994 (2) SCR 179 – relied on.**

Approver's evidence (PW-6)

3.1. The principle of tendering pardon to an accomplice is to unravel the truth in a grave offence so that guilt of the other accused persons concerned in commission of crime could be brought home. The object of Section 306 of CrPC is to allow pardon in cases where heinous offence is alleged to have been committed by several persons so that with the aid of the evidence of the person granted pardon, the offence may be brought home to the rest. This Section empowers the Chief Judicial Magistrate or a Metropolitan Magistrate to tender a pardon to a person supposed to have been directly or indirectly concerned in or privy to an offence to which the section applies, at any stage of the investigation or

inquiry or trial of the offence on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence. Under Section 306 of the Code, the Magistrate of the First Class is also empowered to tender pardon to an accomplice at any stage of inquiry or trial but not at the stage of investigation on condition of his making full and true disclosure of the entire circumstances within his knowledge relative to the crime. Section 307 of the Code vests the Court to which the commitment is made, with power to tender a pardon to an accomplice. An accomplice who has been granted pardon under Section 306 or 307 of the Code gets protection from prosecution. When he is called as a witness for the prosecution, he must comply with the condition of making a full and true disclosure of the whole of the circumstances within his knowledge concerning the offence and to every other person concerned, whether as principal or abettor, in the commission thereof and if he suppresses anything material and essential within his knowledge concerning the commission of crime or fails or refuses to comply with the condition on which the tender was made and the Public Prosecutor gives his certificate under Section 308 of the Code to that effect, the protection given to him can be lifted. [Paras 26, 28]

3.2. Section 306(4) makes it clear that the person accepting a tender of pardon should be examined as a witness first in the Court of Magistrate and subsequently in the trial Court. Once an accused is granted pardon under Section 306, he ceases to be an accused and becomes witness for the prosecution. Regarding the delay in tendering pardon, it is not in dispute that the trial commenced on 11.03.2003 with the examination of prosecution witnesses. The approver – PW-6, submitted his application to become an approver on 16.06.2004 well before the judgment which was delivered on 19.04.2005.

Section 307 of the Code denotes that pardon can be tendered at any time after commitment of a case but before the judgment is pronounced. In view of the same, inasmuch as the approver submitted his application well before the judgment was delivered, i.e., on 19.04.2005, the contention regarding delay on the part of PW-6 is liable to be rejected. [Para 29]

3.3. Initially, PW-6 was one of the 13 accused persons charged with the offence of murder and in the array of accused, he was shown as (A-12). Accordingly, the prosecution is justified in taking the stand that the approver (PW-6) was directly or indirectly concerned in or privy to the offence of murder. In view of the same and in the light of the language used in Section 307 of the Code, the Courts below are right in entertaining the evidence of PW-6 as approver. [Para 30]

3.4. In his examination-in-chief, the approver had clearly stated that he was one of the accused in the case and during investigation he was arrested by the police. On completion of investigation, the investigating agency submitted charge-sheet against him along with others for trial. In categorical terms, he asserted that he was aware of the whole incident which led to the killing of 'T' and also asserted that he was also connected with and involved in his murder along with others. He highlighted that on 21.08.2000, there was a public meeting organized by CPI (M) party at Santinagar. The deceased, 'T' and other party leaders attended the said meeting. In the year 2000, there was a student agitation at Ratia Ferry Ghat against kidnapping of three students and one labourer by the extremists. On this issue, the students had blocked the road. The deceased, 'T', being the local leader of the CPI (M) party, resisted the students in making agitation and blocking up the road. For that matter, PW-6 along with other accused developed a grudge in their minds to

give 'T' a good lesson. On 30.08.2000, at about 7/8 p.m., a meeting was convened in the house of the accused A-5. All the accused persons including PW-6 were present in the said meeting wherein it was decided to eliminate 'T' as he stood against the students' movement. To materialize the plan chalked out in the meeting held on 30.08.2000, 13 persons including PW-6 had spread over in different groups in different places to eliminate 'T'. All the 13 accused persons reached Ferry Ghat around 6.15 p.m. After reaching there, they found the boat carrying 'T', PW-10 and 9/10 other persons in the middle of the river. As soon as 'T' and others got down from the boat, one of the accused shouted to attack him. While 'T' was washing his feet in the river water, suddenly, PW-6 caught hold of him and dragged him down on the side of the river. He fell on the ground with his back side up. At that point of time, A-5 and A-11 fired two rounds of bullet from their pistols on 'T'. Simultaneously, a bomb had exploded on the other side of the river. The witnesses who were waiting in the passenger shed to escort the victim rushed to the place of occurrence. On seeing them, all the assailants fled towards south-east direction. [Para 31]

3.5. Regarding his change of mind, PW-6 explained that he became perplexed by the death of 'T'. He further explained that out of repentance, he once made an attempt to commit suicide by hanging himself at his residence in the middle of the month of March, 2004. Thereafter, he decided to divulge the whole incident leading to the killing of 'T' before the Court. He also asserted that he had decided to disclose the whole incident voluntarily on the advise of the members of his family. He identified all the accused persons in the Court by name and face. [Para 32]

3.6. In cross-examination, PW-6 deposed that the police arrested him in connection with this case one day

after the occurrence. He was in police custody for eight days and, thereafter, on expiry of police remand, he was granted bail. He asserted that during his stay in police custody, he was not interrogated by police. About his change of mind, in cross-examination, he explained that since 31.08.2000 till mid of March, 2004, he had been running amok. During the aforesaid intervening period, he did not meet any people to express his mental agony. He also asserted that he lost his mental peace as the murder of 'T' was taken place before his own eyes and he was also directly involved in his killing. He denied that he deposed falsely. He also denied that he was provoked by the CPI (M) party that if he turns to be an approver, he would be given a suitable job. [Para 33]

3.7. A reading of the entire evidence of PW-6 makes it clear that the reason for change of his mind for tendering pardon is acceptable and in tune with the conditions prescribed in Sections 306 and 307 of the Code. The trial Judge, who had the liberty of noting his appearance and recorded his evidence, believed his version which was rightly accepted by the High Court. On perusal of his entire evidence, it is clear that the conditions stated in Sections 306 and 307 of the Code were fully complied with and his statement is acceptable. The decision arrived at by the courts below is concurred with. [Para 34]

<u>Corroborative evidence with regard to the statement of PW-6:</u>

4. A-5 was identified by PW-1, PW-4, PW-7 and PW-8. A-7 was identified by PW-1 and PW-7. A-4 was identified by PW-1 and PW-4. A-1 was identified by PW-4 and PW-8. A-11 was identified by PW-1, PW-4, PW-7 and PW-8. Though A-9 was identified by PW-1, PW-4, PW-7 and PW-

8, inasmuch as his name has been deleted from the array of the appellants vide this Court's order dated 16.09.2009, there is no need to consider his case in these appeals. [Paras 36, 37]

Eye-witnesses in the boat

5.1. PW-1 identified A-7, A-4, A-5, A-11, A-2, A-10, A-3 and A-9. In his evidence, he deposed that 'T', the deceased, was known to him. PW-1, in his evidence, narrated the entire events commencing from conspiracy ending with gunshot on the deceased – 'T'. Though it was pointed out that he had not stated all the details in the complaint, on going through the same, this Court is satisfied that all relevant details have been stated in the complaint and the omission to mention is only negligible. Likewise, it was contended by the appellants that though there were some police personnel in the police mobile van, PW-1 did not disclose the incident to any of those police officials traveling in the said vehicle. For this, PW-1 has explained that they took the injured to Hospital first and later on, in association with his party supporters, he lodged a complaint. In such a situation, it is but natural that the person who received gunshot injury has to be admitted in the hospital and only thereafter anybody could think of the next step including making a complaint to the police. There is no infirmity in the conduct of PW-1 in not conveying anything to the police personnel in the mobile van and even his interaction with his party colleagues. The other eye-witness is PW-3, who was in the boat. It was he, who identified A-12, A-13 and A-6 as the members of attacking group. He also admitted that the deceased 'T' was known to him. Apart from three persons mentioned above, PW-3 also stated that about 10/12 persons attacked 'T'. There is no contradiction with regard to the identification of the said three assailants. Apart from eye-witnesses PW-1 and PW-3, another eye-

witness PW-11 was also present in the boat.

His evidence shows that he was also in the boat, however, he only mentioned that accused A-8 was found near the venue of the meeting and he narrated about the enquiry made by him whether 'T' would attend the meeting. Even, according to him, the said A-8 had disappeared from the place of meeting. [Para 39]

5.2. The other three persons in the boat were PW-2, PW-10, and PW-12. No doubt, all the three witnesses turned hostile since they refused to identify the assailants before the Court at the instance of the prosecution. However, as rightly observed by the High Court, they testified to the other parts of the occurrence supporting the prosecution case that on the said date and time, a group of miscreants had done to death the victim 'T'. Though, their evidence may not be fully supportable to the prosecution case, however, as observed by the High Court, it is clear from their statements that they accompanied the deceased in the same boat and corroborated with other witnesses with regard to the factum of murder though they did not identify the persons concerned. It is settled position of law that the evidence of hostile witnesses need not be rejected in its entirety but may be relied on for corroboration. [Para 39]

Eye-witnesses in the passenger shed

6.1. The four eye-witnesses, namely, PW-4, PW-7, PW-8 and PW-9 were waiting in the passenger shed on the opposite bank of the river and when the assailants had attacked the victim all of a sudden, they rushed to the spot. In his evidence, PW-4 admitted that 'T' was known to him and he was his maternal uncle. PW-7, in his examination-in-chief, stated that 'T' was murdered on 31.08.2000 by some miscreants belonging to UBLF

extremists group. According to him at the time of occurrence, he was sitting in the passenger shed which is about 100 cubics away from the place of occurrence. He also mentioned that besides him PW-8, PW-4, PW-9 were also present there. He also admitted that at that time it was drizzling. In order to protect themselves from the rain, they took shelter in the passenger shed at around 05:30 p.m. He also stated in the examination-in-chief about the meeting at Santinagar and explained that the deceased 'T' went to Santinagar to attend that peace meeting organized by DYFI. He further explained that he along with others went to Santinagar to escort 'T'. Like, PW-4, he also narrated that while he was sitting in the passenger shed, he saw a group of 12/14 persons proceeding towards Santinagar Ferry Ghat, out of which, he recognized A-5, A-11, A-9 and A-7. At about 06:30 p.m., according to him, he noticed that 'T' accompanied by about 15 persons crossing the river in a boat. The accused persons, namely, A-9, A-5, A-7 and A-11 were identified in the Court by name and face by PW-7. PW-8 was one of the persons waiting in the passenger shed at the relevant time. He admitted that 'T' was his eldest brother. He informed the Court that on 31.08.2000, his brother was killed by the miscreants at Santinagar Ferry Ghat. According to him, on that day, around 05:15 p.m., PW-7, PW-4, PW-9 and he himself were sitting in the passenger shed which is about 100 cubics away from Santinagar Ferry Ghat. PW-8 also deposed that they were waiting in the passenger shed to escort his brother who was supposed to return from Santinagar after attending a peace meeting. He also stated that there was security threat on the life of his brother because of which they used to accompany and escort him whenever he go outside in connection with any party work. When they were waiting in the passenger shed, it was drizzling and at that time they saw a good number of persons

proceeding towards Ferry Ghat out of them he recognized A-5, A-11, A-9 and A-1. He saw A-1 coming hurriedly from the other side of the river. He deposed, as soon as 'T' reached near the bank of the river he heard hue and cry and at that time he also heard sound of two rounds of fire. Thereafter, they rushed to the place of occurrence, and then the miscreants ran away towards south-east direction. On arriving at the place of occurrence, he found 'T' lying on the ground with his upside down with two bullet injuries one on the left side of his back and another on the back of his head. The wounds were bleeding profusely. With the help of others, he took his brother up to the main road and thereafter took him to the hospital in a police van. As the condition of his brother was alarming, he was shifted to GB Hospital, Agartala from Kalyanpur hospital. He identified A-1, A-9, A-11 in the Court by name and face. He also mentioned that PW-10, PW-12, PW-3, PW-11 and three others were in the boat along with his brother while crossing the river. Another witness from the passenger shed was PW-9. Like other witnesses, namely, PWs 4, 7 and 8, he also explained the said incident. Though PW-9 turned hostile, he admitted that he along with PW-8, PW-4 and PW-7 were sitting in the passenger shed with a view to escort his brother 'T'. [Para 40]

6.2. The analysis of statement of various persons, particularly, eye-witnesses clearly strengthen the case of PW-6, approver, in all aspects including conspiracy, planning to attack the deceased for his statement about the students' movement, actual incident, role played by the assailants and subsequent events after the gunshot till the death of the deceased 'T'. By these statements, the prosecution has strengthened its case through PW-6 approver and there is no reason to disbelieve his version. [Para 41]

Reliance on the hostile witness

7.1. PW-2, PW-9, PW-10 and PW-12 were declared as hostile witnesses. It is settled law that corroborated part of evidence of hostile witness regarding commission of offence is admissible. The fact that the witness was declared hostile at the instance of the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the Court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The Court should be slow to act on the testimony of such a witness, normally, it should look for corroboration with other witnesses. Merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. The evidence of hostile witness can be relied upon at least up to the extent, he supported the case of prosecution. The evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution. [Para 42]

7.2. In the instant case, eye witnesses including the hostile witnesses, firmly established the prosecution version. Five eye-witnesses, namely, PW-1, PW-4, PW-6, PW-7 and PW-8 clearly identified two convicts-appellants, A-5 and A-11. PWs 1, 4, 7 and 8 identified accused A-9. PWs 1 & 7 identified accused A-7. PWs 1 & 4 identified A-4. PWs 4 & 8 identified A-1. It is clear that 6 accused persons including two convicts-appellants had been identified by more than one eye-witnesses. It is also clear that 6 accused could have been identified by the eye

witnesses though all of them could not have been identified by the same assailants. However, it is clear that two or more than 2 eye-witnesses could identify one or more than one assailants. The general principle of appreciating evidence of eye witnesses, in such a case is that where a large number of offenders are involved, it is necessary for the Court to seek corroboration, at least, from two or more witnesses as a measure of caution. Likewise, it is the quality and not the quantity of evidence to be the rule for conviction even where the number of eye witnesses is less than two. [Para 43]

7.3. It is well settled that in a criminal trial, credible evidence of even hostile witnesses can form the basis for conviction. In other words, in the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence. As rightly observed by the High Court, there are only six accused persons namely, A-5, A-11, A-9, A-4, A-7 and A-1 identified by two or more eye witnesses while A-5 and A-11 were recognized by PWs 1, 4, 7 and 8 corroborated by PW-6 (approver). A-7 was recognized by PWs-1 & 7, A-4 by PWs 1 & 4 and A-1 by PWs 4 & 8, all of them being corroborated by PW-6 (approver). If PW-6 (approver) is included, there are three eye-witnesses who could identify six offenders including two convicts-appellants. [Para 44]

Applicability of Section 34 IPC

8.1. The reading of Section 34 IPC makes it clear that the burden lies on prosecution to prove that the actual participation of more than one person for commission of criminal act was done in furtherance of common intention at a prior concept. Further, where the evidence did not establish that particular accused has dealt blow the liability would devolve on others also who were involved with common intention and such conviction in those

cases are not sustainable. A clear distinction made out between common intention and common object is that common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or pre-concept. Though there is substantial difference between the two sections, namely, Sections 34 and 149 IPC, to some extent they also overlap and it is a question to be determined on the facts of each case. [Para 45]

8.2. There is no bar in convicting the accused under substantive section read with Section 34 if the evidence discloses commission of an offence in furtherance of the common intention of them all. It is also settled position that in order to convict a person vicariously liable under Section 34 or Section 149 IPC, it is not necessary to prove that each and every one of them had indulged in overt acts in order to apply Section 34, apart from the fact that there should be two or more accused. Two facts must be established, namely a) common intention b) participation of accused in the commission of an offence. It requires a pre-arranged plan and pre-supposes prior concept. Therefore, there must be prior meeting of minds. It can also be developed at the spur of the moment but there must be pre-arrangement or pre-meditated concept. As rightly observed by the High Court, though the trial Court was of the view that the evidence of an approver contains full and correct version of the incident so far as participation of the accused A-5 and A-11, however, there is no plausible reason by the trial Court as to why the other part of the statement of the approver could not be believed. In order to seek the aid of Section 34 IPC, it is not necessary that individual act of the accused persons has to be proved by the prosecution by direct evidence. Again, common intention has to be inferred from proved

facts and circumstances and once there exist common intention, mere presence of the accused persons among the assailants would be sufficient proof of their participation in the offence. The trial Court failed to explain or adduce sufficient reasons as to why the other part of the evidence that the accused persons named by the approver were found present in the place of occurrence could not be believed for the purpose of invoking Section 34 when two or more eye-witnesses corroborated the testimony of approver (PW-6) specifically naming six accused persons including the two convicted appellants. [Para 46]

8.3 The existence of common intention amongst the participants in the crime is the essential element for application of Section 34 and it is not necessary that the acts of several persons charged with the commission of an offence jointly must be the same or identically similar. From the evidence of eye-witnesses as well as the approver (PW-6) it is clear that one A-8 was deployed at the place of meeting at Santinagar for the purpose of giving intimation to other accused persons about the movement of the deceased. It is also seen from the evidence that one more accused was stationed on the shore of the river near Bagan Bazar. It is also seen from the evidence that after the meeting, the boat carrying 'T' and other eye-witnesses was about to reach Bagan Bazar shore, accused A-1 who was deployed there suddenly left towards Bagan Bazar and within few minutes 10 accused persons rushed to the boat from Bagan Bazar. Thereafter, the occurrence took place. From the materials placed by the prosecution, particularly, from the eye-witnesses, the common intention can be inferred among the accused persons including the six persons identified by the eye-witnesses. If the case of the prosecution is considered in the light of the disclosure made by the approver (PW-6), coupled with the statement of eye-

witnesses, it is clear that the 13 assailants had planned and remained present on the shore of the river to eliminate 'T'. In view of these materials, the High Court is right in applying Section 34 IPC and basing conviction of six accused persons including the two convicted appellants that is A-5, A-11, A-9, A-7, A-4 and A-1. [Para 47]

Medical evidence:

9.1. The Doctor who conducted the post mortem on the dead body was examined as PW-14. His report shows three fire arm wounds on the dead body of the deceased - one, measuring 0.75 cm. in radius over upper part of left anterior chest wall at posterior auxiliary plane, two, lacerated injury 3 cms. X .5 cm x bone deep occipital region, and three, lacerated injury, 4 cm x 1 cm x bone deep over occipital region of skull. PW-14 has categorically stated that the first injury was sustained by the deceased on his back. According to him, injury Nos. 2 and 3 might be received by the deceased by the same bullet if the bullet had split. There is no inconsistency between the contents of the post mortem examination report (Ex.7) and the medical evidence of PW-14, and the ocular evidence of the approver (PW-6). As rightly observed by the trial Court and the High Court, the ocular version i.e., evidence of the approver (PW-6) stands corroborated by the medical evidence of PW-14 and (Ex.7). [Para 48]

9.2. Each witness identified at least two assailants and approver (PW-6) has identified all of them. In a case of this nature where large number of persons committed the crime, it is but natural that due to fear and confusion a witness cannot recognize and remember all the assailants. If any witness furnishes all the details accurately, in that event also it is the duty of the Court to verify his version carefully. [Para 49]

Conclusion

10. The statement of approver (PW-6) inspires confidence including the conspiracy part which gets full support from the narration of the occurrence given by the eye-witnesses, more particularly, as to the deployment of some of the offenders for reporting to others about the movement of the victim. As rightly pointed out by the High Court, there is nothing wrong in accepting his entire statement and true disclosure of the incident coupled with corroboration of his evidence with the eye witnesses. The ultimate decision arrived at by the High Court is confirmed. [Paras 50, 51]

Case Law Reference:

2007 (3) SCR 507	relied on	Para 6
2007 (2) SCR 630	relied on	Para 7
2008 (2) SCR 721	relied on	Para 7
2010 (4) SCR 103	relied on	Para 7
2010 (9) SCR 1039	relied on	Para 7
2010 (12) SCR 400	relied on	Para 7
2010 (15) SCR 452	relied on	Para 7
2011 (4) SCR 1176	relied on	Para 7
2011 (5) SCR 1	relied on	Para 7
(1963) 3 SCR 830	relied on	Para 13
1969 (3) SCR 130	relied on	Para 14
1957 SCR 953	relied on	Para 15
1975 (3) SCR 453	relied on	Para 16

1985 (Supp) SCC 599	**relied on**	**Para 17**
1994 (1) Suppl. SCR 483	**relied on**	**Para 18**
AIR 1999 SC 1969	**relied on**	**Para 18**
2000 (3) Suppl. SCR 104	**relied on**	**Para 18**
2004 (6) Suppl. SCR 1	**relied on**	**Para 20**
2007 (11) SCR 997	**relied on**	**para 20**
1971 (1) SCR 617	**relied on**	**Para 21**
1977 (3) SCR 636	**relied on**	**Para 22**
1994 (2) SCR 179	**relied on**	**Para 23**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1994 of 2009.

From the Judgment and Order dated 29.01.2008 of the High Court of Gauhati, Agratala Bench in Criminal Appeal No. 90 of 2005.

WITH

Criminal Appeal No. 1719 of 2011.

Sidharth Luthra, Satyanarayan and Siddhartha Chowdhury for the Appellants.

Anuj Prakash and Gopal Singh for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J.

a) Criminal Appeal No. 1994 of 2009

1. This appeal is filed against the final judgment and order dated 29.01.2008 passed by the Gauhati High Court, Agartala Bench in Criminal Appeal No. 90 of 2005 whereby the Division Bench of the High Court, on an appeal filed by the State of

Tripura-respondent herein, reversed the order of acquittal of the appellants herein dated 19.04.2005 passed by the Additional Sessions Judge, West Tripura, Khowai in Case S.T. No. 54(WT/K)/2002 and convicted and sentenced them to imprisonment for life under Section 302 read with Section 34 of Indian Penal Code, 1860 (hereinafter referred to as "IPC") with a fine of Rs.3000/- each, in default, to suffer a further term of simple imprisonment for three months.

b) Criminal Appeal No.1719 of 2011

@ SLP (Crl.) 6728/11 Crl. M.P.17812 of 2008

2. The convicted accused, Tapan Das (A-5) and Gautam Das (A-11), against the same order of the High Court dated 29.01.2008 confirming their conviction under Section 302 IPC and imposing life sentence with a fine of Rs.3,000/- each, in default, to suffer simple imprisonment for three months filed this appeal by way of special leave petition with a delay of 62 days. Delay condoned. Leave granted.

3. **Brief facts:**

(a) On 31.08.2000, a meeting was convened in West Santinagar S.B. School at the invitation of Durgapur Local Committee of Democratic Youth Federation of India (in short "DYFI"). After the meeting was over, Tapan Chakraborty, (since deceased), a leader of DYFI accompanied by Babul Dey PW-1, Ganesh Kol PW-2, Nilai Das PW-3, Ramakanta Paul PW-10, Benu Ranjan Dhupi PW-11 and Prabir Biswas PW-12 reached Santinagar Ferry Ghat to cross the river on way to home, on the other side of the river. At about 6.30 p.m., when Tapan Chakbraborty and his companions disembarked from the boat, Ratan Sukladas (A-12) dragged him down and when he fell on the ground, Tapan Das (A-5) and Gautam Das (A-11) shot at him causing severe bullet injuries. After finishing their job, the assailants fled away. The victim was immediately taken to the local hospital but as he was sinking, he was referred to

G.B. Hospital at Agartala for specialized treatment. The victim died on the way to hospital.

(b) On the very same day, at about 08:35 p.m, one Babul Dey (PW-1) lodged a First Information Report (in short "the FIR") being FIR No. 85/2000 with the Police Station, Kalyanpur, West Tripura, Tripura. On the basis of the FIR, a case was registered under Sections 148, 149, 326 and 307 of the IPC read with Section 27 of the Arms Act, 1959 against eight persons, viz., Somesh Das (A-7), Mrinal Das (A-4), Tapan Das (A-5), Ashim Bhattacharjee (A-2), Pradip Das (A-9), Shailendra Das (A-3), Subal Deb (A-10) and Gautam Das (A-11) and others.

(c) After the death of Tapan Chakraborty, Section 302 IPC was also added against the accused persons. During the investigation, the Investigating Officer arrested 13 accused persons and on completion, filed a report under Section 173 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") under Sections 148, 149, 326 and 302 IPC and Section 27 of the Arms Act against Somesh Das (A-7), Mrinal Das (A-4), Tapan Das (A-5), Ashim Bhattacharjee (A-2), Pradip Das (A-9), Shailendra Das (A-3), Subal Deb (A-10), Gautam Das (A-11), Anil Das (A-1), Bikash Das (A-6), Uttam Shil (A-8), Ratan Sukladas (A-12) and Radha Kant Das (A-13).

(d) Vide order dated 12.08.2002, the Additional Sessions Judge, Khowai, West Tripura, framed charges under Sections 148, 149 and 302 IPC against all the 13 accused persons. Thereafter on 20.11.2002, on the request of the Special Public Prosecutor to alter the charges, the Additional Sessions Judge modified the charges under Section 302 read with Section 34/ 120B IPC and Section 27 of the Arms Act.

(e) During the recording of evidence, on 16.06.2004, accused Ratan Sukladas (A-12) filed an application praying for grant of 'pardon' and to treat him as an 'approver' which was granted by the trial Court. After examining all the witnesses, the

trial Court, vide judgment dated 19.04.2005, acquitted Anil Das (A-1), Ashim Bhattacharjee (A-2), Shailendra Das (A-3), Mrinal Das (A-4), Bikash Das (A-6), Somesh Das (A-7), Uttam Shil (A-8), Pradip Das (A-9), Subal Deb (A-10) and Radha Kant Das (A-13) of the charges leveled against them and convicted Tapan Das (A-5) and Gautam Das (A-11) for the offences punishable under Section 302 of the IPC and sentenced them to suffer rigorous imprisonment for life and to pay a fine of Rs.3,000/- each, in default, to further undergo simple imprisonment for three months.

(f) Aggrieved by the judgment of the trial Court, Tapan Das (A-5) and Gautam Das (A-11) filed an appeal being Criminal Appeal No. 47 of 2005 in the Gauhati High Court, Agartala Bench. The State of Tripura also filed Criminal Appeal No. 90 of 2005 against the order of acquittal of ten accused persons by the trial Court. The High Court, by impugned common judgment dated 29.01.2008, dismissed the appeal filed by the convicted accused persons (A-5 and A-11) and partly allowed the appeal filed by the State by setting aside the acquittal of four persons, namely, Mrinal Das (A-4), Pradip Das (A-9), Somesh Das (A-7) and Anil Das (A-1) and convicted them under Sections 302/34 IPC and sentenced them with imprisonment for life with a fine of Rs.3000/- each, in default, to suffer a further term of simple imprisonment for three months.

(g) Aggrieved by the common impugned judgment dated 29.01.2008 passed by the Division Bench of the High Court, all the convicted accused persons filed these appeals before this Court by way of special leave. Vide this Court's order dated 16.09.2009, the name of Pradip Das, appellant No.2 herein and (A-9) before the trial Court has been deleted from the array of the parties as he is not traceable.

4. Heard Mr. Sidharth Luthra, learned senior counsel for the appellants and Mr. Anuj Prakash, learned counsel for respondent-State.

Legal position with regard to interference in Appeal against Acquittal:

5. Since the High Court has interfered in the case of acquittal, let us consider the general principles enunciated by this Court with regard to the same.

6. In *State of Goa vs. Sanjay Thakran & Anr.* (2007) 3 SCC 755, this Court while considering the power of appellate court to interfere in an appeal against acquittal, after adverting to various earlier decisions on this point has concluded as under:-

> "16…..while exercising the powers in appeal against the order of acquittal the court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterised as perverse. Merely because two views are possible, the court of appeal would not take the view which would upset the judgment delivered by the court below. However, the appellate court has a power to review the evidence if it is of the view that the view arrived at by the court below is perverse and the court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate court, in such circumstances, to reappreciate the evidence to arrive at a just decision on the basis of material placed on record to find out whether any of the accused is connected with commission of the crime he is charged with."

7. In *Chandrappa and Others vs. State of Karnataka* (2007) 4 SCC 415, while considering the similar issue, namely, appeal against acquittal and power of the appellate court to reappreciate, review or reconsider evidence and interfere with the order of acquittal, this Court, reiterated the principles laid down in the above decisions and further held that:-

> **"42…..**The following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:
>
> (1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.
>
> (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
>
> (3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.
>
> (4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. *Firstly,* the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. *Secondly,* the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.
>
> (5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

The same principles have been reiterated in several recent decisions of this Court vide *State of Uttar Pradesh vs. Jagram and Others,* (2009) 17 SCC 405, *Sidhartha Vashisht alias Manu Sharma vs. State (NCT of Delhi)* (2010) 6 SCC 1, *Babu vs. State of Kerala,* (2010) 9 SCC 189, *Ganpat vs. State of Haryana and Others,* (2010) 12 SCC 59, *Sunil Kumar Sambhudayal Gupta (Dr.) and Others vs. State of Maharashtra,* (2010) 13 SCC 657, *State of Uttar Pradesh vs. Naresh and Others,* (2011) 4 SCC 324, *State of Madhya Pradesh vs. Ramesh and Another,* (2011) 4 SCC 786.

8. It is clear that in an appeal against acquittal in the absence of perversity in the judgment and order, interference by this Court exercising its extraordinary jurisdiction, is not warranted. However, if the appeal is heard by an appellate court, being the final court of fact, is fully competent to re-appreciate, reconsider and review the evidence and take its own decision. In other words, law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court. If two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal. There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is found and to come to its own conclusion. The appellate court can also review the conclusion arrived at by the trial Court with respect to both facts and law. While dealing with the appeal against acquittal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and only by giving cogent and adequate reasons set aside the judgment of acquittal. An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a

compelling reason for interference. When the trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts etc., the appellate court is competent to reverse the decision of the trial Court depending on the materials placed.

9. With the above principles, let us analyse the reasonings and ultimate conclusion of the High Court in interfering with the order of acquittal and also the confirmation of sentence on the two convicted appellants.

Evidentiary value of Approver/Accomplice:

10. Before considering the impugned judgment on merits, inasmuch as the High Court heavily relied on the evidence of the "approver", let us find out the legal position about the evidentiary value of "approver" and its acceptability with or without corroboration.

11. Though a conviction is not illegal merely because it proceeds on the uncorroborated testimony of an approver, yet the universal practice is not to convict upon the testimony of an accomplice unless it is corroborated in material particulars. The evidence of an approver does not differ from the evidence of any other witness save in one particular aspect, namely, that the evidence of an accomplice is regarded ab initio as open to grave suspicion.

12. If the suspicion which attaches to the evidence of an accomplice be not removed, that evidence should not be acted upon unless corroborated in some material particulars; but if the suspicion attaching to the accomplice's evidence be removed, then that evidence may be acted upon even though uncorroborated, and the guilt of the accused may be established upon the evidence alone.

13. In order to understand the correct meaning and application of this term, it is desirable to mention Section 133

of the Indian Evidence Act, 1872 along with Illustration (b) to Section 114 which read as under:-

"**133. Accomplice .-** An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

Illustration (b) to Section 114

"(b) The Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars."

Dealing with the scope and ambit of the above-noted two provisions, this Court, in Bhiva Doulu Patil v. State of Maharahshtra, AIR 1963 SC 599=(1963) 3 SCR 830 has held that both the sections are part of one subject and have to be considered together. It has further been held:-

"The combined effect of Sections 133 and Illustration (b) to Section 114, may be stated as follows:

According to the former, which is a Rule of law, an accomplice is competent to give evidence and according to the latter, which is a Rule of practice it is almost always unsafe to convict upon his testimony alone. Therefore, though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal yet the courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars."

14. The very same principle was reiterated in *Mohd. Husain Umar Kochra etc. v. K. S. Dalipsinghji and Another etc.,* (1969) 3 SCC 429 and it was held :—

"…. The combined effect of Sections 133 and 114, Illustration (b) is that though a conviction based upon accomplice evidence is legal, the Court will not accept

such evidence unless it is corroborated in material particulars. The corroboration must connect the accused with the crime. It may be direct or circumstantial. It is not necessary that the corroboration should confirm all the circumstances of the crime. It is sufficient if the corroboration is in material particulars. The corroboration must be from an independent source. One accomplice cannot corroborate another."

15. While considering the validity of approver's testimony and tests of credibility, this Court, in *Sarwan Singh S/o Rattan Singh vs. State of Punjab* AIR 1957 SC 637 has held as under:-

"7…..An accomplice is undoubtedly a competent witness under the Indian Evidence Act. There can be, however, no doubt that the very fact that he has participated in the commission of the offence introduces a serious stain in his evidence and Courts are naturally reluctant to act on such tainted evidence unless it is corroborated in material particulars by other independent evidence. It would not be right to expect that such independent corroboration should cover the whole of the prosecution story or even all the material particulars. If such a view is adopted it would render the evidence of the accomplice wholly superfluous. On the other hand, it would not be safe to act upon such evidence merely because it is corroborated in minor particulars or incidental details because, in such a case, corroboration does not afford the necessary assurance that the main story disclosed by the approver can be reasonably and safely accepted as true. But it must never be forgotten that before the court reaches the stage of considering the question of corroboration and its adequacy or otherwise, the first initial and essential question to consider is whether even as an accomplice the approver is a reliable witness. If the answer to this question is against the approver then there is an end of the matter,

and no question as to whether his evidence is corroborated or not falls to be considered. In other words, the appreciation of an approver's evidence has to satisfy a double test. His evidence must show that he is a reliable witness and that is a test which is common to all witnesses. If this test is satisfied the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration. This test is special to the cases of weak or tainted evidence like that of the approver…..

8…..Every person who is a competent witness is not a reliable witness and the test of reliability has to be satisfied by an approver all the more before the question of corroboration of his evidence is considered by criminal courts"

16. Further, in *Ravinder Singh v. State of Haryana,* (1975) 3 SCC 742, this Court, while considering the approver's testimony within the meaning of Section 133 of the Indian Evidence Act, 1872 has observed :—

"12. An Approver is a most unworthy friend, if at all, and he, having bargained for his immunity, must prove his worthiness for credibility in Court. This test is fulfilled, firstly, if the story he relates involves him in the crime and appears intrinsically to be a natural and probable catalogue of events that had taken place. Secondly, once that hurdle is crossed, the story given by an approver so far as the accused on trial is concerned, must implicate him in such a manner as to give rise to a conclusion of guilt beyond reasonable doubt. In a rare case, taking into consideration all the factors, circumstances and situation governing a particular case, conviction based on the uncorroborated evidence of an approver confidently held to be true and reliable by the Court may be permissible. Ordinarily, however, an approver's statement has to be corroborated in material particulars bridging closely the

distance between the crime and the criminal. Certain clinching features of involvement disclosed by an approver appertaining directly to an accused, if reliable, by the touchstone of other independent credible evidence, would give the needed assurance for acceptance of his testimony on which a conviction may be based."

17. In *Abdul Sattar v. Union Territory, Chandigarh,* 1985 (Supp) SCC 599 where the prosecution had sought to prove its case by relying upon the evidence of the approver, it was held that the approver is a competent witness but the position in law is fairly well settled that on the uncorroborated testimony of the approver, it would be risky to base the conviction, particularly, in respect of a serious charge like murder. Once the evidence of the approver is found to be not reliable, the worth of his evidence is lost and such evidence, even by seeking corroboration, cannot be made the foundation of a conviction.

18. The above said ratio has been reaffirmed and reiterated by this Court in *Suresh Chandra Bahri v. State of Bihar* (1995 Supp (1) SCC 80); *Ramprasad v. State of Maharashtra, :* AIR 1999 SC 1969 : (1999 Cri LJ 2889) and *Narayan Chetanram Chaudhary v. State of Maharashtra, :* (2000) 8 SCC 457.

19. In *Narayan Chetanram Chaudhary* (supra), it was further held that for corroborative evidence, the court must look at the broad spectrum of the approver's version and then find out whether there is other evidence to corroborate and lend assurance to that version. The nature and extent of such corroboration may depend upon the facts of different cases. Corroboration need not be in the form of ocular testimony of witnesses and may even be in the form of circumstantial evidence. Corroborative evidence must be independent and not vague or unreliable.

20. Similar question again came up for consideration before this Court in *K. Hashim v State of Tamil Nadu,* (2005)

1 SCC 237 : 2005 Cri LJ 143 and *Sitaram Sao @ Mungeri v State of Jharkhand,* (2007) 12 SCC 630 wherein this Court has held that:

> "26. Section 133 of the Evidence Act expressly provides that an accomplice is a competent witness and the conviction is not illegal merely because it proceeds on an uncorroborated testimony of an accomplice. In other words, this section renders admissible such uncorroborated testimony. But this Section has to be read along with Section 114, illustration (b). The latter section empowers the Court to presume the existence of certain facts and the illustration elucidates what the Court may presume and make clear by means of examples as to what facts the Court shall have regard in considering whether or not maxims illustrated apply to a given case. Illustration (b) in express terms says that accomplice is unworthy of credit unless he is corroborated in material particulars. The Statute permits the conviction of an accused on the basis of uncorroborated testimony of an accomplice but the rule of prudence embodied in illustration (b) to Section 114 of the Evidence Act strikes a note of warning cautioning the Court that an accomplice does not generally deserve to be believed unless corroborated in material particulars. In other words, the rule is that the necessity of corroboration is a matter of prudence except when it is safe to dispense with such corroboration must be clearly present in the mind of the Judge"

21. In *Sheshanna Bhumanna Yadav vs. State of Maharashtra* (1970) 2 SCC 122, the test of reliability of approver's evidence and rule as to corroboration was discussed. The following discussion and conclusion are relevant which read as under:-

> "12. The law with regard to appreciation of approver's evidence is based on the effect of Sections 133 and 114,

> illustration (b) of the Evidence Act, namely, that an accomplice is competent to depose but as a rule of caution it will be unsafe to convict upon his testimony alone. The warning of the danger of convicting on uncorroborated evidence is therefore given when the evidence is that of an accomplice. The primary meaning of accomplice is any party to the crime charged and some one who aids and abets the commission of crime. The nature of corroboration is that it is confirmatory evidence and it may consist of the evidence of second witness or of circumstances like the conduct of the person against whom it is required. Corroboration must connect or tend to connect the accused with the crime. When it is said that the corroborative evidence must implicate the accused in material particulars it means that it is not enough that a piece of evidence tends to confirm the truth of a part of the testimony to be corroborated. That evidence must confirm that part of the testimony which suggests that the crime was committed by the accused. If a witness says that the accused and he stole the sheep and he put the skins in a certain place, the discovery of the skins in that place would not corroborate the evidence of the witness as against the accused. But if the skins were found in the accused's house, this would corroborate because it would tend to confirm the statement that the accused had some hand in the theft.
>
> 13. This Court stated the law of corroboration of accomplice evidence in several decisions. One of the earlier decision is *Sarwan Singh v. State of Punjab,* 1957 SCR 953 and the recent decision is *Lachi Ram v. State of Punjab,* (1967) 1 SCR 243. In Sarwan Singh case this Court laid down that before the court would look into the corroborative evidence it was necessary to find out whether the approver or accomplice was a reliable witness. This Court in Lachi Ram case said that the first test of reliability of approver and accomplice evidence was for the

court to be satisfied that there was nothing inherently impossible in evidence. After that conclusion is reached as to reliability corroboration is required. The rule as to corroboration is based on the reasoning that there must be sufficient corroborative evidence in material particulars to connect the accused with the crime."

22. In *Dagdu and Ors. vs. State of Maharashtra,* (1977) 3 SCC 68, the scope of Section 133 and Illustration (b) to Section 114 of the Indian Evidence Act, 1872 and nature of rule of corroboration of accomplice evidence was explained by a three-Judge Bench of this Court in the following manner:

> **"24.** In *Bhiiboni Sahu v. King* the Privy Council after noticing Section 133 and Illustration (b) to Section 114 of the Evidence Act observed that whilst it is not illegal to act on the uncorroborated evidence of an accomplice, it is a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act on the evidence of an accomplice unless it is corroborated in material respects so as to implicate the accused; and further that the evidence of one accomplice cannot be used to corroborate the evidence of another accomplice. The rule of prudence was based on the interpretation of the phrase "corroborated in material particulars" in Illustration (b). Delivering the judgment of the Judicial Committee, Sir John Beaumont observed that the danger of acting on accomplice evidence is not merely that the accomplice is on his own admission a man of bad character who took part in the offence and afterwards to save himself betrayed his former associates, and who has placed himself in a position in which he can hardly fail to have a strong bias in favour of the prosecution; the real danger is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue. He may implicate ten people in an offence and the story may be true in all its details as to eight of them but untrue

> as to the other two whose names may have been introduced because they are enemies of the approver. The only real safeguard therefore against the risk of condemning the innocent with the guilty lies in insisting on independent evidence which in some measure implicates each accused.
>
> **25.** This Court has in a series of cases expressed the same view as regards accomplice evidence. (See *State of Bihar v. Basawan Singh; Hari Charan Kurmi v. State of Bihar; Haroon Haji Abdulla v. State of Maharashtra;* and *Ravinder Singh v. State of Haryana.*) In Haricharan, Gajendragadkar, C.J., speaking for a five-Judge Bench observed that the testimony of an accomplice is evidence under Section 3 of the Evidence Act and has to be dealt with as such. The evidence is of a tainted character and as such is very weak; but, nevertheless, it is evidence and may be acted upon, subject to the requirement which has now become virtually a part of the law that it is corroborated in material particulars."

23. In *Rampal Pithwa Rahidas and Others vs. State of Maharashtra,* 1994 Supp (2) SCC 73, while considering the very same provisions, this Court has held that approver's evidence must be corroborated in material particulars by direct or circumstantial evidence. This Court further held that while considering credibility of the approver and weight to be attached to his statement, the statement made in bail application of approver can be looked into by the court.

24. It is clear that once the evidence of the approver is held to be trustworthy, it must be shown that the story given by him so far as an accused is concerned, must implicate him in such manner as to give rise to a conclusion of guilt beyond reasonable doubt. Insistence upon corroboration is based on the rule of caution and is not merely a rule of law. Corroboration need not be in the form of ocular testimony of witnesses and may even be in the form of circumstantial evidence.

25. Keeping the legal principles enunciated by this Court in respect of interference by the appellate court in case of acquittal by the trial Court and evidentiary value of "approver"/ "accomplice", let us discuss the oral and documentary evidence led in by the prosecution and the defence.

Approver's evidence (PW-6)

26. One Ratan Sukladas S/o Prafullya Sukladas, originally charged as accused No. 12, after tendering pardon was examined as PW-6 on the side of the prosecution. Mr. Sidharth Luthra, learned senior counsel for the appellants submitted that inasmuch as PW-6 waited for four years to change his mind and sought pardon for his action, his statement is not reliable and the courts below ought to have rejected his testimony. In order to appreciate the said contention, it is useful to refer the relevant provisions of the Code relating to tender of pardon and power to direct tender of pardon to approver/accomplice.

27. Sections 306 and 307 of the Code read as under:

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

(2) XXXXX

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

(a) His reasons for so doing;

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

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

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

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

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

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

(a) Commit it for trial-

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

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

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

"**307. Power to direct tender of pardon.—**At any time after commitment of a case but before Judgment is passed, the court to which the commitment is made may, with a view, to obtaining at the trial the evidence of any

person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person."

28. The principle of tendering pardon to an accomplice is to unravel the truth in a grave offence so that guilt of the other accused persons concerned in commission of crime could be brought home. The object of Section 306 of the Code of Criminal Procedure, 1973 (in short "the Code") is to allow pardon in cases where heinous offence is alleged to have been committed by several persons so that with the aid of the evidence of the person granted pardon, the offence may be brought home to the rest. This Section empowers the Chief Judicial Magistrate or a Metropolitan Magistrate to tender a pardon to a person supposed to have been directly or indirectly concerned in or privy to an offence to which the section applies, at any stage of the investigation or inquiry or trial of the offence on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence. Under Section 306 of the Code, the Magistrate of the First Class is also empowered to tender pardon to an accomplice at any stage of inquiry or trial but not at the stage of investigation on condition of his making full and true disclosure of the entire circumstances within his knowledge relative to the crime. Section 307 of the Code vests the Court to which the commitment is made, with power to tender a pardon to an accomplice. An accomplice who has been granted pardon under Section 306 or 307 of the Code gets protection from prosecution. When he is called as a witness for the prosecution, he must comply with the condition of making a full and true disclosure of the whole of the circumstances within his knowledge concerning the offence and to every other person concerned, whether as principal or abettor, in the commission thereof and if he suppresses anything material and essential within his knowledge concerning the commission of crime or fails or refuses to comply with the condition on which the tender was made and the Public Prosecutor gives his

certificate under Section 308 of the Code to that effect, the protection given to him can be lifted.

29. Section 306 (4) makes it clear that the person accepting a tender of pardon should be examined as a witness first in the Court of Magistrate and subsequently in the trial Court. Once an accused is granted pardon under Section 306, he ceases to be an accused and becomes witness for the prosecution. Regarding the delay in tendering pardon, it is not in dispute that the trial commenced on 11.03.2003 with the examination of prosecution witnesses. The approver – PW-6, submitted his application to become an approver on 16.06.2004 well before the judgment which was delivered on 19.04.2005. We have already quoted Section 307 of the Code which denotes that pardon can be tendered at any time after commitment of a case but before the judgment is pronounced. In view of the same, inasmuch as the approver submitted his application well before the judgment was delivered, i.e., on 19.04.2005, the contention regarding delay on the part of PW-6 is liable to be rejected.

30. It is also not in dispute that initially, PW-6 was one of the 13 accused persons charged with the offence of murder and in the array of accused, he was shown as (A-12). Accordingly, the prosecution is justified in taking the stand that the approver (PW-6) was directly or indirectly concerned in or privy to the offence of murder. In view of the same and in the light of the language used in Section 307 of the Code, the Courts below are right in entertaining the evidence of PW-6 as approver. As regards the condition prescribed in Section 306 of the Code that the approver must make a full and true disclosure of the whole of the circumstances, let us analyze his statement whether he complied with the above said requirement.

31. In his examination-in-chief, he had clearly stated that he was one of the accused in the case and during investigation he was arrested by the police. On completion of investigation,

the investigating agency submitted charge-sheet against him along with others for trial. In categorical terms, he asserted that he was aware of the whole incident which led to the killing of Tapan Chakraborty and also asserted that he was also connected with and involved in his murder along with others. He highlighted that on 21.08.2000, there was a public meeting organized by CPI (M) party at Santinagar. The deceased, Tapan Chakraborty and other party leaders attended the said meeting. In the year 2000, there was a student agitation at Ratia Ferry Ghat against kidnapping of three students and one labourer by the extremists. On this issue, the students had blocked the road. The deceased, Tapan Chakraborty, being the local leader of the CPI (M) party, resisted the students in making agitation and blocking up the road. For that matter, PW-6 along with other accused developed a grudge in their minds to give Tapan Chakraborty a good lesson. On 30.08.2000, at about 7/8 p.m., a meeting was convened in the house of the accused Tapan Das (A-5). All the accused persons including PW-6 were present in the said meeting wherein it was decided to eliminate Tapan Chakraborty as he stood against the students' movement. He further highlighted that two days back, prior to holding of meeting on 30.08.2000, they saw posters hanging on the walls that a meeting of CPI (M) would be held at Santinagar on 31.08.2000 at 3:00 p.m where Ramakanta Paul (PW-10) and Tapan Chakraborty would remain present. To materialize the plan chalked out in the meeting held on 30.08.2000, 13 persons including PW-6 had spread over in different groups in different places to eliminate Tapan Chakraborty. Uttam Shil (A-8) was deputed on the other side of the river to let them informed when Tapan Chakraborty would be proceeding towards Bagan Bazar on conclusion of meeting. Radha Kant Das (A-13), Ashim Bhattacharjee (A-2), Bikash Das (A-6), Mrinal Das (A-4), Shailendra Das (A-3) and PW-6 were waiting at Bagan Bazar. Another group of persons consisting of Tapan Das (A-5), Gautam Das (A-11), Somesh Das (A-7), Pradip Das (A-9) were waiting in the house of Anil

Das (A-1). All were keeping watch and observing the situation till 4 p.m. Around 6 p.m., they were informed by Anil Das (A-1) that the meeting at Santinagar had been over and the participants of the said meeting had started for the Ferry Ghat to cross the river. The persons assembled in the house of Anil Das (A-1) started for Ferry Ghat. On seeing them, another group including PW-6 waiting at Bagan Bazar also followed them. All the aforesaid 13 persons reached Ferry Ghat around 6.15 p.m. After reaching there, they found the boat carrying Tapan Chakraborty, Ramakanta Paul PW-10 and 9/10 other persons in the middle of the river. As soon as Tapan Chakraborty and others got down from the boat, one of the accused shouted to attack him. While Tapan Chakraborty was washing his feet in the river water, suddenly, PW-6 caught hold of him and dragged him down on the side of the river. He fell on the ground with his back side up. At that point of time, Tapan Das (A-5) and Gautam Das (A-11) fired two rounds of bullet from their pistols on Tapan Chakraborty. Simultaneously, a bomb had exploded on the other side of the river. The witnesses who were waiting in the passenger shed to escort the victim rushed to the place of occurrence. On seeing them, all the assailants fled towards south-east direction. PW-6 crossed the river along with others taking the route of Ratia to conceal themselves. They were advised by Tapan Das (A-5) and Gautam Das (A-11) to keep themselves confined in their respective houses. On the following day, PW-6 came to know from local news broadcasted by the All India Radio that Tapan Chakraborty died following the gun shots.

32. Regarding his change of mind, PW-6 explained that he became perplexed by the death of Tapan Chakraborty. He further explained that out of repentance, he once made an attempt to commit suicide by hanging himself at his residence in the middle of the month of March, 2004. Thereafter, he decided to divulge the whole incident leading to the killing of Tapan Chakraborty before the Court. He also asserted that he had decided to disclose the whole incident voluntarily on the

advise of the members of his family. He identified all the accused persons in the Court by name and face.

33. In cross-examination, PW-6 deposed that the police arrested him in connection with this case one day after the occurrence. He was in police custody for eight days and, thereafter, on expiry of police remand, he was granted bail. He asserted that during his stay in police custody, he was not interrogated by police. About his change of mind, in cross-examination, he explained that since 31.08.2000 till mid of March, 2004, he had been running amok. During the aforesaid intervening period, he did not meet any people to express his mental agony. He also asserted that he lost his mental peace as the murder of Tapan Chakraborty was taken place before his own eyes and he was also directly involved in his killing. He denied that he deposed falsely. He also denied that he was provoked by the CPI (M) party that if he turns to be an approver, he would be given a suitable job.

34. A reading of the entire evidence of PW-6 makes it clear that the reason for change of his mind for tendering pardon is acceptable and in tune with the conditions prescribed in Sections 306 and 307 of the Code. The trial Judge, who had the liberty of noting his appearance and recorded his evidence, believed his version which was rightly accepted by the High Court. On going through his entire evidence, the conditions stated in Sections 306 and 307 of the Code are fully complied with and we accept his statement and concur with the decision arrived at by the courts below.

Corroborative evidence with regard to the statement of PW-6:

35. In the FIR, the following persons have been named as accused relating to the occurrence, namely, Anil Das (A-1), Ashim Bhattacharjee (A-2), Shailendra Das (A-3), Mrinal Das (A-4), Tapan Das (A-5), Bikash Das (A-6), Somesh Das (A-7), Uttam Shil (A-8), Pradip Das (A-9), Subal Deb (A-10),

Gautam Das (A-11), Ratan Sukladas (A-12) (turned approver) and Radha Kant Das (A-13).

36. Ratan Sukladas who turned as an 'approver' and was examined as PW-6, named all the 13 accused (including himself). He mentioned the following persons as accused, namely, Anil Das (A-1), Ashim Bhattacharjee (A-2), Shailendra Das (A-3), Mrinal Das (A-4), Tapan Das (A-5), Bikash Das (A-6), Somesh Das (A-7), Uttam Shil (A-8), Pradip Das (A-9), Subal Deb (A-10), Gautam Das (A-11), and Radha Kant Das (A-13).

37. Among the 13 accused, we are concerned only with Tapan Das (A-5) and Gautam Das (A-11) in these appeals, who were convicted by the trial Court and their conviction was confirmed by the High Court and Somesh Das (A-7), Mrinal Das (A-4) and Anil Das (A-1), who were acquitted by the trial Court and convicted by the High Court. Except the abovementioned 5 accused persons, we are not concerned with others. Tapan Das (A-5) was identified by Babul Dey (PW-1), Nehar Ranjan Deb (PW-4), Bidhu Urang (PW-7) and Pranab Chakraborty (PW-8). Somesh Das (A-7) was identified by Babul Dey (PW-1) and Bidhu Urang (PW-7). Mrinal Das (A-4) was identified by Babul Dey (PW-1) and Nehar Ranjan Deb (PW-4). Anil Das (A-1) was identified by Nehar Ranjan Deb (PW-4) and Pranab Chakraborty (PW-8). Gautam Das (A-11) was identified by Babul Dey (PW-1), Nehar Ranjan Deb (PW-4), Bidhu Urang (PW-7) and Pranab Chakraborty (PW-8). Though Pradip Das (A-9) was identified by Babul Dey (PW-1), Nehar Ranjan Deb (PW-4), Bidhu Urang (PW-7) and Pranab Chakraborty (PW-8), inasmuch as his name has been deleted from the array of the appellants vide this Court's order dated 16.09.2009, there is no need to consider his case in these appeals.

38. Now let us analyse the witnesses relied on by the prosecution.

Eye-witnesses in the boat

39. Babul Dey - PW-1 identified Somesh Das (A-7), Mrinal Das (A-4), Tapan Das (A-5), Gautam Das (A-11), Ashim Bhattacharjee (A-2), Subal Deb (A-10), Shailendra Das (A-3) and Pradip Das (A-9). In his evidence, he deposed that Tapan Chakraborty, the deceased, was known to him. He admitted that he belongs to DYFI, which is the youth wing of CPI(M) party. The deceased was the Vice-Chairman of Kalyanpur Block and was also the Secretary of DYFI. He explained that a meeting was held at Durgapur on 31.08.2000 which was started at 3 p.m. and completed at 5 p.m. He along with Tapan Chakraborty attended the said meeting. After completion of the meeting, all the participants including him left for Kalyanpur by crossing the river by a boat. At around 06:00 p.m., after crossing the river, when Tapan Chakraborty was washing his feet in the river water, some miscreants pushed him and they were also using abusive language towards him. They opened gun fire in the air. On seeing this, he along with others fled to the retiring shed nearby the river where some members of the party were waiting for them. He also noticed that the assailants were running towards north and they were 15/16 in number. When he along with others returned to the place of occurrence, they found Tapan Chakraborty lying on the ground in injured condition. They took Tapan Chakraborty to Kalyanpur Hospital in a mobile police van. On the advise of the doctors, Tapan Chakraborty was shifted to G.B. Hospital, Agartala. He admitted that he did not go to G.B. Hospital. However, he came to learn that on the way to G.B. Hospital, Tapan Chakraborty succumbed to his injuries. He along with Ramakanta Paul (PW-10) and others then went to their Party office and discussed the matter and decided to lodge a complaint to the police. Accordingly, their Secretary, Sunil Deb scribed an ejahar as per the version of PW-1 and after writing the same, he read over the same to him and after satisfying that it was written as per his version, he put his signature therein. In the witness box, he identified his signature which was marked as Ex.1. He also informed the Court that the

accused persons were the supporters of Congress (I) party. He also clarified that two of the miscreants were supporters of Amara Bengali Party.

(a) Babul Dey was examined as PW-1. In his evidence, he narrated the entire events commencing from conspiracy ending with gunshot on the deceased - Tapan Chakraborty. Though it was pointed out that he had not stated all the abovementioned details in the complaint, on going through the same, we are satisfied that all relevant details have been stated in the complaint and the omission to mention is only negligible. Likewise, it was commended by the counsel for the appellants that though there were some police personnel in the police mobile van, PW-1 did not disclose the incident to any of those police officials traveling in the said vehicle. For this, PW-1 has explained that they took the injured to Kalyanpur Hospital first and later on, in association with his party supporters, he lodged a complaint. In such a situation, it is but natural that the person who received gunshot injury has to be admitted in the hospital and only thereafter anybody could think of the next step including making a complaint to the police. We are satisfied that there is no infirmity in the conduct of PW-1 in not conveying anything to the police personnel in the mobile van and even his interaction with his party colleagues. PW-1 has also admitted that Tapan Chakraborty was the Secretary of DYFI, because of which it was argued that due to political rivalry, he had falsely implicated the accused persons. In view of the above discussion, we are not impressed upon such objection and reject the same.

(b) The other eye-witness is Nitai Das (PW-3), who was in the boat. It was he, who identified Ratan Sukladas (A-12), Radha Kant Das (A-13) and Bikash Das (A-6) as the members of attacking group. He also admitted that the deceased Tapan Chakraborty was known to him. Like PW-1, he also explained that the meeting was held at Santinagar between 3:00 p.m. to 5:45 p.m. He along with Tapan Chakraborty and others reached

Santinagar through Ferry Ghat. They crossed the river by boat and got down on the other side of the river and in that process, according to him, he heard sound of gunshot and simultaneously a bomb was hurled from the other side of the river. Due to fear, they fled at a distance of 10 cubics from the place of occurrence and some people who were waiting in the passenger shed rushed to the spot. When he along with others returned to the place of occurrence, he found Tapan Chakbraborty lying on the ground in injured condition. Apart from three persons mentioned above, he also stated that about 10/12 persons attacked Tapan Chakraborty. The miscreants, after commission of offence, fled towards south-east direction. Thereafter, they took him to Kalyanpur Hospital in a police van. He was examined by the I.O. on the same night, that is, at about 9.00 p.m., to whom also he disclosed the names of the above said accused persons. There is no contradiction with regard to the identification of the said three assailants. Though counsel for the appellants has pointed out certain omissions, on going through the same, we are satisfied that these omissions were not at all material and the High Court has rightly relied on and accepted his evidence.

(c) Apart from eye-witnesses PW-1 and PW-3, another eye-witness Benu Ranjan Dhupi (PW-11) was also present in the boat. According to him, on the fateful day, that is, on 31.08.2000 around 3.00 p.m., he met Tapan Chakraborty at Bagan Bazar who requested him to go to Santinagar well ahead in connection with peace meeting to be held there and to supervise and see that everything was in order. According to him, as directed by Tapan Chakraborty, he reached Santinagar at 3:00 p.m. He mentioned that Uttam Shil (A-8) enquired from him whether Tapan Chakraborty would attend the meeting. After concluding the meeting, Tapan Chakraborty and others including PW-11 got into the boat to cross the river. While he was getting down from the boat, he heard hue and cry and some one saying “attack them attack them”. He also heard a sound of explosion of bomb on the other side of the

river and the sound of two rounds of fire. Thereafter, he fled from the spot due to fear. According to him, after 10 days of the aforesaid occurrence, he met Ramakanta Paul (PW-10) at Bagan Bazar. His evidence shows that he was also in the boat, however, he only mentioned that accused Uttam Shil (A-8) was found near the venue of the meeting and he narrated about the enquiry made by him whether Tapan Chakraborty would attend the meeting. Even, according to him, the said Uttam Shil (A-8) had disappeared from the place of meeting.

(d) The other three persons in the boat were Ganesh Kol (PW-2), Ramakanta Paul (PW-10), and Prabir Biswas (PW-12). No doubt, all the three witnesses turned hostile since they refused to identify the assailants before the Court at the instance of the prosecution. However, as rightly observed by the High Court, they testified to the other parts of the occurrence supporting the prosecution case that on the said date and time, a group of miscreants had done to death the victim Tapan Chakraborty. Though, their evidence may not be fully supportable to the prosecution case, however, as observed by the High Court, it is clear from their statements that they accompanied the deceased in the same boat and corroborated with other witnesses with regard to the factum of murder though they did not identify the persons concerned. It is settled position of law that the evidence of hostile witnesses need not be rejected in its entirety but may be relied on for corroboration.

Eye-witnesses in the passenger shed

40. Now, let us discuss the eye-witnesses who were present in the passenger shed.

(a) The four eye-witnesses, namely, Nehar Ranjan Deb (PW-4), Bidhu Urang (PW-7), Pranab Chakraborty (PW-8) and Satyendra Tanti (PW-9) were waiting in the passenger shed on the opposite bank of the river and when the assailants had attacked the victim all of a sudden, they rushed to the spot. In

his evidence, Nehar Ranjan Deb (PW-4) admitted that Tapan Chakraborty was known to him and he was his maternal uncle. He was the Vice-Chairman of Kalyanpur Panchayat Society. On 31.08.2000, in the evening, at around 06:30 p.m., he went to a tea stall at Bagan Bazar and found Pranab Chakraborty (PW-8), younger brother of Tapan Chakraborty. Pranab Chakraborty told him that Tapan had gone to Santinagar to attend a meeting. He requested him to accompany him to Ferry Ghat for escorting Tapan Chakraborty as he was running a risk of his life because of some untoward incident which took place in his house. Satyendra Tanti (PW-9) and Bidhu Urang (PW-7) also accompanied them. He further explained that they reached Ferry Ghat at around 05:45 p.m. and took shelter in the passenger shed as, at that time, it was drizzling. According to him, while they were waiting in the passenger shed, he had noticed Anil Das (A-1) proceeding hurriedly towards Bagan Bazar from the side of Ferry Ghat. After 5/7 minutes, he had seen about 10 youths proceeding towards Ferry Ghat from the direction of Bagan Bazar. He mentioned the name of four persons, namely, Gautam Das (A-11), Pradip Das (A-9), Tapan Das (A-5) and Mrinal Das (A-4) who were among the youths. Those persons were waiting in the Ferry Ghat. The distance of Ferry Ghat from passenger shed would be 100 cubics. He noticed Tapan Chakraborty and others getting down from the boat and as soon as they got down, the miscreants dragged Tapan Chakraborty. All the persons in the passenger shed proceeded towards Ferry Ghat, at that time, they also heard the sound of bursting of bomb as well as sound of gun fire. They became frightened and retreated for a while, thereafter, they proceeded towards Ferry Ghat. After reaching there, they found Tapan Chakraborty lying on the ground with injuries. They lifted him and brought him on the main road and with the help of a Police Mobile Van they took him to Kalyanpur Hospital. However, he admitted that he did not accompany them. He asserted that after the commission of offence the miscreants fled towards south. In cross-examination, he admitted that the deceased was forefront leader of the CPI (M) party. He denied

the suggestion that the murder of Tapan Chakraborty was the result of inter-Party rivalry.

(b) Next witness who was present in the passenger shed was Bidhu Urang, examined as PW-7. In his examination-in-chief, he stated that Tapan Chakraborty was murdered on 31.08.2000 by some miscreants belonging to UBLF extremists group. He was killed at Santinagar Ferry Ghat at around 06:30 p.m. and according to him at the time of occurrence, he was sitting in the passenger shed which is about 100 cubics away from the place of occurrence. He also mentioned that besides him Pranab Chakraborty (PW-8), Nahar Ranjan Deb (PW-4), Satyendra Tanti (PW-9) were also present there. He also admitted that at that time it was drizzling. In order to protect themselves from the rain, they took shelter in the passenger shed at around 05:30 p.m. He also stated in the examination-in-chief about the meeting at Santinagar and explained that the deceased Tapan Chakraborty went to Santinagar to attend that peace meeting organized by DYFI. He further explained that he along with others went to Santinagar to escort Tapan Chakraborty. Like, PW-4, he also narrated that while he was sitting in the passenger shed, he saw a group of 12/14 persons proceeding towards Santinagar Ferry Ghat, out of which, he recognized Tapan Das (A-5), Gautam Das (A-11), Pradip Das (A-9) and Somesh Das (A-7). At about 06:30 p.m., according to him, he noticed that Tapan Chakraborty accompanied by about 15 persons crossing the river in a boat. One Ramakant Paul (PW-10) was one of the 15 persons who accompanied Tapan Chakraborty. Suddenly, he heard the sound of two gun shots and immediately when he looked forward, he saw a group of persons running away towards south-east direction. At once, he alongwith his companions rushed to Ferry Ghat and found Tapan Chakraborty in injured condition. They carried him upto main road and then they took him in a police mobile van. He asserted that the group of persons who were found running away from the Ferry Ghat was the same whom he saw earlier proceeding towards Ferry Ghat from Bagan Bazar. He informed

the Court that on 31.08.2000, at around 10:30 p.m. one police officer seized blood stained earth from Santinagar Ferry Ghat in his presence and drawn seizure list wherein he signed. He admitted his signature found in the seizure list which was marked as Ex.-3. One Sujit Das also signed the seizure list along with him. He asserted that any two persons of the group fired two shots on Tapan Chakraborty. He also informed the Court that before he heard the sound of firing, he saw a flash of fire within the circle comprising 12/14 persons. The accused persons, namely, Pradip Das (A-9), Tapan Das (A-5), Somesh Das (A-7) and Gautam Das (A-11) were identified in the Court by name and face by PW-7. In cross-examination, it is true that he informed the Court that he does not know any person named Ratan Sukladas, (PW-6) approver.

(c) One Pranab Chakraborty was examined as PW-8. He was one of the persons waiting in the passenger shed at the relevant time. He admitted that Tapan Chakraborty was his eldest brother. According to him, prior to his death, he held many responsible posts in CPI (M) Party. Besides, he was the Vice Chairman of the Kalyanpur Panchayat Society. He informed the Court that on 31.08.2000, his brother was killed by the miscreants at Santinagar Ferry Ghat. According to him, on that day, around 05:15 p.m., Bidhu Urang (PW-7), Nehar Ranjan Deb (PW-4), Satyendra Tanti (PW-9) and he himself were sitting in the passenger shed which is about 100 cubics away from Santinagar Ferry Ghat. PW-8 also deposed that they were waiting in the passenger shed to escort his brother who was supposed to return from Santinagar after attending a peace meeting. He explained that from Bagan Bazar, they went straight to passenger shed. He also stated that there was security threat on the life of his brother because of which they used to accompany and escort him whenever he go outside in connection with any party work. When they were waiting in the passenger shed, it was drizzling and at that time they saw a good number of persons proceeding towards Ferry Ghat out of them he recognized Tapan Das (A-5), Gautam Das (A-11),

Pradip Das (A-9) and Anil Das (A-1). He saw Anil Das (A-1) coming hurriedly from the other side of the river. He deposed, as soon as Tapan Chakraborty reached near the bank of the river he heard hue and cry and at that time he also heard sound of two rounds of fire. Thereafter, they rushed to the place of occurrence, and then the miscreants ran away towards south-east direction. On arriving at the place of occurrence, he found Tapan lying on the ground with his upside down with two bullet injuries one on the left side of his back and another on the back of his head. The wounds were bleeding profusely. With the help of others, he took his brother up to the main road and thereafter took him to the hospital in a police van. As the condition of his brother was alarming, he was shifted to GB Hospital, Agartala from Kalyanpur hospital. He identified Anil Das (A-1), Pradip Das (A-9), Gautam Das (A-11) in the Court by name and face. In cross-examination, he denied the suggestion that he could not recognize Tapan Das (A-5), Pradip Das (A-9) and Gautam Das (A-11). He also mentioned that Ramakanta Paul (PW-10), Prabir Biswas (PW-12), Nilai Das (PW-3), Benu Ranjan Dhupi (PW-11), Sujit Das, Subrata Das, Rajesh Das were in the boat along with his brother while crossing the river

(d) Another witness from the passenger shed was Satyendra Tanti (PW-9). Like other witnesses, namely, PWs 4, 7 and 8, he also explained the said incident. He admitted that Tapan Chakraborty was the Vice Chairman, Kalyanpur Panchayat Society and held several responsible posts in the CPI (M) party. He also admitted that Tapan was related to his family. Since, he informed the Court that he did not notice any of the persons while coming out of the passenger shed, he was declared as a hostile witness from the side of the prosecution. Though PW-9 turned hostile as stated earlier, he admitted that he along with Pranab Chakraborty (PW-8), Nehar Ranjan Deb (PW-4) and Bidhu Urang (PW-7) were sitting in the passenger shed with a view to escort his brother Tapan Chakraborty.

41. The analysis of statement of various persons,

particularly, eye-witnesses clearly strengthen the case of PW-6, approver, in all aspects including conspiracy, planning to attack the deceased for his statement about the students' movement, actual incident, role played by the assailants and subsequent events after the gunshot till the death of the deceased Tapan Chakraborty. We are satisfied that by these statements, the prosecution has strengthened its case through PW-6 approver and there is no reason to disbelieve his version.

Reliance on the hostile witness

42. In the case on hand Ganesh Kol (PW-2), Satyendra Tanti (PW-9), Ramakanta Paul (PW-10) and Prabhir Biswas (PW-12) were declared as hostile witnesses. It is settled law that corroborated part of evidence of hostile witness regarding commission of offence is admissible. The fact that the witness was declared hostile at the instance of the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the Court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The Court should be slow to act on the testimony of such a witness, normally, it should look for corroboration with other witnesses. Merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. To make it clear that evidence of hostile witness can be relied upon at least up to the extent, he supported the case of prosecution. The evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution.

43. In our case, eye witnesses including the hostile witnesses, firmly established the prosecution version. Five eye-witnesses, namely, PW-1, PW-4, PW-6, PW-7 and PW-8

clearly identified two convicts-appellants, Tapan Das (A-5) and Gautam Das (A-11). PWs 1, 4, 7 and 8 identified accused Pradip Das (A-9). PWs 1 & 7 identified accused Somesh Das (A-7). PWs 1 & 4 identified Mrinal Das (A-4). PWs 4 & 8 identified Anil Das (A-1). It is clear that 6 accused persons including two convicts-appellants had been identified by more than one eye-witnesses. It is also clear that 6 accused could have been identified by the eye witnesses though all of them could not have been identified by the same assailants. However, it is clear that two or more than 2 eye-witnesses could identify one or more than one assailants. The general principle of appreciating evidence of eye witnesses, in such a case is that where a large number of offenders are involved, it is necessary for the Court to seek corroboration, at least, from two or more witnesses as a measure of caution. Likewise, it is the quality and not the quantity of evidence to be the rule for conviction even where the number of eye witnesses is less than two.

44. It is well settled that in a criminal trial, credible evidence of even hostile witnesses can form the basis for conviction. In other words, in the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence. As rightly observed by the High Court, there are only six accused persons namely, Tapan Das (A-5), Gautam Das (A-11), Pradip Das (A-9), Mrinal Das (A-4), Somesh Das (A-7) and Anil Das (A-1) identified by two or more eye witnesses while Tapan Das (A-5) and Gautam Das (A-11) were recognized by PWs 1, 4, 7 and 8 corroborated by PW-6 (approver). Somesh Das (A-7) was recognized by PWs-1 & 7, Mrinal Das (A-4) by PWs 1 & 4 and Anil Das (A-1) by PWs 4 & 8, all of them being corroborated by PW-6 (approver). If PW-6 (approver) is included, there are three eye-witnesses who could identify six offenders including two convicts-appellants. Inasmuch as we were taken through the entire evidence of the abovementioned witnesses, we fully endorse the view expressed by the High Court.

45. Now we have to find out whether the High Court is justified in interfering with the order of acquittal insofar as accused Anil Das (A-1), Mrinal Das (A-4), Somesh Das (A-7) and Pradip Das (A-9) are concerned, in the light of the principles which we have explained in the earlier part of our judgment. The trial Court, after finding that the factum of conspiracy as disclosed by the approver remains unsubstantiated for want of independent corroborating evidence, acquitted them. Since the High Court has reversed the said decision of acquittal and convicted the accused persons relying on Section 34 IPC, let us find out whether the High Court is justified in upsetting the order of acquittal into conviction. Section 34 IPC reads as under:

> "**34. Acts done by several persons in furtherance of common intention.-** When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

The reading of Section 34 CPC makes it clear that the burden lies on prosecution to prove that the actual participation of more than one person for commission of criminal act was done in furtherance of common intention at a prior concept. Further, where the evidence did not establish that particular accused has dealt blow the liability would devolve on others also who were involved with common intention and such conviction in those cases are not sustainable. A clear distinction made out between common intention and common object is that common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or pre-concept. Though there is substantial difference between the two sections, namely, Sections 34 and 149 IPC, to some extent they also overlap and it is a question to be determined on the facts of each case.

46. There is no bar in convicting the accused under

substantive section read with Section 34 if the evidence discloses commission of an offence in furtherance of the common intention of them all. It is also settled position that in order to convict a person vicariously liable under Section 34 or Section 149 IPC, it is not necessary to prove that each and every one of them had indulged in overt acts in order to apply Section 34, apart from the fact that there should be two or more accused. Two facts must be established, namely a) common intention b) participation of accused in the commission of an offence. It requires a pre-arranged plan and pre-supposes prior concept. Therefore, there must be prior meeting of minds. It can also be developed at the spur of the moment but there must be pre-arrangement or pre-meditated concept. As rightly observed by the High Court, though the trial Court was of the view that the evidence of an approver contains full and correct version of the incident so far as participation of the accused Tapan Das (A-5) and Gautam Das (A-11), however, there is no plausible reason by the trial Court as to why the other part of the statement of the approver could not be believed. In order to seek the aid of Section 34 IPC, it is not necessary that individual act of the accused persons has to be proved by the prosecution by direct evidence. Again, as mentioned above, common intention has to be inferred from proved facts and circumstances and once there exist common intention, mere presence of the accused persons among the assailants would be sufficient proof of their participation in the offence. We agree with the conclusion of the High Court that the trial Court failed to explain or adduce sufficient reasons as to why the other part of the evidence that the accused persons named by the approver were found present in the place of occurrence could not be believed for the purpose of invoking Section 34 when two or more eye-witnesses corroborated the testimony of approver (PW-6) specifically naming six accused persons including the two convicted appellants.

47. The existence of common intention amongst the participants in the crime is the essential element for application

of Section 34 and it is not necessary that the acts of several persons charged with the commission of an offence jointly must be the same or identically similar. We have already pointed out from the evidence of eye-witnesses as well as the approver (PW-6) that one Uttam Shil (A-8) was deployed at the place of meeting at Santinagar for the purpose of giving intimation to other accused persons about the movement of the deceased. It is also seen from the evidence that one more accused was stationed on the shore of the river near Bagan Bazar. It is also seen from the evidence that after the meeting, the boat carrying Tapan Chakraborty and other eye-witnesses was about to reach Bagan Bazar shore, accused Anil Das (A-1) who was deployed there suddenly left towards Bagan Bazar and within few minutes 10 accused persons rushed to the boat from Bagan Bazar. Thereafter, the occurrence took place. The materials placed by the prosecution, particularly, from the eye-witnesses, the common intention can be inferred among the accused persons including the six persons identified by the eye-witnesses. If we consider the case of the prosecution in the light of the disclosure made by the approver (PW-6), coupled with the statement of eye-witnesses, it is clear that the 13 assailants had planned and remained present on the shore of the river to eliminate Tapan Chakraborty. In view of these materials, the High Court is right in applying Section 34 IPC and basing conviction of six accused persons including the two convicted appellants that is Tapan Das (A-5), Gautam Das (A-11), Pradip Das (A-9), Somesh Das (A-7), Mrinal Das (A-4) and Anil Das (A-1).

Medical evidence:

48. The Doctor who conducted the post mortem on the dead body was examined as PW-14 and his report has been marked as Ex.7. The said report shows three fire arm wounds on the dead body of the deceased. One, measuring 0.75 cm. in radius over upper part of left anterior chest wall at posterior auxiliary plane, two, lacerated injury 3 cms. X .5 cm x bone deep

occipital region, and three, lacerated injury, 4 cm x 1 cm x bone deep over occipital region of skull. PW-14 has categorically stated that the first injury was sustained by the deceased on his back. According to him, injury Nos. 2 and 3 might be received by the deceased by the same bullet if the bullet had split. We also verified the post mortem examination report (Ex.7) and the medical evidence of PW-14 and find no inconsistency between the contents in his report (Ex. 7), his evidence as PW-14 and the ocular evidence of the approver (PW-6). As rightly observed by the trial Court and the High Court, the ocular version i.e., evidence of the approver (PW-6) stands corroborated by the medical evidence of PW-14 and (Ex.7). We concur with the said conclusion.

49. Though Mr. Sidharth Luthra, learned senior counsel appearing for the appellants pointed out certain contradictions in the statement of witnesses with their previous statements recorded during investigation and with all their statements in the Court, on verification, we are satisfied that those contradictions, if any, are only minimal and it would not affect the claim of the prosecution case. We have already discussed elaborately about the identification of the assailants by the prosecution witnesses including the approver (PW-6). Though it was pointed out by the learned senior counsel for the appellants that none of the seven witnesses other than approver (PW-6) could recognize all the assailants, in the earlier paragraphs, we have pointed out that each witness identified at least two assailants and approver (PW-6) has identified all of them. In a case of this nature where large number of persons committed the crime, it is but natural that due to fear and confusion a witness cannot recognize and remember all the assailants. If any witness furnishes all the details accurately, in that event also it is the duty of the Court to verify his version carefully.

Conclusion

50. As discussed earlier, the statement of approver (PW-

6) inspires confidence including the conspiracy part which gets full support from the narration of the occurrence given by the eye-witnesses, more particularly, as to the deployment of some of the offenders for reporting to others about the movement of the victim. As rightly pointed out by the High Court, there is nothing wrong in accepting his entire statement and true disclosure of the incident coupled with corroboration of his evidence with the eye witnesses. We fully agree with the discussion and ultimate conclusion arrived at by the High Court and unable to accept any of the contentions raised by the learned senior counsel for the appellants.

51. Under these circumstances, we confirm the ultimate decision arrived at by the High Court. Consequently, both the appeals fail and are accordingly dismissed as devoid of any merit.

B.B.B Appeals dismissed.

THE NATIONAL TEXTILE CORPORATION LTD.
v.
NARESHKUMAR BADRIKUMAR JAGAD & ORS.
(Civil Appeal No. 7448 of 2011)

SEPTEMBER 05, 2011

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

Maharashtra Rent Control Act, 1999 – s.3(1)(a) & (b) – Exemption from application of the Act 1999 – Claim for – Tenability – Status of appellant- National Textile Corporation – Textile Undertaking 'P' had tenancy rights in the premises in question – Act 1995 came into effect leading to statutory transfer of the tenancy rights of Textile undertaking 'P' to Central Government and thereafter to appellant-NTC – Respondent-owner of the premises filed eviction suit against the appellant – Appellant claimed protection under exemption provisions in the Act 1999 on the ground that the Central Government still remained tenant and appellant was merely its agent – Held: The Central Government and the appellant are separate legal entities and not synonymous – Appellant is being controlled by the provisions of the Act 1995 and not by the Central Government – Appellant is a Government Company and neither government nor government department – Nor can it claim the status of an 'agent' of the Central Government for the simple reason that rights vested in the appellant stood crystallised after being transferred by the Central Government – Appellant cannot be permitted to say that though all the rights vested in it but it merely remained the agent of the Central Government – Acceptance of such a submission would require interpreting the expression 'vesting' as holding on behalf of some other person – Such a meaning cannot be given to the expression 'vesting' – Appellant not entitled for exemption under s.3(1)(a) or 3(1)(b) of the Act 1999 – Appellant directed to file usual undertaking to hand over peaceful and vacant possession of

the premises to respondent No.1 – Textile Undertakings (Nationalisation) Act, 1995 – Contract Act, 1872 – ss.182 and 230.

Textile Undertakings (Nationalisation) Act, 1995 – s.3(1) and (2) – Right, title and interest of textile undertaking vested in Central Government and thereafter in appellant-National Textile Corporation by statutory transfer – Meaning of the expression 'vesting' – Held: 'Vesting' means having obtained an absolute and indefeasible right – It refers to and is used for transfer or conveyance – 'Vesting' in the general sense, means vesting in possession – However, 'vesting' does not necessarily and always means possession but includes vesting of interest as well – 'Vesting' may mean vesting in title, vesting in possession or vesting in a limited sense, as indicated in the context in which it is used in a particular provision of the Act – Word `Vest' has different shades, taking colour from the context in which it is used – It does not necessarily mean absolute vesting in every situation and is capable of bearing the meaning of a limited vesting, being limited, in title as well as duration.

Pleadings – Purpose and necessity of – Held: Pleadings and particulars are necessary to enable the court to decide the rights of the parties in the trial – A decision of a case cannot be based on grounds outside the pleadings of the parties – A party has to take proper pleadings and prove the same by adducing sufficient evidence – In view of the provisions of Order VIII Rule 2 CPC, the appellant was under an obligation to take a specific plea to show that the eviction suit filed against it was not maintainable which it failed to do so – The appellant ought to have taken a plea in the written statement that it was merely an 'agent' of the Central Government, thus the suit against it was not maintainable – The appellant did not take such plea before either of the courts below – More so, whether A is an agent of B is a question of fact and has to be properly pleaded and proved by adducing

evidence – The appellant miserably failed to take the required pleadings for the purpose – Code of Civil Procedure, 1908 – Order VIII, Rule 2.

Pleadings – New plea – Held: A new plea cannot be taken in respect of any factual controversy whatsoever, however, a new ground raising a pure legal issue for which no inquiry/proof is required can be permitted to be raised by the court at any stage of the proceedings.

Words and Phrases – vesting – Meaning of.

The textile undertaking- Poddar Mills had leasehold rights in the premises in question. The Textile Undertakings (Taking over of Management) Act, 1983 came into force whereby the management of 13 textile undertakings including the Poddar Mills was taken over by the Central Government. The lease granted in favour of Poddar Mills expired by efflux of time. The Poddar Mills however continued as a tenant by holding over the premises. The Textile Undertakings (Nationalisation) Act, 1995 came into force by virtue of which the tenancy rights of Poddar Mills purportedly stood vested in the Central Government and thereafter vested in the appellant-National Textile Corporation (NTC). Meanwhile the Maharashtra Rent Control Act, 1999 also came into force. The respondent-owner of suit premises filed eviction suit against National Textile Corporation (NTC) which was decreed. The decree was upheld by the appellate court as well as the High Court in civil revision.

In the instant appeal, the appellant submitted that the tenancy rights of Poddar Mills stood vested absolutely in the Central Government on commencement of the Act 1995 by operation of law; that the appellant stepped in the shoes of the Central Government merely as an agent in the context of the Act 1999; that the Central

Government continued to be a tenant in the suit premises and thus, the National Textile Corporation was entitled to protection of either S. 3(1)(a) of the Maharashtra Rent Control Act, 1999 being premises let out to the Government; and that thus the suit filed by the respondents was not maintainable.

Per contra, the respondents *inter alia* submitted that the appellant had never raised the issue before the courts below that the Central Government was the tenant and that it was holding the premises merely as an agent; that even otherwise, the tenancy rights which had vested in the Central Government, stood vested immediately, by operation of law, in the appellant, a public sector undertaking and thus the appellant had no protection of the Act 1999.

Dismissing the appeal, the Court

HELD:1.1. In the instant case, no reference had ever been made by the appellant to the effect of the provisions of the Textile Undertakings (Nationalisation) Act, 1995 before the trial court while filing the written submissions; neither any issue was framed; nor arguments had been advanced in regard to the same; this issue was not agitated either before the appellate court or revisional court. Before this Court, an application was filed to urge additional grounds regarding the application of the Act 1995 without seeking amendment to the pleadings (WS). [Para 6]

1.2. Pleadings and particulars are necessary to enable the court to decide the rights of the parties in the trial. Therefore, the pleadings are more of help to the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief

not founded on the pleadings should not be granted". A decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. [Paras 6,7]

1.3. A party has to take proper pleadings and prove the same by adducing sufficient evidence. No evidence can be permitted to be adduced on a issue unless factual foundation has been laid down in respect of the same. A new plea cannot be taken in respect of any factual controversy whatsoever, however, a new ground raising a pure legal issue for which no inquiry/proof is required can be permitted to be raised by the court at any stage of the proceedings. [Para 13, 14]

M/s. Trojan & Co. v. RM N.N. Nagappa Chettiar **AIR 1953 SC 235:1953 SCR 780;** *State of Maharashtra v. M/s. Hindustan Construction Company Ltd.* **AIR 2010 SC 1299: 2010 (4) SCR 46;** *Kalyan Singh Chouhan v. C.P. Joshi* **AIR 2011 SC 1127: 2011 SCR 216;** *Ram Sarup Gupta (dead) by L.Rs. v. Bishun Narain Inter College & Ors.* **AIR 1987 SC 1242: 1987 (2) SCR 805;** *Bachhaj Nahar v. Nilima Mandal & Ors.* **AIR 2009 SC 1103: 2008 (14) SCR 621;** *Kashi Nath (Dead) through L.Rs. v. Jaganath* **(2003) 8 SCC 740: 2003 (5) Suppl. SCR 202;** *Biswanath Agarwalla v. Sabitri Bera & Ors.* **(2009) 15 SCC 693: 2009 (12) SCR 459;** *Syed and Company & Ors. v. State of Jammu &Kashmir & Ors.* **1995 Supp (4) SCC 422:** *Chinta Lingam & Ors. v. The Govt. of India & Ors*. **AIR 1971 SC 474: 1971 (2) SCR 871;** *J. Jermons v. Aliammal & Ors* **(1999) 7 SCC 382: 1999 (1) Suppl. SCR 467;** *M/s Sanghvi Reconditioners Pvt. Ltd. v. Union of India & Ors* **AIR 2010 SC 1089: 2010 (2) SCR 352 and** *Greater Mohali Area Development Authority & Ors. v. Manju Jain & Ors.,* **AIR 2010 SC 3817: 2010 (10) SCR 134 – relied on.**

2.1. The Government loosely means the body of persons authorized to administer the affairs of, or to govern, a State. It commands and its decision becomes binding upon the members of the society. Government includes, both the Central Government as well as the State Government. The government is impersonal in character having three independent functionaries as its branches. It performs regal and sovereign functions, which are not alienable to any other person, *e.g.* defence, security, currency etc. Government means a group of people responsible for governing the country. It consists of the activities, methods and principles involved in governing a country or other political unit. [Para 15]

2.2. The Government is a body that governs and exercises control by issuing directions and is not governed by any other agency. It is a body politic that formulates policies and the laws by which a civil society is controlled. It is a political concept formulated to rule the nation. It is not a profit and loss establishment. Government Department means something purely fundamental, i.e. relating to a particular government or to the practice of governing a country. It has different Wings. However, the expression 'Government' may be required to be interpreted in the context used in a particular Statute. The expression denotes the Executive and not the Legislature. [Para15]

2.3. To perform the functions, the Government has its various departments and to facilitate its working, the Government itself may be divided into various Sections. To carry out the commercial activities by the State, the Corporations have been established by enactment of Statutes and the "power to charter Corporations is incidental to or in aid of Governmental functions." Such Corporations would ex-hypothesis be agencies of the Government. [Para 16]

2.4. Banks and Financial institutions carrying out financial transactions, are independent to do business subject to the regulatory laws made by the legislature. They are not under the direct executive control of the government. They are profit and loss earning organisations coupled with all connected financial and economic activities. They are a body corporate with a limited role to play and do not "govern" people as understood by governance. [Para 17]

State of Rajasthan & Anr. v. Sripal Jain **AIR 1963 SC 1323: 1964 SCR 742;** *Pashupati Nath Sukul v. Nem Chandra Jain & Ors.* **AIR 1984 SC 399: 1984 (1) SCR 939;** *R.S. Nayak v. A.R. Antulay* **AIR 1984 SC 684: 1984 (2) SCR 495;** *V.S. Mallimath v. Union of India & Anr.* **AIR 2001 SC 1455: 2001 (2) SCR 567;** *Sukhdev Singh & Ors. v. Bhagatram Sardar Singh Raghuvanshi & Anr.* **AIR 1975 SC 1331: 1975 (3) SCR 619;** *Ramana Dayaram Shetty v. The International Airport Authority of India & Ors.* **AIR 1979 SC 1628: 1979 (3) SCR 1014 and** *Federal Bank Ltd. v. Sagar Thomas & Ors.* **AIR 2003 SC 4325: 2003 (4) Suppl. SCR 121– relied on.**

State of Punjab & Ors. v. Raja Ram & Ors. **AIR 1981 SC 1694: 1981 (2) SCR 712;** *The State of Bihar v. The Union of India & Anr.,* **AIR 1970 SC 1446: 1970 (2) SCR 522;** *S.S. Dhanoa v. Municipal Corporation Delhi & Ors.,* **AIR 1981 SC 1395: 1981 (3) SCR 864;** *K. Jayamohan v. State of Kerala & Anr.,* **(1997) 5 SCC 170: 1996 (7) Suppl. SCR 201;** *Hindustan Steel Works Construction Ltd. v. State of Kerala & Ors.,* **AIR 1997 SC 2275: 1997 (3) SCR 919;** *Mohd. Hadi Raja v. State of Bihar & Anr.,* **AIR 1998 SC 1945: 1998 (3) SCR 22;** *State through Narcotics Control Bureau v. Kulwant Singh* **AIR 2003 SC 1599: 2003 (1) SCR 995 – referred to.**

3.1. In view of the provisions of Section 230 of the Indian Contract Act 1872, an agent is not liable for the acts of a disclosed principal subject to a contract to the

contrary. Where the relationship of principal and agent is established the agent cannot be sued when the principal has been disclosed. A suit does not lie against an agent where the principal is known or has been disclosed. [Para 21]

3.2. The appellant may be called 'agency' or 'instrumentality' of the Central Government for a limited purpose, namely to label it to be the "State" within the ambit of Article 12 of the Constitution. However, even by stretch of imagination, the appellant cannot be held to be an 'agent' of the Central Government as defined under Section 182 of the Contract Act. Evidently the appellant is neither the government nor the department of the government, but a Government Company. Appellant cannot identify itself with the Central Government. It cannot be said that appellant is merely an agent of the Central Government for the simple reason that rights vested **in the appellant stood crystallised after being transferred by the Central Government. Appellant is being controlled by the provisions of the Act 1995 and not by the Central Government. Whereas an agent is merely an extended hand of the principal and cannot claim independent rights. [Para 21, 22]**

Prem Nath Motors Ltd. v. Anurag Mittal **AIR 2009 SC 569;** *Vivek Automobiles Ltd. v. Indian Inc.* **(2009) 17 SCC 657;** *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology & Ors.* **(2002) 5 SCC 111: 2002 (3) SCR 100;** *Food Corporation of India v. Municipal Committee, Jalalabad & Anr.,* **AIR 1999 SC 2573;** *A.K. Bindal & Anr. v. Union of India & Ors.* **(2003) 5 SCC 163 and** *Southern Roadways Ltd., Madurai v. S.M. Krishnan* **AIR 1990 SC 673: 1989 (1) Suppl. SCR 410 – relied on.**

M/s. Electronics Corporation of India Ltd., etc. etc. v. Secretary, *Revenue Department, Government of Andhra*

Pradesh & Ors., etc. etc. **AIR 1999 SC 1734 and** *Smt. Chandrakantaben v. Vadilal Bapalal Modi* **AIR 1989 SC 1269: 1989 (2) SCR 232 – referred to.**

3. Section 3 (1) (a) & (b) of the Act 1999 provide for exemption from the application of the Act 1999. It was within the exclusive domain of the legislature to decide which section of tenants should be afforded protection on the basis of economic criteria. If a particular section of tenants is not protected considering their economic conditions it can be held to be a reasonable classification and making such distinction is valid. The exclusion of premises let or sub-let to banks or any public sector undertaking or any corporation established by or under any Central or State Act or foreign missions, international agencies, multinational companies and private and public limited companies having paid up share capital of rupees one crore or more cannot be held to be arbitrary. [Para 23]

Saraswat Coop. Bank Ltd. & Anr. v. State of Maharashtra & Ors., **(2006) 8 SCC 520: 2006 (4) Suppl. SCR 567;** *Leelabai Gajanan Pansare & Ors. v. Oriental Insurance Company Ltd. & Ors.,* **(2008) 9 SCC 720: 2008 (12) SCR 248 – relied on.**

D.C. Bhatia & Ors. v. Union of India & Anr. **(1995) 1 SCC 104: 1994 (4) Suppl. SCR 539 – referred to.**

4. Section 3(1) and (2) of the Act, 1995 require construction giving proper meaning to the expression 'vesting'. `Vesting' means having obtained an absolute and indefeasible right. It refers to and is used for transfer or conveyance. `Vesting' in the general sense, means vesting in possession. However, `Vesting' does not necessarily and always means possession but includes vesting of interest as well. `Vesting' may mean vesting in

title, vesting in possession or vesting in a limited sense, as indicated in the context in which it is used in a particular provision of the Act. Word `Vest' has different shades, taking colour from the context in which it is used. It does not necessarily mean absolute vesting in every situation and is capable of bearing the meaning of a limited vesting, being limited, in title as well as duration. Thus, the word 'vest' clothes varied colours from the context and situation in which the word came to be used in the statute. The expression `vest' is a word of ambiguous import since it has no fixed connotation and the same has to be understood in a different context under different set of circumstances. [Paras 26, 27]

Fruit & Vegetable Merchants Union v. Delhi Improvement Trust, **AIR 1957 SC 344: 1957 SCR 1;** *Maharaj Singh v. State of Uttar Pradesh & Ors.* **AIR 1976 SC 2602: 1977 (1) SCR 1072;** *Municipal Corporation of Hyderabad v. P.N. Murthy & Ors.* **AIR 1987 SC 802: 1987 (2) SCR 107;** *Vatticherukuru Village Panchayat v. Nori Venkatarama Deekshithulu & Ors.,* **1991 Supp. (2) SCC 228: 1991 (2) SCR 531;** *Dr. M. Ismail Faruqui etc. v. Union of India & Ors.,* **AIR 1995 SC 605: 1994 (5) Suppl. SCR 1;** *Government of A.P. v. H.E.H. The Nizam, Hyderabad,* **(1996) 3 SCC 282: 1996 (3) SCR 772 ;** *K.V. Shivakumar & Anr. v. Appropriate Authority & Ors.* **(2000) 3 SCC 485: 2000 (1) SCR 991;** *Municipal Corporation of Greater Bombay & Ors. v. Hindustan Petroleum Corporation & Anr.* **AIR 2001 SC 3630: 2001 (2) Suppl. SCR 50;** *Sulochana Chandrakant Galande v. Pune Municipal Transport & Ors.* **(2010) 8 SCC 467: 2010 (9) SCR 476 – relied on.**

5. The Act 1995 has been brought for providing the acquisition and transfer of the rights, title and interest of the owners in respect of the textile undertakings. Respondents had not been the owner of the textile undertaking. They had rented out the premises to Poddar

Mills and what had vested in the Central Government was only the right, title and interest of the Poddar Mills and nothing else. The Poddar Mills was having only right in tenancy in the suit premises. The owner had been defined in clause (g) of Section 2 of the Act 1995, taking into consideration the expression in relation to textile undertaking as a proprietor or lessee, or occupier of the textile company undertaking. It included even the receiver and liquidator where the companies had gone under liquidation. Textile undertaking has been defined in Section 2(m) which means undertaking specified in column (2) of the First Schedule to the Act 1995 i.e., the textile undertakings, management of which had been taken over by the Central Government under the Act 1983. The First Schedule included Poddar Mills at Sl. No.9 and Poddar Mills had been paid compensation to the tune of Rs.7,46,30,000. Nothing has been paid so far as respondent No.1 is concerned. Sub-section (6) of Section 4 of the Act 1995 provides that any suit, appeal or other proceedings of whatever nature in relation to any property which had vested in the Central Government under Section 3 on the appointed day, instituted or preferred by or against the textile company is pending, the same shall not abate or adversely affect the rights of the parties by reason of the transfer of textile undertaking. Thus, the commencement of the Act 1995 does not really affect even the pending cases. In view thereof, it cannot be said that the Act 1995 would prejudice the cause of the respondents in the proceedings which arose subsequent to the commencement of this Act. [Para 28]

6. It is not permissible for the appellant to canvass that the Central Government has any concern so far as the tenancy rights are concerned. Right vested in the Central Government stood transferred and vested in the appellant. Both are separate legal entities and are not

synonymous. The appellant being neither the government nor government department cannot agitate that as it has been substituted in place of the Central Government, and acts merely as an agent of the Central Government, thus protection of the Act 1999 is available to it. Appellant cannot be permitted to say that though all the rights vested in it but it merely remained the agent of the Central Government. Acceptance of such a submission would require interpreting the expression 'vesting' as holding on behalf of some other person. Such a meaning cannot be given to the expression 'vesting'. [Para 29]

7. It is a settled legal proposition that an agent cannot be sued where the principal is known. In the instant case, the appellant has not taken plea before either of the courts below. In view of the provisions of Order VIII Rule 2 CPC, the appellant was under an obligation to take a specific plea to show that the suit was not maintainable which it failed to do so. The vague plea to the extent that the suit was bad for non-joinder and, thus, was not maintainable, did not meet the requirement of law. The appellant ought to have taken a plea in the written statement that it was merely an 'agent' of the Central Government, thus the suit against it was not maintainable. More so, whether A is an agent of B is a question of fact and has to be properly pleaded and proved by adducing evidence. The appellant miserably failed to take the required pleadings for the purpose. [Para 29]

8. The inescapable conclusion is that appellant is not entitled for exemption under Section 3(1)(a) or 3(1)(b) of the Act 1999. Nor can it claim the status of an 'agent' of the Central Government. However, considering the nature of business of the appellant, it is in the interest of justice that appellant be given time upto 31.12.2013, to vacate the premises. Appellant shall file a usual undertaking within

four weeks to hand over peaceful and vacant possession to respondent No.1. [Para 30]

Case Law Reference:

1953 SCR 780	relied on	Para 6
2010 (4) SCR 46	relied on	Para 7
2011 SCR 216	relied on	Para 7
1987 (2) SCR 805	relied on	Para 8
2008 (14) SCR 621	relied on	Para 8
2003 (5) Suppl. SCR 202	relied on	Para 9
2009 (12) SCR 459	relied on	Para 9
1995 Supp (4) SCC 422	relied on	Para 10
1971 (2) SCR 871	relied on	Para 11
1999 (1) Suppl. SCR 467	relied on	Para 12
2010 (2) SCR 352	relied on	Para 14
2010 (10) SCR 134	relied on	Para 14
1964 SCR 742	relied on	Para 15
1984 (1) SCR 939	relied on	Para 15
1984 (2) SCR 495	relied on	Para 15
2001 (2) SCR 567	relied on	Para 15
1975 (3) SCR 619	relied on	Para 16
1979 (3) SCR 1014	relied on	Para 16
2003 (4) Suppl. SCR 121	relied on	Para 17
1981 (2) SCR 712	referred to	Para 18
1970 (2) SCR 522	referred to	Para 18

1981 (3) SCR 864	**referred to**	**Para 18**
1996 (7) Suppl. SCR 201	**referred to**	**Para 18**
1997 (3) SCR 919	**referred to**	**Para 18**
1998 (3) SCR 22	**referred to**	**Para 18**
2003 (1) SCR 995	**referred to**	**Para 18**
AIR 1999 SC 2573	**relied on**	**Para 19**
AIR 1999 SC 1734	**referred to**	**Para 19**
(2003) 5 SCC 163	**relied on**	**Para 20**
1989 (1) Suppl. SCR 410	**relied on**	**Para 20**
1989 (2) SCR 232	**referred to**	**Para 21**
AIR 2009 SC 569	**relied on**	**Para 21**
(2009) 17 SCC 657	**relied on**	**Para 21**
2002 (3) SCR 100	**relied on**	**Para 22**
2006 (4) Suppl. SCR 567	**relied on**	**Para 23**
2008 (12) SCR 248	**relied on**	**Para 24**
1994 (4) Suppl. SCR 539	**referred to**	**Para 24**
1957 SCR 1	**relied on**	**Para 27**
1977 (1) SCR 1072	**relied on**	**Para 27**
1987 (2) SCR 107	**relied on**	**Para 27**
1991 (2) SCR 531	**relied on**	**Para 27**
1994 (5) Suppl. SCR 1	**relied on**	**Para 27**
1996 (3) SCR 772	**relied on**	**Para 27**
2000 (1) SCR 991	**relied on**	**Para 27**
2001 (2) Suppl. SCR	**relied on**	**Para 27**

2010 (9) SCR 476	**relied on**	**Para 27**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7448 of 2011.,

From the Judgment & Order dated 03.08.2009 of the High Court of Judicature of Bombay in Civil Revision Application No. 564 of 2008.

WITH

C.A. Nos. 7449 & 7450 of 2011.

Prag P. Tripathi, ASG, Mukul Rohatgi, Shyam Divan, Ramesh P. Bhatt, Sanjoy Ghose, Mayuri Raguvanshi, Kunal Bahri, Anitha Shenoy, Sanjay Ghose, Mayuri Raguvanshi, Gautam Narayan, Mahesh Agarwal, Rishi Agarwal, Ranjit Shetty, Gaurav Goel, E.C. Agrawal, Rakesh Sinha, Abhijat P. Medh for the appearing paties.

The Judgment of the Court was delivered by

Dr. B.S. CHAUHAN, J. 1. This appeal has been preferred against the judgment and order dated 3.8.2009 in Civil Revision Application No. 564 of 2008 passed by the High Court of Judicature at Bombay affirming the judgment and order of the Small Causes Appellate Court dated 14.8.2008 in Appeal No. 627 of 2006 by which the appellate court has affirmed the judgment and decree dated 5.8.2006 in TE & R Suit No. 311/326/2001 passed by the Court of Small Causes at Bombay.

2. **FACTS**:

A. The suit premises belongs to the trust run by the respondents – Nareshkumar Badrikumar Jagad & Ors. Sh. Damodar Dass Tapi Dass and Sh. Daya Bhai Tapidas executed a lease deed dated 11.3.1893 in respect of the suit premises admeasuring 12118 sq. yds. bearing plot no. 9 in Survey No. 73 of Lower Parel Division, N.M. Joshi Marg,

Chinchpokli, Mumbai-400 011, in favour of a company named Hope Mills Limited for a period of 99 years commencing from 22.10.1891. The lease so executed was to expire on 21.10.1990.

B. The original owners transferred and conveyed the suit property in favour of one Harichand Roopchand and Ratan Bai on 22.2.1907. Thereafter, the suit property came to be vested in and owned by a public charitable trust, namely, Harichand Roopchand Charity Trust (hereinafter called as 'Trust').

C. The leasehold rights in respect of suit property stood transferred to Prospect Mills Ltd. and, thereafter to Diamond Spinning & Weaving Co. Pvt. Ltd. and, ultimately, vide a lease indenture dated 25.10. 1926 to Toyo Poddar Cotton Mills Ltd. (hereinafter called the 'Poddar Mills').

D. The Textile Undertakings (Taking over of Management) Act, 1983 (hereinafter called 'the Act 1983') was enacted by the Parliament in order to take over the management of 13 textile undertakings including the Poddar Mills pending their nationalisation. The lease granted in favour of Poddar Mills expired by efflux of time on 22.10.1990. Thus, the said Poddar Mills continued as a tenant by holding over the suit premises. The Trust issued a legal notice dated 2.12.1994 to the National Textile Corporation (hereinafter called as the appellant), terminating its tenancy qua the suit premises. The Parliament enacted the Textile Undertakings (Nationalisation) Act, 1995 (hereinafter called 'the Act 1995'). The Trust filed an eviction suit against the appellant under the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter called 'the Act 1947'). The Act 1947 stood repealed by the Maharashtra Rent Control Act, 1999 (hereinafter called 'the Act 1999'). The respondent-Trust issued a notice for terminating the tenancy of the appellant vide notice dated 26.9.2000. The respondents/plaintiffs after withdrawal of the suit filed under the Act 1947, filed a fresh suit in the Small Causes Court at Bombay seeking eviction of appellant and for a decree

of mesne profits on 20.4.2001. The appellant filed the written statement denying the pleas taken by the respondents/plaintiffs. The suit was decreed in favour of the respondents/plaintiffs vide judgment and decree dated 5.8.2006 by which the appellant was directed to hand over vacant and peaceful possession of the suit premises to the respondents within four months.

E. Being aggrieved, the appellant preferred Appeal No. 627 of 2006 to the Division Bench of the Small Causes Court at Bombay on 13.11.2006 which was dismissed by the appellate court by affirming the judgment and decree of the trial court vide judgment and decree dated 14.8.2008. The appellant preferred civil revision before the High Court of Bombay, which has been dismissed vide impugned judgment and order dated 3.8.2009.

Hence, this appeal.

3. Shri Prag P. Tripathi, learned Additional Solicitor General, appearing for the appellant has submitted that the judgments and decrees of the courts below have to be set aside as none of the courts below has taken into consideration the effect of the provisions of the Act 1995 by virtue of which the textile undertaking stood absolutely vested in the Central Government and further vested in the appellant. As on the expiry of the lease of 99 years on 22.10.1990, the Act 1947 was in force, the then tenant, Poddar Mills became the statutory tenant. Such tenancy rights stood vested absolutely in the Central Government on commencement of the Act 1995 by operation of law. The appellant stepped in the shoes of the Central Government merely as an agent, thus, the Central Government remained the tenant. The Central Government continued to be a tenant in the suit premises and thus, would be protected in terms of Section 3(1) (a) of the Act 1999 being premises let out to the Government. The courts below failed to consider this vital legal issue. The suit filed by the respondents was not maintainable. The judgments and decrees of the courts below are liable to be set aside.

4. Per contra, Shri Mukul Rohatgi, learned senior counsel appearing for the respondents, submitted that it is not permissible for the court to travel beyond the pleadings. No evidence can be led on an issue in respect of which proper pleadings have not been taken. Findings of fact cannot be recorded on a issue on facts in respect of which no factual foundation has been laid. The appellant had never raised the issue before the courts below that the Central Government was the tenant and it was holding the premises merely as an agent. In the written statement filed by the appellants, no reference was made to the provisions of Act 1995. Even otherwise, the tenancy rights which had vested in the Central Government, stood vested immediately, by operation of law, in the appellant, a public sector undertaking as well as the public limited company having a paid up share capital of more than rupees one crore, thus the appellant has no protection of the Act 1999. As the said provisions of Act 1999 are not attracted in the instant case, the suit for eviction was filed before the Small Causes Court at Bombay. All issues raised in the plaint have been adjudicated by three courts. The power of the revisional court, in view of the provisions of Section 115 of Code of Civil Procedure, 1908 (hereinafter called as 'CPC'), remains very limited after the amendment Act 2002, w.e.f. 1.7.2002. Being the fourth court, in exercise of its power under Article 136 of the Constitution, this Court should not entertain the appeal. The appeal lacks merit and is liable to be dismissed.

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

6. In the instant case, no reference had ever been made by the appellant to the effect of the provisions of the Act 1995 before the trial court while filing the written submissions; neither any issue has been framed; nor arguments had been advanced in regard to the same; this issue has not been agitated either before the appellate court or revisional court. Before us, an application has been filed to urge additional grounds regarding

the application of the Act 1995 without seeking amendment to the pleadings (WS).

7. Pleadings and particulars are necessary to enable the court to decide the rights of the parties in the trial. Therefore, the pleadings are more of help to the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted". A decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (Vide: *M/s. Trojan & Co. v. RM N.N. Nagappa Chettiar,* AIR 1953 SC 235; *State of Maharashtra v. M/s. Hindustan Construction Company Ltd.,* AIR 2010 SC 1299; and *Kalyan Singh Chouhan v. C.P. Joshi,* AIR 2011 SC 1127).

8.In *Ram Sarup Gupta (dead) by L.Rs. v. Bishun Narain Inter College & Ors.,* AIR 1987 SC 1242, this Court held as under:

> "..... in the absence of pleadings, evidence if any, produced by the parties cannot be considered..... no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it."

Similar view has been reiterated in *Bachhaj Nahar v. Nilima Mandal & Ors.,* AIR 2009 SC 1103.

9. In *Kashi Nath (Dead) through L.Rs. v. Jaganath,* (2003) 8 SCC 740, this Court held that "where the evidence is not in line of the pleadings and is at variance with it, the said evidence cannot be looked into or relied upon."

Same remain the object for framing the issues under Order

XIV CPC and the court should not decide a suit on a matter/point on which no issue has been framed. (Vide: *Biswanath Agarwalla v. Sabitri Bera & Ors.,* (2009) 15 SCC 693; and *Kalyan Singh Chouhan* (supra).

10. In *Syed and Company & Ors. v. State of Jammu & Kashmir & Ors.,* 1995 Supp (4) SCC 422, this Court held as under:

> "Without specific pleadings in that regard, evidence could not be led in since it is settled principle of law that no amount of evidence can be looked unless there is a pleading. Therefore, without amendment of the pleadings merely trying to lead evidence is not permissible."

11. In *Chinta Lingam & Ors. v. The Govt. of India & Ors.,* AIR 1971 SC 474, this Court held that unless factual foundation has been laid in the pleadings no argument is permissible to be raised on that particular point.

12. In *J. Jermons v. Aliammal & Ors,* (1999) 7 SCC 382, while dealing with a similar issue, this Court held as under:

> "…… there is a fundamental difference between a case of raising additional grounds based on the pleadings and the material available on record and a case of taking a new plea not borne out of the pleadings. In the former case no amendment of pleading is required, whereas in the latter it is necessary to amend the pleadings…The respondents cannot be permitted to make out a new case by seeking permission to raise additional grounds in revision."

13. In view of the above, the law on the issue stands crystallised to the effect that a party has to take proper pleadings and prove the same by adducing sufficient evidence. No evidence can be permitted to be adduced on a issue unless factual foundation has been laid down in respect of the same.

14. There is no quarrel to the settled legal proposition that a new plea cannot be taken in respect of any factual controversy whatsoever, however, a new ground raising a pure legal issue for which no inquiry/proof is required can be permitted to be raised by the court at any stage of the proceedings. (See : *M/s Sanghvi Reconditioners Pvt. Ltd. v. Union of India & Ors.,* AIR 2010 SC 1089; and *Greater Mohali Area Development Authority & Ors. v. Manju Jain & Ors.,* AIR 2010 SC 3817).

15. The questions do arise as to whether in the facts and circumstances of this case the Government is a tenant or the appellant can be termed as "Government" or "Government Department" or "agent" of the Central Government in the context of the Act 1999.

The Government loosely means the body of persons authorized to administer the affairs of, or to govern, a State. It commands and its decision becomes binding upon the members of the society. Government includes, both the Central Government as well as the State Government. The government is impersonal in character having three independent functionaries as its branches. It performs regal and sovereign functions, which are not alienable to any other person, *e.g.* defence, security, currency etc. Government means a group of people responsible for governing the country. It consists of the activities, methods and principles involved in governing a country or other political unit.

The Government is a body that governs and exercises control by issuing directions and is not governed by any other agency. It is a body politic that formulates policies and the laws by which a civil society is controlled. It is a political concept formulated to rule the nation. It is not a profit and loss establishment. "From the legal point of view, government may be described as the exercise of certain powers and the performance of certain duties by public authorities or officers,

together with certain private persons or corporations exercising public functions."

Thus, Government Department means something purely fundamental, i.e. relating to a particular government or to the practice of governing a country. It has different Wings.

However, the expression 'Government' may be required to be interpreted in the context used in a particular Statute. The expression denotes the Executive and not the Legislature. (Vide: *State of Rajasthan & Anr. v. Sripal Jain,* AIR 1963 SC 1323; *Pashupati Nath Sukul v. Nem Chandra Jain & Ors.,* AIR 1984 SC 399; *R.S. Nayak v. A.R. Antulay,* AIR 1984 SC 684; and *V.S. Mallimath v. Union of India & Anr.,* AIR 2001 SC 1455)

16. To perform the functions, the Government has its various departments and to facilitate its working, the Government itself may be divided into various Sections. To carry out the commercial activities by the State, the Corporations have been established by enactment of Statutes and the "power to charter Corporations is incidental to or in aid of Governmental functions." Such Corporations would ex-hypothesis be agencies of the Government. (Vide : *Sukhdev Singh & Ors. v. Bhagatram Sardar Singh Raghuvanshi & Anr.,* AIR 1975 SC 1331; and *Ramana Dayaram Shetty v. The International Airport Authority of India & Ors.,* AIR 1979 SC 1628).

17. Banks and Financial institutions carrying out financial transactions, are independent to do business subject to the regulatory laws made by the legislature. They are not under the direct executive control of the government. They are profit and loss earning organisations coupled with all connected financial and economic activities. They are a body corporate with a limited role to play and do not "govern" people as understood by governance. (See: *Federal Bank Ltd. v. Sagar Thomas & Ors.,* AIR 2003 SC 4325).

18. In *State of Punjab & Ors. v. Raja Ram & Ors.,* AIR 1981 SC 1694, this Court considered the provisions of the Food Corporation Act, 1964 and held that Food Corporation of India was not a Government department but a Government Company. The Court observed :

> "A Government department has to be an organisation which is not only completely controlled and financed by the Government but has also no identity of its own. The money earned by such a department goes to the exchequer of the Government and losses incurred by the department are losses of the Government. The Corporation, on the other hand, is an autonomous body capable of acquiring, holding and disposing of property and having the power to contract. It may also sue or be sued by its own name and the Government does not figure in any litigation to which it is a party."

(See also: *The State of Bihar v. The Union of India & Anr.,* AIR 1970 SC 1446; *S.S. Dhanoa v. Municipal Corporation Delhi & Ors.,* AIR 1981 SC 1395; *K. Jayamohan v. State of Kerala & Anr.,* (1997) 5 SCC 170; *Hindustan Steel Works Construction Ltd. v. State of Kerala & Ors.,* AIR 1997 SC 2275; *Mohd. Hadi Raja v. State of Bihar & Anr.,* AIR 1998 SC 1945; and *State through Narcotics Control Bureau v. Kulwant Singh,* AIR 2003 SC 1599).

19. In *Food Corporation of India v. Municipal Committee, Jalalabad & Anr.,* AIR 1999 SC 2573, this Court considered the case of imposition of house tax under the provisions of the Punjab Municipalities Act, 1911 and held that Food Corporation of India was a Government Company and not a Government Department - *a distinct entity from Central Government.* Thus, was not entitled to exemption from tax under Article 285 of the Constitution. While deciding the said case, reliance had been placed by the Court on its earlier judgment in *M/s. Electronics Corporation of India Ltd., etc. etc. v. Secretary, Revenue*

Department, Government of Andhra Pradesh & Ors., etc. etc., AIR 1999 SC 1734.

20. In *A.K. Bindal & Anr. v. Union of India & Ors.,* (2003) 5 SCC 163, this Court clarified:

> "The legal position is that *identity of the government company remains distinct from the Government. The government company is not identified with the Union* but has been placed under a special system of control and conferred certain privileges by virtue of the provisions contained in Sections 619 and 620 of the Companies Act. Merely because the entire shareholding is owned by the Central Government will not make the incorporated company as Central Government….."
>
> (Emphasis added)

21. In *Southern Roadways Ltd., Madurai v. S.M. Krishnan,* AIR 1990 SC 673, this Court examined an issue whether the possession of the agent can be termed to be the possession of the principal for all purposes including the acquisition of title and held that agent who receives property from or for his principal, obtains no interest for himself in the property for the reason that possession of the agent is the possession of the principal and in view of the fiduciary relationship the agent cannot claim his own possession. While deciding the said case reliance was placed on various earlier judgments including *Smt. Chandrakantaben v. Vadilal Bapalal Modi,* AIR 1989 SC 1269.

In *Prem Nath Motors Ltd. v. Anurag Mittal,* AIR 2009 SC 569, this Court dealt with the relationship of agent and principal and held that in view of the provisions of Section 230 of the Indian Contract Act 1872 (hereinafter called the 'Contract Act'), an agent is not liable for the acts of a disclosed principal subject to a contract to the contrary. Where the relationship of principal and agent is established the agent cannot be sued when the

principal has been disclosed. (See also: *Vivek Automobiles Ltd. v. Indian Inc.,* (2009) 17 SCC 657).

Thus, it was made clear that suit does not lie against an agent where the principal is known or has been disclosed.

The appellant may be called 'agency' or 'instrumentality' of the Central Government for a limited purpose, namely to label it to be the "State" within the ambit of Article 12 of the Constitution. (See: *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology & Ors.,* (2002) 5 SCC 111).

However, even by stretch of imagination, the appellant cannot be held to be an 'agent' of the Central Government as defined under Section 182 of the Contract Act.

22. Thus, if the aforesaid settled legal principles are applied to the appellant, it becomes evident that appellant is neither the government nor the department of the government, but a Government Company. Appellant cannot identify itself with the Central Government. The submission made by Mr. Tripathi that appellant is merely an agent of the Central Government is not worth consideration at all for the simple reason that rights **vested** in the appellant stood crystallised after being transferred by the Central Government. Appellant is being controlled by the provisions of the Act 1995 and not by the Central Government. Whereas an agent is merely an extended hand of the principal and cannot claim independent rights.

23. Section 3 (1) (a) & (b) provide for exemption from the application of the Act 1999. This Court examined the validity of provisions of Section 3(1) (a) and (b) of the Act 1999 in *Saraswat Coop. Bank Ltd. & Anr. v. State of Maharashtra & Ors.,* (2006) 8 SCC 520 and came to the conclusion that it was within the exclusive domain of the legislature to decide which section of tenants should be afforded protection on the basis of economic criteria. If a particular section of tenants is not protected considering their economic conditions it can be held

to be a reasonable classification and making such distinction is valid. The exclusion of premises let or sub-let to banks or any public sector undertaking or any corporation established by or under any Central or State Act or foreign missions, international agencies, multinational companies and private and public limited companies having paid up share capital of rupees one crore or more could not be held to be arbitrary. The Court further held that the provisions of Section 3(1)(b) are applicable to all premises whether let out before or after commencement of the Act 1999.

24. In *Leelabai Gajanan Pansare & Ors. v. Oriental Insurance Company Ltd. & Ors.,* (2008) 9 SCC 720, this Court dealt with the same issue as which of the categories of tenants have been excluded from the operation of the Act 1999 and held as under:

> "Therefore, we are of the view that on a plain meaning of the word "PSUs" as understood by the legislature, it is clear that, India's PSUs are in the form of statutory corporations, public sector companies, government companies and companies in which the public are substantially interested (see the Income Tax Act, 1961). When the word PSU is mentioned in Section 3(1)(b), the State Legislature is presumed to know the recommendations of the various Parliamentary Committees on PSUs. These entities are basically cash-rich entities. They have positive net asset value. They have positive net worths. They can afford to pay rents at the market rate……we hold that Section 3(1)(b) clearly applies to different categories of tenants, all of whom are capable of paying rent at market rates. Multinational companies, international agencies, statutory corporations, government companies, public sector companies can certainly afford to pay rent at the market rates. This thought is further highlighted by the last category in Section 3(1)(b). Private limited companies and public limited companies having a paid-up share capital of more

> than Rs 1,00,00,000 are excluded from the protection of the Rent Act. This further supports the view which we have taken that each and every entity mentioned in Section 3(1)(b) can afford to pay rent at the market rates."
>
> (Emphasis added)

(See also: *D.C. Bhatia & Ors. v. Union of India & Anr.,* (1995) 1 SCC 104).

25. The case stands squarely covered by the judgment of this Court in *Leelabai Gajanan Pansare* (supra) so far as the issue of exemption to the Act 1999 is concerned.

26. Section 3(1) and (2) of the Act 1995 reads as under:

> "3(1) On the appointed day, the right, title and interest of the owner in relation to every textile undertaking shall stand transferred to and *shall vest absolutely* in, the Central Government.
>
> (2) Every textile undertaking *which stands vested* in the Central Government by virtue of sub-section (1), shall immediately after it has so vested, *stand transferred to, and vested* in, the National Textile Corporation." (Emphasis added)

The aforesaid provisions require construction giving proper meaning to the expression 'vesting'.

27. 'Vesting' means having obtained an absolute and indefeasible right. It refers to and is used for transfer or conveyance. 'Vesting' in the general sense, means vesting in possession. However, 'Vesting' does not necessarily and always means possession but includes vesting of interest as well. 'Vesting' may mean vesting in title, vesting in possession or vesting in a limited sense, as indicated in the context in which it is used in a particular provision of the Act. Word 'Vest' has different shades, taking colour from the context in which it is

used. It does not necessarily mean absolute vesting in every situation and is capable of bearing the meaning of a limited vesting, being limited, *in title as well as duration*. Thus, the word 'vest' clothes varied colours from the context and situation in which the word came to be used in the statute. The expression 'vest' is a word of ambiguous import since it has no fixed connotation and the same has to be understood in a different context under different set of circumstances. (Vide: *Fruit & Vegetable Merchants Union v. Delhi Improvement Trust,* AIR 1957 SC 344 ; *Maharaj Singh v. State of Uttar Pradesh & Ors.,* AIR 1976 SC 2602; *Municipal Corporation of Hyderabad v. P.N. Murthy & Ors.,* AIR 1987 SC 802; *Vatticherukuru Village Panchayat v. Nori Venkatarama Deekshithulu & Ors.,* 1991 Supp. (2) SCC 228; *Dr. M. Ismail Faruqui etc. v. Union of India & Ors.,* AIR 1995 SC 605 ; *Government of A.P. v. H.E.H. The Nizam, Hyderabad,* (1996) 3 SCC 282 ; *K.V. Shivakumar & Anr. v. Appropriate Authority & Ors.,* (2000) 3 SCC 485 ; *Municipal Corporation of Greater Bombay & Ors. v. Hindustan Petroleum Corporation & Anr.,* AIR 2001 SC 3630 ; and *Sulochana Chandrakant Galande v. Pune Municipal Transport & Ors.,* (2010) 8 SCC 467).

28. The Act 1995 has been brought for providing the acquisition and transfer of the rights, title and interest of the owners in respect of the textile undertakings. Respondents had not been the owner of the textile undertaking. They had rented out the premises to Poddar Mills and what had vested in the Central Government was only the right, title and interest of the Poddar Mills and nothing else. The Poddar Mills was having only right in tenancy in the suit premises. The owner had been defined in clause (g) of Section 2 of the Act 1995, taking into consideration the expression in relation to textile undertaking as a proprietor or lessee, or occupier of the textile company undertaking. It included even the receiver and liquidator where the companies had gone under liquidation. Textile undertaking has been defined in Section 2(m) which means undertaking specified in column (2) of the First Schedule to the Act 1995

i.e., the textile undertakings, management of which had been taken over by the Central Government under the Act 1983. The First Schedule included Poddar Mills at Sl. No.9 and Poddar Mills had been paid compensation to the tune of Rs.7,46,30,000. Nothing has been paid so far as respondent No.1 is concerned. Sub-section (6) of Section 4 of the Act 1995 provides that any suit, appeal or other proceedings of whatever nature in relation to any property which had vested in the Central Government under Section 3 on the appointed day, instituted or preferred by or against the textile company is pending, the same shall not abate or adversely affect the rights of the parties by reason of the transfer of textile undertaking. Thus, the commencement of the Act 1995 does not really affect even the pending cases. In view thereof, it is beyond our imagination as how the Act 1995 would prejudice the cause of the respondents in the proceedings which arose subsequent to the commencement of this Act.

29. It is not permissible for the appellant to canvass that the Central Government has any concern so far as the tenancy rights are concerned. Right vested in the Central Government stood transferred and vested in the appellant. Both are separate legal entities and are not synonymous. The appellant being neither the government nor government department cannot agitate that as it has been substituted in place of the Central Government, and acts merely as an agent of the Central Government, thus protection of the Act 1999 is available to it. Appellant cannot be permitted to say that though *all the rights vested in* it but it merely remained the agent of the Central Government. Acceptance of such a submission would require interpreting the expression 'vesting' as holding on behalf of some other person. Such a meaning cannot be given to the expression 'vesting'.

It is a settled legal proposition that an agent cannot be sued where the principal is known. In the instant case, the appellant has not taken plea before either of the courts below.

In view of the provisions of Order VIII Rule 2 CPC, the appellant was under an obligation to take a specific plea to show that the suit was not maintainable which it failed to do so. The vague plea to the extent that the suit was bad for non-joinder and, thus, was not maintainable, did not meet the requirement of law. The appellant ought to have taken a plea in the written statement that it was merely an 'agent' of the Central Government, thus the suit against it was not maintainable. More so, whether A is an agent of B is a question of fact and has to be properly pleaded and proved by adducing evidence. The appellant miserably failed to take the required pleadings for the purpose.

30. Thus, in view of the above, we reach the inescapable conclusion that appellant is not entitled for exemption under Section 3(1)(a) or 3(1)(b) of the Act 1999. Nor can it claim the status of an 'agent' of the Central Government. Submissions advanced on behalf of the appellant are preposterous. Facts and circumstances of the case do not warrant review of the impugned judgment.

However, considering the nature of business of the appellant, it is in the interest of justice that appellant be given time upto 31.12.2013, to vacate the premises. Appellant shall file a usual undertaking within four weeks from today to hand over peaceful and vacant possession to the respondent No.1.

With the aforesaid observation, appeal stands dismissed.

B.B.B. Apppeal dismissed.

BHARAT SANCHAR NIGAM LTD.

v.

R. SANTHAKUMARI VELUSAMY & ORS.

(Civil Appeal Nos. 5286-87 of 2005)

SEPTEMBER 6, 2011

[R.V. RAVEENDRAN AND MARKANDEY KATJU, JJ.]

Service Law – Upgradation – Applicability of reservation provisions – Biennial Cadre Review (BCR) Scheme – Nature of – Held: As upgradation involves neither appointment nor promotion, it will not attract reservation – Upgradation involves mere conferment of financial benefits by providing a higher scale of pay – If there is mere upgradation of posts, as contrasted from promotion, reservation provisions would not apply – However, where the upgradation does not involve appointment to a different or higher post, but is as a result of a promotional process involving selection, then the principles of reservation are attracted – In the instant case, the BCR scheme in question was an upgradation scheme to give relief against stagnation – It did not involve creation of any new posts – It did not involve advancement to a higher post – It did not involve any process of selection for conferment of the benefit of higher pay-scale – The upgradation was given to the senior most 10% of BCR scale employees in Grade III strictly as per seniority – The BCR scheme was a scheme for upgradation simplicitor without involving any creation of additional posts or any process of selection for extending the benefit – Such a scheme of upgradation did not invite the rules of reservation – Constitution of India, 1950 – Article 16(4) and 16(4A).

Service Law – Promotion and upgradation – Distinguished – Principles relating to applicability of rules of reservation – Discussed.

The appellant is the successor of the Department of Telecommunications, Ministry of Communications, and Government of India (for short 'government' or 'telecom department'). There were four grades of employees of telecom departments. Promotions from one grade to a higher grade were on the basis of seniority/departmental examination. The telecom department introduced an 'One Time-Bound Promotion' scheme ('OTBP scheme') in the year 1983-84 under which regular employees who had completed 16 years of service in a grade, were placed in the next higher grade. After some years, the employees unions demanded a second time-bound promotion on completion of 26 years of service in the basic grade, as Group C and Group D cadres were only entitled to one-time bound promotion. The government decided that a second time bound promotion was not feasible. However, to provide relief from stagnation in the grade, the government decided to have a Biennial Cadre Review ('BCR') under which a specified percentage of posts could be upgraded on the basis of functional justification.

The BCR scheme was accordingly introduced vide Circular dated 16.10.1990. It was made applicable to those cadres in Group C and Group D, for which one-time bound promotion scheme on completion of 16 years of service in the basic grade was in force. Under the said scheme, employees who were in regular service as on 1.1.1990 and had completed 26 years of satisfactory service in the basic cadres, were to be screened by a duly constituted Committee to assess their performance and determine their suitability for advancement and if they were found suitable, to be upgraded in the higher scale. The upgradation was restricted to 10% of the posts in Grade III.

The circular of the telecom department dated 1.3.1996 applying rules of reservations to promotions to Grade IV

under BCR was challenged by the All India Non SC/ST Telecom Employees Association on the ground that principles of reservation would not apply for upgradation of existing posts which did not carry any change in duties and responsibilities. The Central Administrative Tribunal, Ahmedabad Bench held that the department could not apply reservation rules while upgrading the posts under the BCR scheme and directed the department to take appropriate action for effecting promotions to the upgraded posts without applying the reservation roster. The writ petition filed by the government challenging the said order of the Tribunal (Ahmedabad Bench) was dismissed by the Gujarat High Court. In view of the said decision, the Government issued an order dated 8.9.1999 directing that a Review DPC be held and all ineligible officers wrongly promoted to Grade IV by application of reservation roster as per office order dated 1.3.1996, should be reverted back and all eligible officers should be placed in Grade IV and their pay should be fixed notionally. As a consequence of the said Circular dated 8.9.1999, the contesting respondents were reverted from Grade IV to Grade III.

The contesting respondents filed applications before the Madras Bench of the Tribunal. They challenged the validity of the said order dated 8.9.1999 and sought its quashing and also sought a direction to the government to permit them to continue in Grade IV. Similar applications were filed before the Tribunal's Bangalore Bench. A Full Bench of the Tribunal at Bangalore allowed the applications. The Full Bench of the Tribunal differed from the decision of its Ahmadabad Bench and held that the decision of the Gujarat High Court affirming the said decision was also of no assistance as it was at variance with the decisions of this Court. It held that the BCR upgradation to Grade IV in the telecom department

amounted to promotion, attracting reservation for SCs and STs.

Following the said decision of the Full Bench of the Tribunal, the Madras Bench of the Tribunal allowed the applications filed by the contesting respondents and directed the government to restore the contesting respondents to their promoted posts which they were holding before the order dated 8.9.1999. The Telecommunication Department challenged the said order of the Tribunal by filing a batch of writ petitions before the Madras High Court. The Madras High Court dismissed the writ petitions upholding the order of the Tribunal.

In the instant appeals the appellant contended that there is a clear distinction between upgradation and promotion; that the BCR scheme introduced as per order dated 16.10.1990 was a scheme of upgradation and not promotion; that where there is only upgradation of existing posts, with creating additional posts, principles of reservation would not apply and that the Tribunal and the High Court committed a serious error by treating upgradation as a promotion to which reservation rules would apply.

Allowing the appeals, the Court

HELD:1.1. Article 16(4) of the Constitution enables the State to make any provision for reservation of appointment or posts in favour of any backward classes of citizens. Article 16(4A) enables the State to make any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of Scheduled Castes and Scheduled Tribes, which in the opinion of the State, are not adequately represented in the services under the State. As upgradation involves neither appointment nor promotion, it will not attract reservation.

Upgradation involves mere conferment of financial benefits by providing a higher scale of pay. If there is mere upgradation of posts, as contrasted from promotion, reservation provisions would not apply. [Para 11]

1.2. However, where the upgradation does not involve appointment to a different or higher post, but is as a result of a promotional process involving selection, then the principles of reservation are attracted. [Para 19]

1.3. The following principles emerge relating to promotion and upgradation:

(i) Promotion is an advancement in rank or grade or both and is a step towards advancement to higher position, grade or honour and dignity. Though in the traditional sense promotion refers to advancement to a higher post, in its wider sense, promotion may include an advancement to a higher pay scale without moving to a different post. But the mere fact that both – that is advancement to a higher position and advancement to a higher pay scale – are described by the common term 'promotion', does not mean that they are the same. The two types of promotion are distinct and have different connotations and consequences;

(ii) Upgradation merely confers a financial benefit by raising the scale of pay of the post without there being movement from a lower position to a higher position. In an upgradation, the candidate continues to hold the same post without any change in the duties and responsibilities but merely gets a higher pay scale;

(iii) When there is an advancement to a higher pay scale without change of post, it may be referred to

as upgradation or promotion to a higher pay scale. But there is still difference between the two. Where the advancement to a higher pay-scale without change of post is available to everyone who satisfies the eligibility conditions, without undergoing any process of selection, it will be upgradation. But if the advancement to a higher pay-scale without change of post is as a result of some process which has elements of selection, then it will be a promotion to a higher pay scale. In other words, upgradation by application of a process of selection, as contrasted from an upgradation simplicitor can be said to be a promotion in its wider sense that is advancement to a higher pay scale;

(iv) Generally, upgradation relates to and applies to all positions in a category, who have completed a minimum period of service. Upgradation, can also be restricted to a percentage of posts in a cadre with reference to seniority (instead of being made available to all employees in the category) and it will still be an upgradation simplicitor. But if there is a process of selection or consideration of comparative merit or suitability for granting the upgradation or benefit of advancement to a higher pay scale, it will be a promotion. A mere screening to eliminate such employees whose service records may contain adverse entries or who might have suffered punishment, may not amount to a process of selection leading to promotion and the elimination may still be a part of the process of upgradation simplicitor. Where the upgradation involves a process of selection criteria similar to those applicable to promotion, then it will, in effect, be a promotion, though termed as upgradation;

(v) Where the process is an upgradation simplicitor,

there is no need to apply rules of reservation. But where the upgradation involves selection process and is therefore a promotion, rules of reservation will apply and

(vi) Where there is a restructuring of some cadres resulting in creation of additional posts and filling of those vacancies by those who satisfy the conditions of eligibility which includes a minimum period of service, will attract the rules of reservation. On the other hand, where the restructuring of posts does not involve creation of additional posts but merely results in some of the existing posts being placed in a higher grade to provide relief against stagnation, the said process does not invite reservation. [Para 21]

All India Employees Association (Railways) vs. V.K. Agarwal **2001 (10) SCC 165;** *Union of India vs. V. K. Sirothia* **2008 (9) SCC 283;** *Lalit Mohan Deb v. Union of India* **1973 (3) SCC 862;** *Tarsen Singh vs. State of Punjab* **1994 (5) SCC 392: 1994 (1) Suppl. SCR 452;** *Union of India vs. S.S. Ranade* **1995 (4) SCC 462: 1995 (3) SCR 773;** *State of Rajasthan vs. Fateh Chand Soni* **1996 (1) SCC 562: 1995 (6) Suppl. SCR 559;** *Dayaram Asanand Gursahani v. State of Maharashtra* **1984 (3) SCC 36: 1984 (2) SCR 703;** *Ram Prasad vs. D.K. Vijay* **1999 (7) SCC 251: 1999 (2) Suppl. SCR 576;** *Union of India vs. Pushpa Rani* **2008 (9) SCC 242: 2008 (11) SCR 440 – relied on.**

N.G. Prabhu vs. Chief Justice, Kerala High Court **1973 (2) Lab. IC 1399 – referred to.**

2.1. The BCR scheme did not involve creation of additional posts but merely restructured the existing posts as a result of which 10% of the posts in Grade III were placed in a higher grade (Grade IV) to give relief against stagnation. This is evident from the terms of the

BCR scheme and the clarification contained in the letter dated 7.5.1993 that no posts were sanctioned, as far as 10% BCR was concerned. [Para 22]

2.2. The BCR scheme dated 16.10.1990 provided that the persons who had completed 26 years of service would be screened by a duly constituted Review Committee to assess the performance and suitability for advancement. The screening was for the limited purpose of finding out whether the service record of the employee contained any adverse entries or whether the employee had suffered punishment. The screening process did not involve consideration of comparative merit nor involve any selection. The 10% posts were upgraded strictly by seniority subject to screening. This is evident from the terms of BCR scheme and the Circular dated 13.12.1995 which provided that the promotions to Grade IV were to be based on seniority in the basic grade from among the officers in Grade III, subject to fitness determined as per OTBP manner, that is screening to ascertain whether there are any adverse comments or punishment against the employee concerned. [Para 23]

2.3. The BCR scheme was an upgradation scheme to give relief against stagnation. It did not involve creation of any new posts. It did not involve advancement to a higher post. It did not involve any process of selection for conferment of the benefit of higher pay-scale. The upgradation was given to the senior most 10% of BCR scale employees in Grade III strictly as per seniority. BCR scheme as per circular dated 16.10.1990 was thus a scheme for upgradation simplicitor without involving any creation of additional posts or any process of selection for extending the benefit. Such a scheme of upgradation did not invite the rules of reservation. [Para 24]

3. The orders of the High Court and the Tribunal are accordingly set aside and the Original Applications

challenging the order of the telecom department dated 8.9.1999 are dismissed. [Para 25]

Case Law Reference:

1995 (3) SCR 773	**relied on**	**Para 8**
1973 (3) SCC 862	**relied on**	**Para 8**
1995 (6) Suppl. SCR 559	**relied on**	**Para 8,17**
1999 (2) Suppl. SCR 576	**relied on**	**Para 8,16**
2001 (10) SCC 165	**relied on**	**Para 10, 11**
2008 (9) SCC 283	**relied on**	**Para 11**
1994 (1) Suppl. SCR 452	**relied on**	**Para 12**
1973 (2) Lab. IC 1399	**referred to**	**Para 15**
1984 (2) SCR 703	**relied on**	**Para 18**
2008 (11) SCR 440	**relied on**	**Para 20**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 5286-5287 of 2005.

From the Judgment & Order dated 18.10.2004 of the High Court of Judicature at Madras in W.P. Nos. 11880 and 11881 of 2001.

WITH

C.A. Nos. 3405, 4542, 4543, 4544, 4545 & 4546 of 2006.

R.D. Agrawala, Pavan Kumar, Prithvi Pal, Jayanth Muth Raj, Malavik G., C.K. Sasi, Kiran Suri, Madhu Moolchandani, S.D. Dwarakanath, Dr. Kailash Chand for the appearing parties.

The Judgment of the Court was delivered by

R.V.RAVEENDRAN, J. 1. The appellant, Bharat Sanchar

Nigam Ltd., is the successor of the Department of Telecommunications, Ministry of Communications, and Government of India (for short 'government' or 'telecom department'). The question involved in these matters is whether rules of reservation will apply to upgradation of posts.

2. There were four grades of employees of telecom departments known as Telegraphists or Telecom Operating Assistants in the Telecom Department. Promotions from one grade to a higher grade were on the basis of seniority/ departmental examination. The telecom department introduced an 'One Time-Bound Promotion' scheme ('OTBP scheme' for short) in the year 1983-84 under which regular employees who had completed 16 years of service in a grade, were placed in the next higher grade. After some years, the employees unions demanded a second time-bound promotion on completion of 26 years of service in the basic grade, as Group C and Group D cadres were only entitled to one-time bound promotion. The government decided that a second time bound promotion was not feasible. However, to provide relief from stagnation in the grade, the government decided to have a Biennial Cadre Review ('BCR' for short) under which a specified percentage of posts could be upgraded on the basis of functional justification.

3. The BCR scheme was accordingly introduced vide Circular dated 16.10.1990. It was made applicable to those cadres in Group C and Group D, for which one-time bound promotion scheme on completion of 16 years of service in the basic grade was in force. Under the said scheme, employees who were in regular service as on 1.1.1990 and had completed 26 years of satisfactory service in the basic cadres, were to be screened by a duly constituted Committee to assess their performance and determine their suitability for advancement and if they were found suitable, to be upgraded in the higher scale. The upgradation was restricted to 10% of the posts in Grade III. We extract below the relevant terms of the BCR from

the Circular dated 16.10.1990:

"…….

(iii) Biennial Cadre Reviews will be conducted in respect of the eligible cadre at the level of circles who control these cadres.

(iv) At the time of review the number of officials who have completed/would be completing 26 years of service in the basic cadres including time spend in higher scale (OTBP) will be ascertained. The persons will be screened by the duly constituted Review committee to assess the performance and suitability for advancement.

(v) In the Biennial cadre review, suitable number of posts will be created by upgradation based on functional justification.

(vi) Creation of posts by upgradation will be in the scales indicated below:

Basic scale of the cadre	Scale after OTBP after 16 years of basic grade	Scale after BCR on completion of 26 years or more
750-940	800-1150	950-1400
825-1200	950-1400	1200-1800
975-1540	1320-2040	1400-2600
975-1600	1400-2300	1600-2660 (10% of the posts in the pay scale of 1600-2660 will be in the pay scale of Rs.2000-3200
1320-2040	1600-2600	1640-2900 (10% of the posts in the pay scale of 1640-2900 will be in the pay scale of Rs.2000-3200)

(vi) xxx xxx xxx

(viii) Necessary posts will be created by upgradation under the powers of CGMs in consultation with their accredited finance.

(ix) The first Biennial Cadre Review for eligible cadres/ officials may be conducted immediately covering the period upto 30.6.1992 to ascertain the eligible officials who have completed/will be completing 26 years of services or more as on the crucial dates, namely, the date of the review 01.1.1991, 01.7.1991 and 01.1.1992. The number of posts needed or provide for the promotion of the eligible persons will be determined and will be sanctioned/activated in four instalments the first immediately, the second on 01.9.1991, the third on 01.7.1991 and the fourth on 01.1.1992. With these posts, it should be possible be provide for promotion of those employees who have completed 26 years of service or more on the above crucial dates, subject to their otherwise being found fit. The criterion for promotion will be seniority, subject to selection.

Order implementing the first instalment of cadre review should be issued before 30.11.1990.

In the second cadre review, which will cover the period from 1.7.1992 to 30.6.1994, which should be completed before 01.7.1992, the required number of posts needed to be released in half yearly instalments on 1.7.1992, 1.1.1993, 1.7.1993 and 1.1.1994 to cater for promotion of those who would have completed 26 years of service on the four crucial dates, will be ascertained and sanctions released in appropriate instalment so that the promotions of eligible personnel could be notified on due dates.

……"

4. The Government issued the following clarification

regarding designations by circular dated 11.3.1991:

State of Entry		Grade allotted
(i)	Initial Entry (Basic grade)	Grade I
(ii)	OTBP scale	Grade II
(iii)	BCR scale	Grade III
(iv)	10% of posts in BCR pay scales to be placed in pay scale of 2000-3200	Grade IV

By letter dated 7.5.1993, the telecom department clarified that there were no sanctioned posts in regard to 10% BCR and the number of posts depend upon the number of BCR officials available; and that therefore no local officiating arrangement could be made if an official in the 10% BCR retired before the next review.

5. By circular dated 13.12.1995, the government formulated the procedure regarding promotion to Grade IV. Under the said procedure, promotions to Grade IV were to be based on seniority in the basic grade from among the officers in Grade III subject to fitness determined in the usual manner of OTBP. By a clarificatory Circular dated 1.3.1996, the government issued a clarification that promotion to Grade IV would be given from among officials in Grade III on the basis of their seniority in the basic grade, subject to fulfillment of other conditions and that normal rules of reservation would apply to promotions in Grade IV.

6. The circular of the telecom department dated 1.3.1996 applying rules of reservations to promotions to Grade IV under BCR was challenged by the All India Non SC/ST Telecom Employees Association on the ground that principles of reservation would not apply for upgradation of existing posts which did not carry any change in duties and responsibilities. The Central Administrative Tribunal, Ahmedabad Bench by its order dated 11.4.1997 (OA No.623/1996 – *All India Non-Schedule Caste/Schedule Tribe Telecom Employees*

Association v. Union of India) held that the department could not apply reservation rules while upgrading the posts under the BCR scheme and directed the department to take appropriate action for effecting promotions to the upgraded posts without applying the reservation roster. The writ petition (SCA No.7576 of 1997) filed by the government challenging the said order of the Tribunal (Ahmedabad Bench) was dismissed by the Gujarat High Court by order dated 24.3.1999. In view of the said decision, the Government issued an order dated 8.9.1999 directing that a Review DPC be held and all ineligible officers wrongly promoted to Grade IV by application of reservation roster as per office order dated 1.3.1996, should be reverted back and all eligible officers should be placed in Grade IV and their pay should be fixed notionally. As a consequence of the said Circular dated 8.9.1999, the contesting respondents were reverted from Grade IV to Grade III.

7. Feeling aggrieved, the contesting respondents filed applications before the Madras Bench of the Tribunal. They challenged the validity of the said order dated 8.9.1999 and sought its quashing and also sought a direction to the government to permit them to continue in Grade IV. Similar applications were filed before the Tribunal's Bangalore Bench. A Full Bench of the Tribunal at Bangalore allowed the applications by order dated 26.4.2000. It held :

> "Through the mechanism of grant of time-bound advancements to the higher scales of pay with different designations, or through appointments to posts which are upgraded with higher scales of pay within a given cadre, entailing creation of additional posts or not, essentially what takes place is a process of advancement/appointment to these higher scales of pay. We are convinced that this process can only be treated as promotion in the light of the principle laid down by the Hon'ble Supreme Court that an appointment to a higher scale of pay even at the same post and even without involving any additional

> responsibilities can still be a promotion. Even if in a given situation, the creation of the upgraded posts with higher scales of pay do not result in a net addition to the existing number of posts in that cadre, but is specifically and explicitly created to remove stagnation, to follows that those upgraded posts involving higher scales of pay are in effect a substitute for promotion. It is so because either through a regular promotion in terms of the Cadre and Recruitment rules or through the creation of the upgraded posts in the same cadre with a higher scale of pay what is sought to be achieved is the provision of opportunities for career advancement which, in the circumstances, is synonymous with promotional opportunities. Once this basic objective for the creation of upgraded posts is understood and appreciated, we are of the firm opinion that such provisions for career advancement through appointments to upgraded posts cannot be treated for the purpose of reservation of special categories like SCs and STs differently from appointments to posts which are designated in particular as promotional posts. In our view, it is also absolutely immaterial as to whether the mode of appointment to these upgraded posts with higher scales of pay is by selection or by merely applying the criterion of seniority subject to fitness. In fact, it is evident that appointments to a number of posts which are specifically designated as promotional posts are also made on the basis of seniority-cum-fitness. Therefore, the adoption of that latter criterion for appointment to a upgraded post by itself cannot make such an appointment as non-promotional appointment. On this score drawing a distinction between upgradation and promotion based on the nomenclature only does not appear to be tenable."

8. The Full Bench of the Tribunal differed from the decision of its Ahmadabad Bench and held that the decision of the Gujarat High Court affirming the said decision was also of no assistance as it was at variance with the decisions of this Court

in *Union of India vs. S.S. Ranade* - 1995 (4) SCC 462, *Lalit Mohan Deb v. Union of India* - 1973 (3) SCC 862, *State of Rajasthan vs. Fateh Chand Soni* - 1996 (1) SCC 562, and *Ram Prasad vs. D.K. Vijay* - 1999 (7) SCC 251. It held that the BCR upgradation to Grade IV in the telecom department amounted to promotion, attracting reservation for SCs and STs.

9. Following the said decision of the Full Bench of the Tribunal, the Madras Bench of the Tribunal by order dated 25.7.2000 allowed the applications filed by the contesting respondents herein and directed the government to restore the contesting respondents to their promoted posts which they were holding before the order dated 8.9.1999. The Telecommunication Department challenged the said order of the Tribunal by filing a batch of writ petitions before the Madras High Court. The Madras High Court, by the impugned order dated 18.10.2004, dismissed the writ petitions upholding the order of the Tribunal.

10. The said order is challenged in these appeals by special leave by the appellant. The appellant has put forth the following contentions :

(i) There is a clear distinction between upgradation and promotion. While promotion involves advancement in rank, grade or both and is always a step towards advancement to higher position, grade or honour, upgradation does not involve promotion to a higher position and the pedestal of the employee remains the same and the employee is merely conferred some financial benefits by granting a higher pay scale, to overcome stagnation. The BCR scheme introduced as per order dated 16.10.1990 was a scheme of upgradation and not promotion.

(ii) Where there is only upgradation of existing posts, with creating additional posts, principles of reservation would not apply. The Tribunal and the High Court committed a serious error by treating upgradation as a promotion to

which reservation rules would apply. The Tribunal and the High Court ought to have followed the decision of this Court in *All India Employees Association (Railways) vs. V.K. Agarwal* - 2001 (10) SCC 165 and the decision of the Gujarat High Court dated 24.3.1999 in Special Civil Application No.7576 of 1997 - *Union of India vs. All India Non SC/ST Telecom Employees Association.*

11. Article 16(4) enables the State to make any provision for reservation of appointment or posts in favour of any backward classes of citizens. Article 16(4A) enables the State to make any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of Scheduled Castes and Scheduled Tribes, which in the opinion of the State, are not adequately represented in the services under the State. As upgradation involves neither appointment nor promotion, it will not attract reservation. Upgradation involves mere conferment of financial benefits by providing a higher scale of pay. If there is mere upgradation of posts, as contrasted from promotion, reservation provisions would not apply. [See : *All India Employees Association (Railways) vs. V.K. Agarwal* - 2001 (10) SCC 165 and *Union of India vs. V. K. Sirothia* - 2008 (9) SCC 283]. In *V.K. Agarawal* this Court held :

"It appears from all the decisions so far that *if as a result of reclassification or readjustment, there are no additional posts which are created and it is a case of upgradation, then the principle of reservation will not be applicable.* It is on this basis that this Court on 19.11.1998 had held that reservation for SC and ST is not applicable in the upgradation of existing posts and CA No.1481 of 1996 and the connected matters were decided against the Union of India. The effect of this is that where the total number of posts remained unaltered, though in different scales of pay, as a result of regrouping and the effect of which may be that some of the employees who were in the

scale of pay of Rs.550-700 will go into the higher scales, it would be a case of upgradation of posts and not a case of additional vacancy or post being created to which the reservation principle would apply. *It is only if in addition to the total number of existing posts some additional posts are created that in respect of those additional posts the reservation will apply*, but with regard to those additional posts the dispute does not arise in the present case. The present case is restricted to all existing employees who were redistributed into different scales of pay as a result of the said upgradation."

(emphasis supplied)

The decision of this Court in *V.K. Sirothia* arose from a decision of the Allahabad Bench of the Tribunal which expressed a similar view (in *V.K. Sirothia vs. Union of India* - O.A. No.384/1986). The Tribunal held :

"The restructuring of posts was done to provide relief in terms of promotional avenues. No additional posts were created. Some posts out of existing total were placed in higher grade to provide these avenues to the staff who were stagnating. The placement of these posts cannot be termed as creation of additional posts. There were definite number of posts and the total remained the same. The only difference was that some of these were in a higher grade. It was deliberate exercise of redistribution with the primary object of betterment of chance of promotion and removal of stagnation."

The Union of India challenged the said order of the Tribunal and this Court by a brief order dated 19.11.1998 (*Union of India vs. V.K. Sirothia* – 2008 (9) SCC 283) dismissed the appeal by a brief order. The relevant portion of the said order is extracted below :

"The finding of the Tribunal that "the so-called promotion

as a result of redistribution of posts is not promotion attracting reservation" on the facts of the case, appears to be based on good reasoning. On facts, it is seen that it is a case of upgradation on account of restructuring of the cadres, therefore, the question of reservation will not arise. We do not find any ground to interfere with the order of the Tribunal."

12. We may next consider the concepts of 'promotion' and 'upgradation'. In *Lalit Mohan Deb,* this Court explained the difference between a promotion post and a selection grade :

"It is well recognised that a promotion post is a higher post with a higher pay. A selection grade has higher pay but in the same post. A selection grade is intended to ensure that capable employees who may not get a chance of promotion on account of limited outlets of promotions should at least be placed in the selection grade to prevent stagnation on the maximum of the scale. Selection grades are, therefore, created in the interest of greater efficiency."

In *Tarsen Singh vs. State of Punjab* – 1994 (5) SCC 392, this Court defined 'promotion' thus :

"Promotion as understood under the service law jurisprudence means advancement in rank, grade or both. Promotion is always a step towards advancement to a higher position, grade or honour."

13. In *S.S. Ranade* the scope and meaning of the word 'promotion' was considered. The issue in that case was whether a Commandant (Selection Grade) held a higher rank than a Commandant and consequently entitled to be superannuated at a later age of 58 years instead of 55 years. This Court, following the decision in *Lalit Mohan Deb,* held as follows:

"Undoubtedly, a Commandant who becomes a Commandant (Selection Grade) secures a promotion to

a higher pay scale. But it is a higher pay scale in the same post. The use of the word 'promotion' in Rule 6 and the Constitution of a Departmental Promotion Committee for selection of Commandant (Selection Grade) in Rule 7, do not necessarily lead to the conclusion that the promotion which is contemplated there is necessarily a promotion to a higher post. *Promotion can be either to a higher pay scale or to a higher post*. These two Rules and the use of the word 'promotion' there do not conclude the issue.

xxx xxx xxx

In the present case, *an element of selection is involved in granting selection grade because there is no automatic promotion to the selection grade pay scale.* But this factor is not decisive. In the present case also, as in the above cases, Selection Grade posts are created entirely for the purpose of granting some relief to those who have very limited avenues of getting promotion to a higher post. That is why a higher pay or pay scale is granted in the same post. Thus, by its very nature, a selection grade post cannot be considered as a higher post for the purposes of Rule 9. ...Because the creation of a selection grade in the same post stands on a very different footing. By its very nature a selection grade provides a higher pay or a higher pay scale in the same post. The beneficiary of a selection grade does not thereby occupy a post which is higher in rank than the post earlier occupied by him."

(emphasis supplied)

On facts, this Court found that the respondent therein required a promotion which resulted in occupation of a post which was higher in rank than the post earlier occupied, to get the relief of longer service. This Court held that though his promotion from Commandant to Commandant (Selection Grade), resulted in a promotion to a higher pay scale, that was

not sufficient to grant relief to the respondent therein as his promotion to selection grade did not involve advancement to a higher post.

14. In *Fateh Chand Soni,* this Court following *Ranade* defined 'promotion' thus:

"The High Court, in our opinion was not right in holding that promotion can only be to a higher post in the service and appointment to a higher scale of an officer holding the same post does not constitute promotion. In the literal sense the word "Promote" means "to advance to a higher position, grade, or honour". So also "Promotion" means "advancement of preferment in honour, dignity, rank or grade". [See: Webster's Comprehensive Dictionary, International Edition, p. 1009]. "*Promotion" thus not only covers advancement to higher position or rank but also implies advancement to a higher grade. In service law also the expression "Promotion" has been understood in the wider sense and it has been held that "Promotion can be either to a higher pay scale or to a higher post."*

(emphasis supplied)

15. The distinction between *upgradation* and *promotion* was spelt out by a Full Bench of the Kerala High Court in *N.G. Prabhu vs. Chief Justice, Kerala High Court* - 1973 (2) Lab. IC 1399, thus :

"Promotion is, of course, appointment, to a different post carrying a higher scale of pay in the service. If, to better the conditions of service of the incumbents in posts in the same category the scale of pay of all the posts in the category is raised, the incumbents would naturally get the higher scale of pay. But in such a case it may not be proper to characterize the event as a promotion to higher posts though a benefit of a higher scale of pay is obtained by all concerned. In other words, if the upgradation relates

to all the posts in a category naturally, there is no sense in calling it a promotion of all the persons in that category. That is because there is no question of appointment from one post to another. Parties continued to hold same posts but get a higher scale of pay. It may be that it is not all the posts in a particular category that are so upgrade, but only a part of it. Normally, the benefit of such upgradation would go to the seniors in the category. They would automatically get a higher scale of pay. That is because though their posts continue in the same category a higher scale of pay is fixed for those posts. It is appropriate then to say that the seniors have been nominated to the higher grade which has been so created by upgradation. This phenomenon does not differ from the case where all the posts are upgraded and, it appears to us that those who get the higher grade cannot be said to have been 'promoted' because here again there is no question of appointment from one post to another. They continue to hold the same post, but because of seniority in the same post they are given a higher scale of pay. When a person is nominated to the higher scale of pay from time to time based on seniority, it may perhaps be loosely termed as a promotion."

16. But even in cases where no additional posts were created, but where a process of selection was involved in the upgradation, the process has to be considered not as an upgradation simplicitor, but a process of promotion and therefore the principles of reservation would be attracted. We may refer to the Constitution Bench decision of this Court in *Ram Prasad* (supra) where this Court held that appointment from senior scale to selection scale is a promotion though it may not be a promotion to a higher position and consequently the reserved candidates are entitled to be promoted to the selection scale by way of roster points. For this purpose, the Constitution Bench relied upon the decision of *Fateh Chand Soni*.

17. In *Fateh Chand Soni* (supra), the issue was whether seniority in the selection grade (in the Rajasthan Police Service) was to be fixed on the basis of date of appointment to the selection scale or on the basis of seniority in the senior scale irrespective of the date on which appointment was made to the selection scale. This Court held that appointment to the selection scale of an officer in the senior scale in the service constituted promotion and seniority in the selection scale had to be fixed on the basis of the date of selection and a person selected and appointed as a result of an earlier selection would rank senior to a person who is selected and appointed as a result of a subsequent selection. We note below the reasoning of this Court :

"In *Lalit Mohan Deb v. Union of India*, the pay scale of all the Assistants in the Civil Secretariat in Tripura was Rs.80-180 and on the basis of the recommendations of the Second Pay Commission appointed by the Government of India the scales were revised and 25% of the posts were placed in the Selection Grade in the scale of Rs. 150-300 and the rest continued in the old pay scale of Rs.80-180. *For the purpose of filling the Selection Grade posts, a test was held and those who qualified in the said test were appointed to the Selection Grade*. The Assistants in the Selection Grade and the Assistants in the old pay scale were doing the same type of work. This Court observed that "provision of a Selection Grade in the same category of posts is not a new thing" and that "a Selection Grade is intended to ensure that capable employees who may not get a chance of promotion on account of limited outlets of promotions should at least be placed in the Selection Grade to prevent stagnation on the maximum of the scale" and that "Selection Grades are, therefore created in the interest of greater efficiency". *The Court took note of the fact that the basis for selection of some of the Assistants to the Selection Grade scale was seniority-cum-merit which is one of the two or three principles of promotion*

widely accepted in the administration and, therefore, the creation of Selection Grade in the category of Assistants was not open to challenge. In that case, the Court had proceeded on the basis that the appointment to the higher grade amounted to promotion.

The Rules governing appointment to the Selection Scale in the Service also envisage that such appointment constitutes promotion. The relevant provision is contained in Rule 28(A) of the Rules which prescribes the criteria, eligibility and procedure for promotion to Junior, Senior and other posts encadred in the Service. Under sub-rule (5) of Rule 28(A) promotion from the lowest post or category of post in the Service to the next higher post or category of post in the Service is required to be made strictly on the basis of seniority-cum-merit. Sub-rule (6) of Rule 28(A) provides that selection for promotion to all other higher posts or higher categories of posts in the Service shall be made on the basis of merit and on the basis of seniority-cum-merit in the proportion of 50:50."

(emphasis supplied)

18. In *Dayaram Asanand Gursahani v. State of Maharashtra* – 1984 (3) SCC 36 a three Judge Bench of this Court held :

"…….As mentioned earlier, the selection grade post is not a post to which promotion has to be made nor is there any efficiency bar rule attached to it. Further it is not shown that the Governor had issued any executive instructions as it had been done in *Sant Ram Sharma v. State of Rajasthan and Anr.* (1968) 1 SCR 111 and in *Lalit Mohan Deb and Ors. v. Union of India and Ors.* (1973) 3 SCC 862 enabling the High Court to withhold increments in the extended pay scale which is in this case called as selection grade pay scale. The pay scale to which a judicial officer is entitled is a condition of service which can be

regulated by a statute or rules made under the proviso to Article 309 or by executive instructions issued under Article 162 of the Constitution. It cannot come within the range of the expression 'control' in Article 235 of the Constitution. (See *B.S. Yadav and Ors. etc. v. State of Haryana and Ors. etc.* (1981) 1 SCR 1024). It is only where there is such a law, rule or executive instruction, the High Court may act under Article 235 of the Constitution to sanction it or to refuse to sanction it. We are of the view that in the present case the mere nomenclature given to the extended pay scale as the selection grade pay scale does not lead to the inference that there is an element of selection involved in sanctioning it. In the circumstances it should be treated as just an extended pay scale which forms part of the pay scale of Rs. 900-1800 as clarified in two Government orders sanctioning the selection grade posts. ……"

The aforesaid decision in *Dayaram Asanand Gursahani* was distinguished in *Fateh Chand Soni* on the following reasoning :

"The High Court has referred to the decision of this Court in *Dayaram Asanand Gursahani v. State of Maharashtra and Ors.* [1984] 2 SCR 703, wherein, after considering the resolution of the State Government sanctioning the post of District Judge in the Selection Grade, this Court has held that the said resolution did not indicate that there was any process of promotion by selection or otherwise from the cadre of District Judges to the Selection Grade District Judges. In the particular facts of that case it was held that mere nomenclature given to the extended pay scale as the Selection Grade pay Scale does not lead to the inference that there is no element of selection involved in sanctioning it and that it should be treated as just an extended pay scale which forms part of the pay scale. The position in the present case is, however, different. Here the Selection

Scale is a separate scale and is not an extension of the Senior Scale. Moreover appointment to the Selection Scale is made by selection on the basis of merit and seniority-cum-merit in accordance with Rule 28(A) of the Rules."

19. In view of the decisions in *Dayaram Asanand Gursahani, Fateh Chand Soni* and *Ram Prasad,* the position that emerges is that even where the upgradation does not involve appointment to a different or higher post, but is as a result of a promotional process involving selection, then the principles of reservation are attracted.

20. In *Union of India vs. Pushpa Rani* - 2008 (9) SCC 242, this Court examined the entire case law and explained the difference between *upgradation* and *promotion* thus :

"In legal parlance, upgradation of a post involves transfer of a post from lower to higher grade and placement of the incumbent of that post in the higher grade. *Ordinarily, such placement does not involve selection but in some of the service rules and/or policy framed by the employer for upgradation of posts, provision has been made for denial of higher grade to an employee whose service record may contain adverse entries or who may have suffered punishment.* The word 'promotion' means advancement or preferment in honour, dignity, rank, grade. Promotion thus not only covers advancement to higher position or rank but also implies advancement to a higher grade. *In service law, the word 'promotion' has been understood in wider sense and it has been held that promotion can be either to a higher pay scale or to a higher post.*

Once it is recognized that additional posts becoming available as a result of restructuring of different cadres are required to be filled by promotion from amongst employees who satisfy the conditions of eligibility and are adjudged suitable, there can be no rational justification to exclude

applicability of policy of reservation while effecting promotions, more so because it has not been shown that procedure for making appointment by promotion against such additional posts is different than the one prescribed for normal promotion.

Policy contained in Letter dated 9.10.2003 has been framed with a view to strengthen and rationalize the staffing pattern. For this purpose, the Ministry of Railways undertook review of certain cadres. The basis of the review was functional, operation and administrative requirement of the Railways. This exercise was intended to improve efficiency of administration by providing incentives to existing employees in the form of better promotional avenues and at the same time requiring promotees to discharge more onerous duties. *The policy envisaged that additional posts becoming available in the higher grades as a sequel to restructuring of some of the cadres should be filled by promotion by considering such of the employees who satisfy the conditions of eligibility including minimum period of service and who are adjudged suitable by the process of selection. This cannot be equated with upgradation of posts which are required to be filled by placing existing incumbents in the higher grade without subjecting them to the rigor of selection*. It has therefore to be held that the Railway Board did not commit any illegality by directing that existing instructions with regard to the policy of reservation of posts for SC and ST will apply at the stage of effecting promotion against the additional posts. The Tribunal committed serious illegality by striking down para 14 of letter dated 9.10.2003. Matters relating to creation and abolition of posts, formation and structuring/restructuring of cadres, prescribing the source/mode of recruitment and qualifications, criteria of selection, evaluation of service records of employees fall within the exclusive domain of employer. What steps should be taken for improving

efficiency of the administration is also the preserve of the employer. Power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provision or is patently arbitrary or is vitiated by mala fides. The court cannot sit in appeal over the judgment of the employer and ordain that a particular post be filled by direct recruitment or promotion or by transfer. The court has no role in determining the methodology of recruitment or laying down the criteria of selection. It is also open to the court to make comparative evaluation of the merit of the candidates. The court cannot suggest the manner in which the employer should structure or restructure the cadres for the purpose of improving efficiency of administration."

(emphasis supplied)

In *Pushpa Rani*, this Court while considering a scheme contained in the letter dated 9.10.2003 held that it provided for a restructuring exercise resulting in creation of additional posts in most of the cadres and there was a conscious decision to fill-up such posts from promotion from all eligible and suitable employees and, therefore, it was a case of promotion and, consequently, reservation rules were applicable.

21. On a careful analysis of the principles relating to promotion and upgradation in the light of the aforesaid decisions, the following principles emerge :

(i) Promotion is an advancement in rank or grade or both and is a step towards advancement to higher position, grade or honour and dignity. Though in the traditional sense promotion refers to advancement to a higher post, in its wider sense, promotion may include an advancement to a higher pay scale without moving to a different post. But the mere fact that both – that is advancement to a higher position and advancement to a higher pay scale – are described by the common term

'promotion', does not mean that they are the same. The two types of promotion are distinct and have different connotations and consequences.

(ii) Upgradation merely confers a financial benefit by raising the scale of pay of the post without there being movement from a lower position to a higher position. In an upgradation, the candidate continues to hold the same post without any change in the duties and responsibilities but merely gets a higher pay scale.

(iii) Therefore, when there is an advancement to a higher pay scale without change of post, it may be referred to as upgradation or promotion to a higher pay scale. But there is still difference between the two. Where the advancement to a higher pay-scale without change of post is available to everyone who satisfies the eligibility conditions, without undergoing any process of selection, it will be upgradation. But if the advancement to a higher pay-scale without change of post is as a result of some process which has elements of selection, then it will be a promotion to a higher pay scale. In other words, upgradation by application of a process of selection, as contrasted from an upgradation simplicitor can be said to be a promotion in its wider sense that is advancement to a higher pay scale.

(iv) Generally, upgradation relates to and applies to all positions in a category, who have completed a minimum period of service. Upgradation, can also be restricted to a percentage of posts in a cadre with reference to seniority (instead of being made available to all employees in the category) and it will still be an upgradation simplicitor. But if there is a process of selection or consideration of comparative merit or suitability for granting the upgradation or benefit of advancement to a higher pay scale, it will be a promotion. A mere screening to eliminate such employees whose service records may contain adverse entries or who might have suffered punishment, may not amount

to a process of selection leading to promotion and the elimination may still be a part of the process of upgradation simplicitor. Where the upgradation involves a process of selection criteria similar to those applicable to promotion, then it will, in effect, be a promotion, though termed as upgradation.

(v) Where the process is an upgradation simplicitor, there is no need to apply rules of reservation. But where the upgradation involves selection process and is therefore a promotion, rules of reservation will apply.

(v) Where there is a restructuring of some cadres resulting in creation of additional posts and filling of those vacancies by those who satisfy the conditions of eligibility which includes a minimum period of service, will attract the rules of reservation. On the other hand, where the restructuring of posts does not involve creation of additional posts but merely results in some of the existing posts being placed in a higher grade to provide relief against stagnation, the said process does not invite reservation.

22. In this case, the BCR scheme did not involve creation of additional posts but merely restructured the existing posts as a result of which 10% of the posts in Grade III were placed in a higher grade (Grade IV) to give relief against stagnation. This is evident from the terms of the BCR scheme and the clarification contained in the letter dated 7.5.1993 that no posts were sanctioned, as far as 10% BCR was concerned.

23. In this case, the BCR scheme dated 16.10.1990 provided that the persons who had completed 26 years of service would be screened by a duly constituted Review Committee to assess the performance and suitability for advancement. The screening was for the limited purpose of finding out whether the service record of the employee contained any adverse entries or whether the employee had suffered punishment. The screening process did not involve

consideration of comparative merit nor involve any selection. The 10% posts were upgraded strictly by seniority subject to screening. This is evident from the terms of BCR scheme and the Circular dated 13.12.1995 which provided that the promotions to Grade IV were to be based on seniority in the basic grade from among the officers in Grade III, subject to fitness determined as per OTBP manner, that is screening to ascertain whether there are any adverse comments or punishment against the employee concerned.

24. To sum up, the BCR scheme was an upgradation scheme to give relief against stagnation. It did not involve creation of any new posts. It did not involve advancement to a higher post. It did not involve any process of selection for conferment of the benefit of higher pay-scale. The upgradation was given to the senior most 10% of BCR scale employees in Grade III strictly as per seniority. BCR scheme as per circular dated 16.10.1990 was thus a scheme for upgradation simplicitor without involving any creation of additional posts or any process of selection for extending the benefit. Such a scheme of upgradation did not invite the rules of reservation.

25. We accordingly allow these appeals, set aside the orders of the High Court and the Tribunal and dismiss the Original Applications challenging the order of the telecom department dated 8.9.1999.

B.B.B Appeals allowed.

BANATWALA & COMPANY
v.
L.I.C. OF INDIA & ANR.
(Civil Appeal No. 7171 of 2010)

SEPTEMBER 19, 2011

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

Rent Control and eviction:

Maharashtra Rent Control Act, 1999 – s. 2(14), 8 and 29 – Provisions for fixation of standard rent and maintenance of essential services under the Maharashtra Rent Control Act – Applicability of, to public premises owned by public corporations/undertakings – Held: The subjects of fixation of Standard Rent and restoration of essential services by the landlord are covered under the Maharashtra Rent Control Act and not under the Public Premises Act – Application of the tenants for the said matters when necessary, are maintainable under the Maharashtra Rent Control Act – Eviction and recovery of arrears of rent are alone covered under the Public Premises Act – Thus, the provisions of the Maharastra Rent Control Act with respect to fixation of Standard Rent for premises, and requiring the landlord not to cut off or withhold essential supply or service, and to restore the same when necessary, are not in conflict with or repugnant to any of the provisions of the Public Premises Act – Provisions of the Public Premises Act govern the relationship between the public undertakings covered under the Act and their occupants to the extent they provide for eviction of unauthorised occupants from public premises, recovery of arrears of rent or damages for such unauthorised occupation, and other incidental matters specified under the Act – Provisions of the Maharashtra Rent Control Act govern the relationship between the public undertakings and their occupants to the extent it covers the other aspects of the

relationship between the landlord and tenants, not covered under the Public Premises Act – Public Premises (Eviction of Unauthorised Occupants) Act, 1971 – ss. 2(e), 5, 7 and 15.

Public Premises (Eviction of Unauthorised Occupants) Act, 1971:

ss. 2(e), 5, 7, 15 – Eviction of unauthorised occupants from Public Premises and recovery of arrears of rent from them – Initiation of proceedings under the Public Premises Act – Held: Proceedings initiated by the landlord would be fully competent under the Public Premises Act – Occupants would not be entitled to seek any remedy under the Bombay Rent Act or the subsequent Maharashtra Rent Control Act since the jurisdiction of the civil court has been ousted u/s. 15 – Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 – Maharashtra Rent Control Act, 1999.

ss. 10 and 15 – Jurisdiction of civil courts for the remedies of fixation of rent or maintenance of essential services, if ousted – Held: Jurisdiction of the civil court for these remedies is not ousted – Actions covered under the Public Premises Act are concerning eviction of unauthorised occupants and recovery of arrears of rent – Act does not speak anything about the fixation of Standard Rent or maintenance of essential services and no remedy is provided thereunder – The fact that proceeding for one purpose is provided under one statute cannot lead to an automatic conclusion that the remedy for a different purpose provided under another competent statute becomes unavailable.

Constitution of India, 1950:

Article 254(2) – Repugnancy between the law made by the Parliament and the law made by the State Legislature – When arises – Held: When both the legislation occupy the same field with respect to one of the matters enumerated in List III and where a direct conflict is seen between the two – It

is to be examined as to whether the two legislations occupy the same field – There is no repugnancy when legislations do not occupy the same field – Provisions of Maharashtra Rent Control Act with respect to fixation of Standard Rent and requiring the landlord to maintain the essential services and supplies not in conflict or repugnant to any of the provisions under the Public Premises Act – Public Premises (Eviction of Unauthorised Occupants) Act, 1971 – Maharashtra Rent Control Act, 1999 – ss. 2(14), 8 and 29.

Two Acts when governing the common field, whether both can apply for different purpose – Held: There could be provisions for certain purposes in one statute and for another purpose in another statute though both govern the common field.

Life Insurance Corporation Act, 1956 – s. 21 – Corporation to be guided by directions of Central Government – Guidelines dated 30.5.2002 laid down by the Central Government that the provisions of the Public Premises Act, 1971 should be used primarily to evict totally unauthorised occupants and to secure periodic revision of rent in terms of the provisions of the Rent Control Act in each State, or to move under genuine grounds under the Rent Control Act for resuming possession, whether directions u/s. 21 – Held: Guidelines dated 30.5.2002 are not directions u/s. 21 – Purpose of these guidelines is to prevent arbitrary use of powers under the Public Premises Act – Relevance of the guidelines would depend upon the nature of guidelines and the source of power to issue such guidelines - Source of the right to apply for determination of standard rent is the Rent Control Act, and not the guidelines – Also, by subsequent clarificatory order, the Central Government made it clear that the guidelines dated 30.5.2002 would not apply to affluent tenants – Public Premises (Eviction of Unauthorised Occupants) Act, 1971.

Rent Control and eviction:

Exemption from operation of Rent Act – Legislative expectations from public bodies as landlords – Held: Exercise of discretion of public authorities must be tested on the assumption that they would act for public benefit and would not act as private landlords – However, these principles not relevant while considering a dispute between a statutory body as landlord and an affluent tenant in regard to a commercial or non-residential premises.

Relationship between landlord and tenant in general – Changes brought about by the Rent Control Acts – Explained and discussed.

First respondent-Life Insurance Corporation of India (L.I.C.) a statutory corporation leased out a floor of a building to appellant firm in the year 1988 under an agreement of lease. At that time, the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 as well as the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 were in force. The Bombay Rent Act was replaced by the Maharashtra Rent Control Act, 1999 with effect from 31.03.2000. The said lease agreement was extended from time to time. In the year 2004, the monthly rent of the premises was revised and the same was challenged in a writ petition which was subsequently withdrawn and the rent was reduced. Thereafter, the lift of the said building was not working properly and an application was filed in the Small Causes Court, for restoration of the lift services under Section 29 of the Maharashtra Rent Control Act, 1999. The court directed the respondents to repair the lift. Aggrieved, the respondents filed a revision petition on the ground that the Maharashtra Rent Act was not applicable and the same was dismissed. Subsequently, the rent was increased and also demand was raised for arrears of rent. Aggrieved, the appellant asked for the break up of rent but they did not receive any reply. The appellant filed an application under Section 8(3) of the MRC Act in the Court

of Small Causes for fixation of standard rent, and also filed an application for fixing interim rent. The respondents contended that the suit premises were public premises covered under the Public Premises Act and the MRC Act was not applicable to them. The respondents also filed an interim application. The Small Causes Court rejected the said application holding that the Standard Rent Application was maintainable under the provisions of the MRC Act. The respondents then filed a writ petition. The High Court set aside the order passed by the Small Causes Court and dismissed the Standard Rent Application. Therefore, the appellants filed the instant appeals.

The question which arose for consideration in the instant appeal was whether the provisions for fixation of standard rent, and provisions prescribing other obligations for the landlord such as maintenance of essential services under the Maharashtra Rent Control Act, 1999 are applicable in respect of public premises owned by a Corporation such as the first respondent-Life Insurance Corporation of India which is otherwise covered by the provisions of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971.

Allowing the appeal, the Court

HELD: 1. (a) The provisions of the Maharastra Rent Control Act, 1999 with respect to fixation of Standard Rent for premises, and requiring the landlord not to cut off or withhold essential supply or service, and to restore the same when necessary, are not in conflict with or repugnant to any of the provisions of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971.

(b) The provisions of the Public Premises Act, 1971

shall govern the relationship between the public undertakings covered under the Act and their occupants to the extent they provide for eviction of unauthorised occupants from public premises, recovery of arrears of rent or damages for such unauthorised occupation, and other incidental matters specified under the Act.

(c) The provisions of the Maharashtra Rent Control Act, 1999 shall govern the relationship between the public undertakings and their occupants to the extent this Act covers the other aspects of the relationship between the landlord and tenants, not covered under the Public Premises Act, 1971.

(d) The application of appellant and similar applications of the tenants for fixation of Standard Rent or for restoration of essential supplies and services when necessary, shall be maintainable under the Maharashtra Rent Control Act, 1999. [Para 72]

Relationship of landlord and tenant in general:

2.1. A tenancy is created as a result of an agreement between the landlord and a tenant. Since the premises owned by the landlord are leased out to the tenant by virtue of the agreement between the parties, the agreement is normally called a 'lease deed'. Although, the lease deed is also a contract between the parties, the provisions of T.P. Act relating to contracts, shall be taken as part of the Indian Contract Act, 1872 (Section 4 of T.P. Act). As a 'lease deed' is a contract relating to 'leases' governed by T.P. Act, the relationship between the landlord and the tenant would be governed by the terms of the lease deed and subject to its terms, by Section 108 relating to the rights and liabilities of leasor and leasee,

and other statutory provisions controlling leases under the T.P. Act. [Para 10]

The Law of Landlord and Tenant by Prof. P.F. Smith **Fourth Edn, p 9 – referred to.**

2.2. Generally, the terms of the agreement between the landlord and the tenant would require the landlord to maintain the premises in tenantable condition, and he will get the premises repaired when necessary. The tenant will be required to vacate the premises at the end of the period of lease. During the lease period, it will be the responsibility of the tenant to pay the rent regularly and 'keep the premises in good condition subject only to changes caused by reasonable wear and tear or irresistible force' and 'when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left'. If the tenant commits breach of the lease agreement by not paying the rent regularly or remaining in arrears thereof, or causing damage to the premises, the landlord may terminate the lease earlier, even before the expiry of the agreed term as per the provisions concerning the termination provided in the agreement and the Transfer of Property Act. If the tenant does not vacate the premises after the termination of lease, the landlord will have to file a suit for evicting him in the Civil Court. On the other hand 'if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor'. Section 108 (l) of the T.P. Act lays down that 'the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf'. This implies that the amount of rent that the landlord will

require shall be a certain definite amount. [Paras 11 and 12]

The changes brought about by the Rent Control Acts -

3.1. Due to the problems of the scarcity of accommodation following the Second World War, special protection was made available to the tenants against unjustified increases in rent and ejectment from the tenancies. This protection was reflected in the provisions of various Rent Control Acts such as the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 which governed the premises of the appellant for all purposes prior to the coming into force of the Public Premises Act, 1971. The Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947, is one such legislation which is an advancement over the Transfer of Property Act. This Act laid down that a tenant will not be evicted unless the landlord establishes that the tenant has committed breaches as laid down under that Act, and the burden will be on the landlord to establish that the tenant has committed the particular breach, such as being in arrears of standard rent over a specified period, erecting permanent structures on the premises without landlord's permission, sub-letting the premises and causing nuisance to the neighbours etc. A reasonable and bonafide requirement of the landlord was also provided as a ground for eviction. If the landlord was charging rent excessively, a right was given to the tenant to have the standard rent fixed under Section 11 of that Act. A further right was given to the tenant to approach the Court under Section 24 of that Act for maintenance and restoration of essential services in case the landlord neglected the same. [Para 13]

The Law of Rent Control by R.B. Andhyarujina, **Second Edn p 12 – referred to.**

3.2. Earlier, the relationship between L.I.C as the landlord and its tenants was governed under the Bombay Rent Act 1947. The Public Premises (Eviction of Unauthorised Occupants) Act, 1971, provides only for eviction of unauthorized occupants, and recovery of arrears of rent from the tenant and those subjects no longer remained covered under the Bombay Rent Act. The Bombay Rent Act came to be replaced by the Maharashtra Rent Control Act, 1999. The MRC Act is subsequent to the Public Premises Act, 1971, and has come into force with effect from 31.3.2000 after receiving the assent of the President of India. Therefore, the subjects which were covered under the Bombay Rent Act came to be covered under the MRC Act as appropriately modified including the concept of standard rent. [Paras 14, 15 and 16]

The impugned judgment of the High Court and its reliance on the Constitution Bench judgment in *Ashoka Marketing Ltd.*:

4. The impugned judgment in the instant case relied upon the observations in *Ashoka Marketing*'s **case-"the provisions of the Public Premises Act, to the extent they cover premises falling within the ambit of the Rent Control Act, override the provisions of the Rent Control Act and a person in unauthorized occupation of public premises under Section 2(e) of the Act cannot invoke the protection of the Rent Control Act", to hold that once the premises were covered under the Public Premises Act, that Act will override the Rent Control Act and therefore, in the instant case, standard rent application was not maintainable. On the other hand, it was submitted on behalf of the appellant that the statement in Ashoka Marketing judgment, when it speaks of 'provisions to the extent they cover', it means the 'subject matter' covered by the provisions under the two acts. It must be noted**

that the controversy in the case of Ashoka Marketing was with respect to the subject of eviction of the unauthorized occupants from the public premises. Eviction of tenants in general was a subject covered by both the statutes under considerations before the Court. However, the Public Premises Act contains the special provisions for the eviction of unauthorized occupants from the public premises, but for which they would fall within the ambit of the Rent Control Act. Consequently, in view of the dicta, the proceedings under the Public Premises Act were held to be valid and legal, and not those under the Delhi Rent Control Act. The subject matter of controversy in the instant case is with respect to the fixation of standard rent, which is not covered under the provision in the Public Premises Act. On the other hand the same is very much covered under the Maharastra Rent Control Act, 1999. The overriding effect given to Public Premises Act cannot mean overriding with reference to a matter which was not dealt with by that Act, since the Public Premises Act did not claim to cover the subject other than eviction of unauthorized occupants from public premises and recovery of arrears of rent. [Para 31]

Ashoka Marketing Ltd. and Anr. Vs. Punjab National Bank and Others **1990 (4) SCC 406: 1990 (3) SCR 649;** *New Delhi Municipal Committee Vs. Kalu Ram & Anr.* **AIR 1976 SC 1637 : 1976 Suppl. SCR 87;** *Shri Sarwan Singh and another Vs. Shri Kasturi Lal* **1977 (1) SCC 750 : 1977 (2) SCR 421 – referred to.**

Public Premises Act vis-à-vis the Bombay Rent Act and the MRC Act on the issue of eviction of unauthorised occupants from Public Premises:

5. For the purposes of eviction of unauthorised occupants, and for the recovery arrears of rent from

them, the proceedings to be initiated by the respondents would be fully competent under the Public Premises Act, and that in such an eventuality the occupants would not be entitled to seek any remedy under the Bombay Rent Act or the subsequent MRC Act, since the jurisdiction of the Civil Court has been ousted under Section 15 of the Public Premises Act in this behalf. [Paras 32, 58]

Kaiser-I-Hind Pvt. Ltd. & Anr. vs. National Textile Corpn. (Maharashtra North) Ltd. & Ors. **2002 (8) SCC 182: 2002 (2) Suppl. SCR 555;** *Crawford Bayley & Co. & Ors. v. Union of* India & Ors. **2006 (6) SCC 25: 2006 (3) Suppl. SCR 240 – relied on.**

The question of Repugnancy:

6.1. The distribution of legislative powers between the Union of India and the States has been provided in the Seventh Schedule of the Constitution. It consists of List I which is the Union List, List II which is the State List and List III which is the Concurrent List. The question of repugnancy can arise only in connection with the subjects which are enumerated in the Concurrent List with respect to which both the Union and the State Legislatures have the concurrent power to legislate, and when the State Legislature makes a law on a subject on which the Parliament has already made a law. It is to deal which such a conflict that Article 254 has been enacted. Article 254 of the Constitution deals with the question of inconsistency between the laws made by the Parliament and laws made by the Legislatures of States. [Para 34]

6.2. The question of repugnancy between the law made by the Parliament and the law made by the State Legislature may arise in cases when both the legislation occupy the same field with respect to one of the matters enumerated in List III and where a direct conflict is seen between the two. The question therefore to be examined

is as to whether the two legislations occupy the same field. If they do not, then there is no repugnancy. Unless the provisions are irreconcilable, there will be a presumption in favour of the constitutionality. [Paras 35 and 36]

6.3. The MRC Act which is a State Act, is an Act subsequent to the Public Premises Act, and has been assented by the President, notwithstanding the existence of the Public Premises Act, the situation, therefore, would be governed by Sub-article (2) of Article 254 of the Constitution. [Paras 60, 61]

Hoechst Pharmaceuticals Ltd. Vs. State of Bihar **1983 (4) SCC 45: 1983 (3) SCR 130;** *State of West Bengal Vs. Kesoram Industries Ltd. And Ors.* **2004 (10) SCC 201: 2004 (1) SCR 564;** *Ch. Tika Ramji and Ors. etc. v. The State of Uttar Pradesh and Ors.* **AIR 1956 SC 676: 1956 SCR 393;** *M. Karunanidhi vs. Union of India and Anr*. **1979 (3) SCC 431: 1979 (3) SCR 254;** *Deep Chand vs.. State of U.P.* **AIR 1959 SC 648: 1959 (2) Suppl. SCR 8;** *Vijay Kumar Sharma and Ors. vs. State of Karnataka and Ors.* **1990 (2) SCC 562: 1990 (1) SCR 614 – referred to.**

In the event of two Acts governing a common field, whether both can apply for different purposes:

7. There could be provisions for certain purposes in one statute, and for another purpose in another statute, though both govern the common field. [Para 39]

Krishna Distt. Coop. Mktg. Society Ltd. Vijayawada vs. N.V. Purnachandra Rao & Ors. **1987 (4) SCC 99: 1987 (3) SCR 728;** *National Engineering Industries Ltd. vs. Shri Kishan Bhageria & Ors.* **1988 Supp. SCC 82;** ***Bharat*** *Hydro Power Corpn. Ltd. & Ors. v. State of Assam & Anr.* **2004 (2) SCC 553: 2004 (1) SCR 284;** *State of Maharashtra v. Bharat Shanti Lal Shah and Ors.* **2008 (13) SCC 5: 2008 (12) SCR**

1083; *Zameer Ahmed Latifur Rehman Sheikh vs. State of Maharashtra & Ors.* **2010 (5) SCC 246: 2010 (4) SCR 1042 – referred to.**

Fixation of Standard Rent in the context of exemptions from the Rent Control Laws – The question of remedy:

8. Whatever be the object of granting exemption, where the object is to see that the properties of the State or semi-state bodies should not suffer by the rigours of the Rent Control Laws or the possession of the public premises be recovered expeditiously, "the Courts have expressed their views that these authorities being public bodies should so behave as not to act contrary to the policies laid down in the Rent Control Laws namely not to increase the rent unreasonably or excessively, nor to evict their tenant unreasonably or arbitrarily, save and except in public interest." [Para 42]

Rampratap Jaidayal Vs. Dominion of India **AIR 1953 Bom 170;** *State of Bombay Vs. F.N. Balsara* **1951 SCR 682: 53 Bom. LR 982 (SC);** *Chiranjitlal v. Union of India'* **AIR 1951 SC 41: 1950 SCR;** *Baburao Shantaram More Vs. The Bombay Housing Board* **AIR 1954 SC 153: 1954 SCR 572;** *M/s Dwarkadas Marfatia V. Bombay Port Trust* **1989 (3) SCC 293 - referred to.**

J.H. Dalal in his Commentary on the Bombay Rent Act **Fifth Edn, p 65 – referred to.**

The issue with respect to maintainability of the Standard Rent application and the question of conflict with the provisions of the Public Premises Act:

9. In the instant case, the subjects of fixation of Standard Rent and restoration of essential services by the landlord are covered under the MRC Act, but in no way under the Public Premises Act. The Public Premises

Act, in fact does not claim to cover these subjects. The Court has to look at the substance of the matter. Regard must be had to the enactment as a whole, to its main objects and scope of its provisions. Incidental and superficial encroachments are to be disregarded. Eviction and recovery of arrears of rent are alone covered under the Public Premises Act. The subject of fixation of rent is different and independent from eviction. That being the position, there is no conflict between the MRC Act and the Public Premises Act when it comes to the provisions in the MRC Act with respect to fixation of Standard Rent and requiring the landlord to maintain the essential services and supplies. Therefore, the provisions of MRC Act in that behalf cannot in any way be said to be repugnant to those under the Public Premises Act. The presumption is in favour of constitutionality, and the Court is not expected to strike down a provision unless the conflict is a real one. In the instant matter there is no such real conflict. [Para 62]

Bharath Gold Mines Ltd. vs. Kannappa **ILR 1988 KAR 3092 – approved.**

Jain Ink Mfg. Co. vs. LIC Prithipal Singh v. Satpal Singh (Dead) thr. its Lrs. **2010 (2) SCC 15: 2009 (16) SCR 736;** *State of West Bengal vs. Kesoram Industries Ltd. And Ors.* **2004 (10) SCC 201: 2004 (1) SCR 564 – relied on.**

On ouster of the jurisdiction of the civil courts:

10.1. Section 10 of the Public Premises Act does give a finality to the orders passed by the Estate Officers or the Appellate Officers, and states that 'the same shall not be called in question in any original suit, application or execution proceeding, and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred

by or under this Act'. Section 15 of the Act specifically states that no court shall have jurisdiction to entertain any suit or proceeding in respect of the subjects, amongst others concerning, '(a) the eviction of any person who is in unauthorised occupation of any public premises, and (d) the arrears of rent payable under sub-section (1) of Section 7 or damages payable under sub-section (2), or interest payable under sub-section (2A), of that section'. Therefore, to that extent the jurisdiction of the Civil Court is ousted. The actions which are covered under the Public Premises Act are concerning eviction of unauthorised occupants and recovery of arrears of rent. The Act however, does not claim to speak anything about the fixation of Standard Rent or maintenance of essential services. For these purposes no remedy is provided under the Public Premises Act. Therefore, the jurisdiction of the Civil Court for these remedies cannot be held to be ousted. [Para 63]

Church of North India vs. Lavajibhai Ratanjibhai 2005 (10) SCC 760; *Dhulabhai Vs. State of M.P.* **AIR 1969 SC 78: 1968 SCR 662 – referred to.**

10.2. It was submitted that if the submission of the appellant is accepted it would mean permitting proceedings before the Court of Estate Officer for recovery of arrears of rent, and before the Rent Controller for fixation of standard rent, and the same is not desirable. This by itself can be no reason to hold the Standard Rent Application to be not maintainable before the Court of Small Causes. [Para 64]

Church of North India vs. Lavajibhai Ratanjibhai **2005 (10) SCC 760;** *National Engineering Industries Ltd. vs. Shri Kishan Bhageria & Ors.* **1988 Supp. SCC 82 – referred to.**

10.3. The MRC Act being a welfare statute like the labour laws is enacted after considering the requirements

of the tenants, and contains the provisions for fixation of standard rent and for restoring essential services and supplies when necessary. The public premises are not specifically exempted from the applicability of the MRC Act. That being so, there is no reason to hold that these remedies would not be available to the tenants of the public premises, though for the purposes of eviction of unauthorised occupants and recovery of arrears of rent, the proceedings would lie only under the Public Premises Act. The proceedings for the recovery of arrears of rent are at the instance of landlord, whereas those for fixation of standard rent are at the instance of the tenant. Both these proceedings are quite different in their prayers and scope of consideration. The fact that the proceeding for one purpose is provided under one statute cannot lead to an automatic conclusion that the remedy for a different purpose provided under another competent statute becomes unavailable. [Para 65]

Expectations from Public Bodies:

11. The exercise of discretion of public authorities must be tested on the assumption that they would act for public benefit and would not act as private landlords and they must be judged by that standard. However, these principles would have no relevance while considering a dispute between a statutory body as landlord and an affluent tenant in regard to a commercial or non-residential premises. [Para 66]

Rampratap Jaidayal Vs. Dominion of India **AIR 1953 Bom 170;** *Baburao Shantaram More Vs. The Bombay Housing Board* **AIR 1954 SC 153:1954 SCR 572;** ***M/s Dwarkadas Marfatia V. Bombay Port Trust*** **1989 (3) SCC 293 – relied on.**

On the relevance of Guidelines:

12.1. In the instant case, the activities of the respondent/L.I.C are controlled by the LIC Act. Section 21 of the LIC Act lays down that the Corporation shall be guided by the directions issued by the Central Government. The guidelines dated 30.5.2002 laid down by the Central Government are not directions under Section 21 of the LIC Act. Guideline no. 2 (i) states that the provisions of the Public Premises Act, 1971 should be used primarily to evict totally unauthorised occupants. Guideline No. 2 (iii) specifically states that it will be open to the public authority to secure periodic revision of rent in terms of the provisions of the Rent Control Act in each State, or to move under genuine grounds under the Rent Control Act for resuming possession. Thus, these guidelines specifically recognize the relevance of certain provisions of Rent Control Acts for their application to the properties covered under the Public Premises Act. It is stated in the guidelines that the public authorities would have rights similar to private landlords under the Rent Control Acts in dealing with genuine legal tenants. It follows that the public authorities would have the obligations of the private landlords also. The purpose of these guidelines is to prevent arbitrary use of powers under the Public Premises Act. The relevance of the guidelines would depend upon the nature of guidelines and the source of power to issue such guidelines. The source of the right to apply for determination of standard rent is the Rent Control Act, and not the guidelines. By subsequent clarificatory order, the Central Government has made it clear that the guidelines dated 30.5.2002 would not apply to affluent tenants. [Paras 67, 68 and 69]

12.2. The respondents submitted that if the appellant or the tenants are aggrieved by the fixation of the rent, their remedy is to invoke the writ jurisdiction of the High Court. The respondents ignored that the writ jurisdiction

is a discretionary jurisdiction. Besides, normally oral evidence is not recorded while exercising the writ jurisdiction. Although part of the evidence to be examined in the process of rent fixation would be documentary, such as the provisions of the contract between the parties, there would also be many other factors which may require oral evidence, particularly with respect to the comparable properties. An appropriate remedy, forum and procedure are therefore, necessary in the interest of fairness and proper adjudication. That apart, there is no reason to insist upon such an interpretation which would deny to the tenants of the public premises, a remedy and a forum which are otherwise available to the tenants under the MRC Act. [Para 70]

12.3. The interpretation as canvassed by the respondents would deny the appropriate remedy to the petitioner and the like tenants, to have the rent of their premises being fixed by filing a Standard Rent Application, and also to get the essential services restored in the event of any difficulty. There is no reason to accept any such interpretation because there is no conflict between the provisions of the MRC Act with those under the Public Premises Act, when it comes to fixation of standard rent and restoring the essential supplies. Otherwise it would expose the provisions of Public Premises Act to the vires of unreasonableness also. The interpretation canvassed by the respondents is not in consonance with the welfare state that is contemplated under the Constitution. [Para 71]

Bharath Gold Mines Ltd. vs. Kannappa **ILR 1988 KAR 3092 – approved.**

13. The order passed by the Single Judge of the High Court in writ petition filed by the respondents is set aside and the writ petition is dismissed. The order passed by the Court of Small Causes rejecting respondents'

application objecting to the maintainability of appellant's application for fixation of Standard Rent is upheld. [Para 73]

Persis Kothawala vs. LIC **2004 (4) BCR 610;** *Shangrila Food Products Ltd. and Anr. Vs. L.I.C. and Anr.* **1996 (5) SCC 54: 1996 (3) Suppl. SCR 279;** *New India Assurance Co. Ltd. Vs. Nusli Neville Wadia* **2008 (3) SCC 279: 2007 (13) SCR 598 – referred to.**

Case Law Reference:

1990 (3) SCR 649	**Referred to**	**Para 26, 28, 30, 31, 60**
1976 Suppl. SCR 87	**Referred to**	**Para 27**
1977 (2) SCR 421	**Referred to**	**Para 29**
2002 (2) Suppl. SCR 555	**Relied on.**	**Para 32**
2006 (3) Suppl. SCR 240	**Relied on.**	**Para 32**
1983 (3) SCR 130	**Referred to**	**Para 35**
2004 (1) SCR 564	**Referred to**	**Para 35**
1956 SCR 393	**Referred to**	**Para 36**
1979 (3) SCR 254	**Referred to**	**Para 37**
1959 (2) Suppl. SCR 8	**Referred to**	**Para 37**
1990 (1) SCR 614	**Referred to**	**Para 38**
1987 (3) SCR 728	**Referred to**	**Para 39**
1988 Supp. SCC 82	**Referred to**	**Para 40, 64**
2004 (1) SCR 284	**Relied on.**	**Para 40, 62**
2008 (12) SCR 1083	**Referred to**	**Para 41**
2010 (4) SCR 1042	**Referred to**	**Para 41**

1951 SCR 682	**Referred to**	**Para 43**
1950 SCR 869	**Referred to**	**Para 43**
2004 (4) BCR 61	**Referred to**	**Para 46**
AIR 1992 Bom 375	**Referred to**	**Para 47**
ILR 1988 KAR 3092	**Approved**	**Para 48, 62 and 71**
1996 (3) Suppl. SCR 279	**Referred to**	**Para 49**
2009 (16) SCR 736	**Referred to**	**Para 54**
2005 (3) SCR 1037	**Referred to**	**Para 55, 63**
1968 SCR 662	**Referred to**	**Para 55**
2007 (13) SCR 598	**Referred to**	**Para 57**
1981 (1) SCR 498	**Relied on**	**Para 62**
AIR 1953 Bom 170	**Relied on**	**Para 66**
1954 SCR 572	**Relied on.**	**Para 66**
1989 (2) SCR 751	**Relied on.**	**Para 66**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7171 of 2010.

From the Judgment & Order dated 8.9.2009 of the High Court of Bombay in WP No. 5023 of 2009.

Vijay Hansaria, Sanjay Sarin, Manoj B. Dalvi, Rehana A. Kesuri, Senha Gagandeep Kaur and Manjusha Wadhwa for the Appellant.

H.P. Raval, ASG, Indra Sawhaney for the Respondent.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. This appeal, by Special leave raises

a question as to whether the provisions for fixation of standard rent, and provisions prescribing other obligations for the landlord such as maintenance of essential services under the concerned Rent Control Act viz. Maharashtra Rent Control Act, 1999 as in the present case (hereinafter referred to as the MRC Act), are applicable in respect of public premises owned by a corporation such as the first respondent Life Insurance Corporation of India (L.I.C in short) which is otherwise covered by the provisions of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (hereinafter referred to as the Public Premises Act).

Short facts leading to this appeal are as follows -

2. The appellant is a firm of Advocates and Solicitors, and is a tenant in possession of 5th floor of a seven storey building, situated at 269 D.N. Road, Fort Mumbai owned by the first Respondent, L.I.C. L.I.C. is a statutory corporation constituted under the Life Insurance Corporation Act, 1956. The area under occupation of the appellant is 1289.16 sq. feet (equivalent to 113 sq. metres). The petitioner is a tenant of these premises since 1st August, 1988 under an agreement of lease which has been extended from time to time. It is relevant to note that there are no proceedings of eviction filed by the respondent No. 1 against the appellant. The second respondent is the Regional Manager (estates) of L.I.C.

3. The respondent No. 2 revised the monthly rent of these premises suddenly by his letter of 14th July, 2004 from Rs. 6,891/- to Rs. 39,069/-, including Municipal taxes and miscellaneous charges. The appellant filed a Writ Petition in the Bombay High Court being Writ Petition No. 2266 of 2004 to challenge the increasing of rent as arbitrary. The respondents made a statement in the High Court that if the petitioner abides by clause IV (e) of the lease agreement between the parties and pays increased rent as provided therein, the respondents will not enforce the increase in the rent that was proposed through letter dated 14.7.2001. Thereupon the writ petition was withdrawn. Subsequently, the respondents sent a reduced bill

of Rs. 9144/- per month which included basic rent of Rs. 6181/- plus municipal taxes and water charges of Rs. 355/- and misc. charges of Rs. 100/-. We place the above clause IV (e) on record. It reads as follows:-

> "(e) The Lessor doth hereby convenant with the Lessee that upon the Lessee paying the rent hereby reserved regularly and observing and performing all the convenants and conditions herein contained, the Lessor shall on Lessee's request extend the period of the lease on the same terms and conditions not exceeding five years from the expiration of the terms hereby granted subject however that there will be an escalation/increase in the rent hereby reserved by 35% of the rate mentioned hereinabove."

4. It so transpired that the lift of the building (wherein these premises are situated) was not working properly, and hence, sometime in 2007, the appellant, alongwith two other tenants, filed an application bearing R.E.S. Application No.48/Res of 2007 in the Small Causes Court, Mumbai for restoration of the lift services under Section 29 of the MRC Act. A Single Judge of that Court who heard an Interim application therein, directed the respondents by his order dated 3.10.2007 to repair the lift. A revision petition bearing Revision Application No.308/2007 was filed by the respondents to challenge that order. The submission of the respondents, that the MRC Act was not applicable, was turned down by a Division Bench of that Court, which dismissed that petition by its order dated 11.1.2008. In the meanwhile, in April, 2007 the respondents further decreased the rent from Rs. 9144/- to Rs. 6891/- per month.

5. The monthly rent for the premises, however continued to be uncertain. The respondents increased the rent for the premises once again in March, 2008 to Rs. 8689/-. In April, 2008 they demanded rent of Rs. 25,063/- on the basis that the rateable value of the building had been raised by the Mumbai Municipal Corporation from the month of April, 2006 onwards from Rs. 17,895/- to Rs. 1,21,805/-. The appellant was called

upon to pay the arrears of rent also from April 2006 amounting to Rs. 8,89,503/-.

6. The appellant therefore asked for the break up of the rent bill by their letter dated 2.4.2008. Since no reply was received, appellant filed an Application (registered as RAN application No.24/SR/08) under Section 8 (3) of the MRC Act in the Court of Small Causes for fixation of standard rent, and also filed an application for fixing interim rent. Respondents in their turn challenged the jurisdiction of the Small Causes Court to entertain the proceeding, and contended that the suit premises were public premises covered under the Public Premises Act, and the MRC Act did not apply to them. They filed an application (exhibit 14) seeking a decision on that issue as a preliminary issue. The Small Causes Court, vide its order dated 30.3.2009, rejected this application Exhibit 14 and held that the said Standard Rent Application was maintainable under the provisions of MRC Act. Being aggrieved by that order, the respondents filed a Writ Petition invoking Article 227 of the Constitution of India in the Bombay High Court bearing Writ Petition No. 5023 of 2009.

7. A Learned Single Judge of the High Court who heard the matter, accepted the contention raised by the respondents, and allowed the petition by his order dated 8.9.2009. Thereby, he set-aside the said order dated 30.3.2009 and dismissed the Standard Rent Application. Being aggrieved by that judgment and order, this Appeal by way of special leave has been filed. Mr. Vijay Hansaria, Sr. Advocate appeared for the appellant, and Mr. H.P. Rawal, Additional Solicitor General appeared for the respondents.

Rival Submissions in a nutshell -

8. The learned counsel for the appellant submitted that under Section 3 (1) (a) of the MRC Act, only the premises belonging to the Government or a local authority are exempted from the application of the Act. The MRC Act covers five

subjects viz. (i) control of rent, (ii) repairs of certain premises, (iii) eviction, (iv) encouraging the construction of new houses by assuring of fair return on the investment to the landlord, and (v) matters connected with the aforesaid purposes. It was submitted that on the other hand, the Public Premises Act provided only for the third subject out of these five subjects viz. (iii) eviction of unauthorized occupants from public premises and for certain incidental matters including recovery of arrears of rent from the tenant. The MRC Act contains a specific chapter namely Chapter II regarding the fixation of standard rent and permitted increases. Section 29 of the MRC Act lays down the duty of the landlord not to cut off or withhold essential supply or service enjoyed by the tenant, and provides for a remedy to the tenant in the events of any breach of this duty by the landlord. As against that, there is no provision in that behalf in the Public Premises Act. Mr. Hansaria, learned counsel for the appellant submitted that in as much as there is no provision for fixation of standard rent or restoration of essential services in the Public Premises Act, and since the MRC Act is a subsequent Act, the provisions of the MRC Act will have to be held as available to the tenants for these purposes. Mr. Hansaria, did not dispute that the premises occupied by the appellant are public premises within the definition of the concept of public premises under the Public Premises Act. He did not also dispute that in regard to matters relating to eviction and recovery of arrears of rent, the Public Premises Act will apply to applications by respondents against appellant. He however, contended that for the purpose of fixation of standard rent of the premises of the appellant, the MRC Act will apply.

9. As against this, the submission of Mr. H.P. Rawal, Additional Solicitor General, was that the concept of standard rent was foreign to the Public Premises Act, and should not be permitted to be applied to the public premises by permitting applications under the MRC Act for that purpose, particularly when the Parliament has not made any provision in this behalf in the Public Premises Act. That apart, according to the

respondents they were seeking to recover the permitted increases on account of increase in the ratable value of the building by the Mumbai Municipal Corporation, which was being disputed by the appellant. With a view to appreciate these rival submissions, we shall look into the general principles governing the relationship between landlord and tenants, and relevant provisions of the MRC Act as well as the Public Premises Act.

Relationship of landlord and tenant in general -

10. A 'lease' is defined in Section 105 of Transfer of Property Act, 1882 (in short T.P. Act), thus:-

> *"105. Lease defined* - A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.
>
> *Lessor, lessee, premium and rent defined* – The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent."

A tenancy is created as a result of an agreement between the landlord and a tenant. Since the premises owned by the landlord are leased out to the tenant by virtue of the agreement between the parties, the agreement is normally called a 'lease deed'. To put it in the words of Prof. P.F. Smith *"The relationship of landlord and tenant arises where one person, who possesses either a freehold or leasehold property interest expressly or impliedly grants to another, by means of a contract, an estate in that property which is less than the freehold interest or for a shorter duration than the leasehold interest of the grantor, as the case may be."* (The Law of

Landlord and Tenant, Fourth Edition, Page 9). Although, the lease deed is also a contract between the parties, the provisions of T.P. Act relating to contracts, shall be taken as part of the Indian Contract Act, 1872 (vide Section 4 of T.P. Act). As a 'lease deed' is a contract relating to 'leases' governed by T.P. Act, the relationship between the landlord and the tenant would be governed by the terms of the lease deed and subject to its terms, by Section 108 relating to the rights and liabilities of leasor and leasee, and other statutory provisions controlling leases under the T.P. Act.

11. Generally, the terms of the agreement between the landlord and the tenant would require the landlord to maintain the premises in tenantable condition, and he will get the premises repaired when necessary. The tenant will be required to vacate the premises at the end of the period of lease. During the lease period, it will be the responsibility of the tenant to pay the rent regularly and 'keep the premises in good condition subject only to changes caused by reasonable wear and tear or irresistible force' and 'when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left' (See Section 108 (m) of T.P. Act. If the tenant commits breaches of the lease agreement by not paying the rent regularly or remaining in arrears thereof, or causing damage to the premises, the landlord may terminate the lease earlier, even before the expiry of the agreed term as per the provisions concerning the termination provided in the agreement and the Transfer of Property Act. If the tenant does not vacate the premises after the termination of lease, the landlord will have to file a suit for evicting him in the Civil Court.

12. On the other hand 'if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor' (see Section 108

(f) of T.P. Act). Section 108 (l) of the T.P. Act lays down that 'the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf'. This implies that the amount of rent that the landlord will require shall be a certain definite amount.

The changes brought about by the Rent Control Acts -

13. These general rules governing the relationship of the landlord and the tenant have undergone a change after the Second World War. There is a change in the economic scenario world over, and the intervention of the welfare state in different walks of life became necessary. *"Due to scarcity of accommodation following the second World War, it was found necessary to give special protection to tenants against increase of rent and ejectment in supersession of the ordinary law of landlord and tenant, embodied in the Transfer of Property Act."* (The Law of Rent Control, by R.B. Andhyarujina, Second Edition, Page 12). The shortage of residential houses in urban areas led to the regulation of the relationship between the landlord and the tenants by specific acts in that behalf. The concept of standard rent arrived at after considering the totality of the factors, came to control the rent to be charged by the landlord. The landlord would not be entitled to charge in excess of the standard rent, although the additions therein on account of Municipal Taxes etc. became permissible. The Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947, (Bombay Rent Act for short) is one such legislation which is an advancement over the Transfer of Property Act. This Act laid down that a tenant will not be evicted unless the landlord establishes that the tenant has committed breaches as laid down under that Act, and the burden will be on the landlord to establish that the tenant has committed the particular breach, such as being in arrears of standard rent over a specified period, erecting permanent structures on the premises without landlord's permission, sub-letting the premises and causing nuisance to the neighbours etc. A reasonable and bonafide requirement of the landlord was also provided as a ground for

eviction. If the landlord was charging rent excessively, a right was given to the tenant to have the standard rent fixed under Section 11 of that act. A further right was given to the tenant to approach the Court under Section 24 of that act for maintenance and restoration of essential services in case the landlord neglected the same.

14. The first respondent L.I.C owns a large number of properties in the city of Mumbai and elsewhere. Earlier, the relationship between L.I.C as the landlord and its tenants was governed under the Bombay Rent Act 1947. The question is as to what change has been brought about by the Public Premises Act 1971, into this relationship? The Public Premises Act 1971, provides only for eviction of unauthorized occupants, and recovery of arrears of rent from the tenant. Can it therefore be said that the other provisions of the Bombay Rent Act, ceased to apply to the tenancies which were earlier covered thereunder? Or would it be proper to say that only the aspect of the eviction and recovery of arrears of rent came to be covered under the Public Premises Act? Can it be said that because the Public Premises Act came to be applied in 1999, L.I.C could suddenly charge any rent as it deemed fit in excess of the standard rent? Can it be said that the remedy for the tenant for fixation of standard rent, and getting the essential services restored when necessary by moving the Court was no longer available merely because the Public Premises Act came to be applied? Does the Public Premises Act have an overriding effect denying these remedies to the tenants for all purposes?

15. The Bombay Rent Act came to be replaced by the MRC Act 1999. The MRC Act is subsequent to the Public Premises Act, 1971, and has come into force with effect from 31.3.2000 after receiving the assent of the President of India. Therefore, the subjects which were covered under the Bombay Rent Act came to be covered under the MRC Act, 1999 as appropriately modified including the concept of standard rent. Can it therefore not be said that as far as premises of L.I.C.

are concerned, on all other subjects excluding the subject of eviction of unauthorized occupants and recovery of arrears of rent, the modified provisions under the MRC Act will apply wherever the Bombay Rent Act was applicable?

16. As far as the petitioner is concerned, it occupied the suit premises in the year 1988 under an agreement of lease with L.I.C, at which time the Public Premises Act as well as Bombay Rent Act were in force. This agreement has been extended from time to time. As stated above, the Bombay Rent Act was replaced with effect from 31.3.2000 by the MRC Act. Would it therefore not be correct to say that for aspects other than eviction, and recovery of arrears of rent, the relationship between the petitioner and the respondent (which was earlier governed by the Bombay Rent Act) will now be governed under the MRC Act?

The Maharashtra Rent Control Act, 1999 -

17. The MRC Act consists of sixty sections which are divided in nine separate chapters, Chapter (I) is on preliminary provisions, Chapter (II) contains the provisions regarding fixation of standard rent and permitted increase, Chapter (III) contains the provisions concerning relief against forfeiture, Chapter (IV) is for recovery of possession, or eviction of the tenant by the Landlord, Chapter (V) contains the special provisions for recovery of possession in certain cases such as where the premises are owned by members of Armed Forces, Scientists etc, Chapter (VI) contains the provisions regarding sub-tenancies and other matters concerning tenancies, Chapter (VII) contains provisions regarding jurisdiction of the Courts, suits, appeals, practice and procedure, Chapter (VIII) contains provisions for the summary disposal of certain applications and Chapter (IX) contains the miscellaneous provisions.

18. As stated earlier, the preamble of MRC Act states that it is an Act relating to five subjects, namely (i) control of rent, (ii) repairs of certain premises, (iii) eviction, (iv) encouraging

the construction of new houses by assuring fair return of investment by the landlord, and (v) matters connected with the purposes mentioned above. Section 2 of the act gives the applicability of the act. Sub-section (1) thereof lays down that in the first instance, the act applies to premises let for the purposes of residence, education, business, trade or storage, and in the areas specified in Schedule I and Schedule II of the Act. Schedule I and II mention the cities and towns to which this Act applies.

19. Section 3 of MRC Act provides for the exemptions from this Act. Whereas sub-section 1 (a) thereof excludes from the application of this Act, the premises belonging to the Government or a local authority, Sub-Section 1 (b) declines to give protection of the provisions of this Act to certain tenants where the tenants are banks, public sector undertakings, multi-national companies, private and public limited companies with a share capital of more than Rs. 1 crore, etc. Section 4 gives the power of the State Government to prescribe conditions for exemption in respect of premises belonging to local authority. We quote these two sections in their entirety.

"***3. Exemption***

(1) This Act shall not apply———

(a) to any premises belonging to the Government or a local authority or apply as against the Government to any tenancy, licence or other like relationship created by a grant from or a licence given by the Government in respect of premises requisitioned or taken on lease or on licence by the Government, including any premises taken on behalf of the Government on the basis of tenancy or of licence or other like relationship by, or in the name of any officer subordinate to the Government authorized in this behalf, but it shall apply in respect of premises let, or given on licence, to the Government or a local

authority or taken on behalf of the Government on such basis by, or in the name of, such officer.

(b) To any premises let or sub-let to banks, or any Public Sector Undertakings or any Corporation established by or under any Central or State Act, or foreign missions, international agencies, multinational companies, and private limited companies and public limited companies having a paid up share capital of more than rupee one core or more.

Explanation. For the purpose of this clause the expression "bank" means,-

(i) the State Bank of India constituted under the State Bank of India Act, 1955;

(ii) a subsidiary bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959;

(iii) a corresponding new bank constituted under section 3 of the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1970 or under section 3 of the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1980, or

(iv) any other bank, being a scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934.

(2) The State Government may direct that all or any of the provisions of this Act shall, subject to such conditions and terms as it may specify, not apply-

(i) to premises used for public purposes of a charitable nature or to any class of premises used for such purposes;

(ii) to premises held by a public trust for a religious or

charitable purpose and let at a nominal or concessional rent;

(iii) to premises held by a public trust for a religious or charitable purpose and administered by a local authority; or

(iv) to premises belonging to or vested in an university established by any law for the time being in force

Provided that, before issuing any direction under this sub-section, the State Government shall ensure that the tenancy rights of the existing tenants are not adversely affected.

(3) The expression "premises belonging to the Government or a local authority' in sub-section (1) shall, notwithstanding anything contained in the said sub-section or in any judgment, decree or order of a court, nor include a building erected on any land held by any person from the Government or a local authority under an agreement, lease, licence or other grant, although having regard to the provisions of such agreement, lease, licence or grant of building so erected may belong or continue to belong to the Government or the local authority, as the case may be, and such person shall be entitled to create a tenancy in respect of such building or a part thereof.

4. Power of State Government to issue orders In respect of premises belonging to local authority, etc.

Notwithstanding anything contained in this Act, the State Government may, from time to time, by general or special order, direct that the exemption granted to a local authority under sub-section (1) of section 3 shall be subject to such conditions and terms as it may specify either generally or

specially in any particular case, as the State Government may in its direction determine.

20. Section 7 (6) of MRC Act defines the local authority which includes certain Municipal Corporations such as Mumbai Municipal Corporation, Nagpur Municipal Corporation, Municipal Councils constituted under the Maharashtra Municipal Council, Nagar Panchayats and Industrial Townships Act, 1965, Zila Parishads and Panchayat Samitis, Village Panchayats, Maharashtra Housing and Area Development Authority, City and Industrial Development Corporation etc.

21. Section 2 (14) defines the standard rent. Section 6 states that provision with regard to standard rent will not apply to certain premises which include, (a) buildings reconstructed after demolishing the old building in the circumstances mentioned in Sections 20 & 21 of the Act, and (b) the premises which are constructed or reconstructed in any housing scheme, undertaken by Government of the Maharashtra Housing and Area Development Authority or by any of its Boards established under Section 18 of the Maharashtra Housing and Area Development Act, 1976. Section 8 lays down that the Court may fix the standard rent and permitted increases, and Section 10 states that claiming rent in excess of standard rent is illegal. Section 11 permits the increase in rent only on account of improvements and special additions, or for heavy repairs. Section 12 permits the increase in rent on account of payment of rates to the public bodies. Section 14 lays down the duty of the landlord to keep the premises in good repairs. Section 29 lays down that the landlord shall not cut off or withhold essential supplies or services and provides for the remedy to the tenant against the same. Section 33 of the Act gives the jurisdiction of Courts in that behalf. In Mumbai, the jurisdiction is with the Court of Small Causes.

22. Sections 2(14), 8 and 29 are relevant for our purpose. They read as follows:-

"2 (14) "standard rent", in relation to any premises means.-

(a) where the standard rent is fixed by the Court or, as the case may be, the Controller under the Bombay Rent Restriction Act 1939, or the Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act, 1944 or the Bombay Rents, Hotel and Lodging House Rates Control Act , 1947, or the Central Provinces and Berar Letting of Houses and Retnt Control Order, 1949 issued under the Central Provinces and Berar Regulation of Letting of Accommodation Act, 1946, or the Hyderabad Houses (Rent, Eviction and Lease) Control Act, 1954, such rent plus an increase of 5 per cent, in the rent so fixed ; or

(b) where the standard rent or fair rent is not so fixed, then subject to the provisions of sections 6 and 8. –

(i) the rent at which the premises were let on the Ist day of October 1987; or

(ii) where the premises were not let on the Ist day of October 1987, or the rent at which they were last let before that day, plus an increase of 5 per cent, in the rent of the premises let before the Ist day of October, 1987, or

(c) in any of the cases specified in section 8, the rent fixed by the court;

"**8. Court may fix standard rent and permitted increases in certain cases**

(1) Subject to the provisions of section 9 in any of the following cases, the court may, upon an application made to it for the purpose, or in any suit or proceedings, fix the standard rent at such amount as, having regard to the provisions of this Act and the circumstances of the case, the court deems just,-

(a) where the court is satisfied that there is no sufficient evidence to ascertain the rent at which the premises were let in any one of the cases mentioned in paragraphs (i) and (ii) of sub-clause (14) of section 7; or

(b) whereby reasons of the premises having been let at one time as a whole or in parts and at another time, in parts or as a whole, or for any other reasons; or

(c) where any premises have been or are let rent-free or, at a nominal rent; or for some consideration in addition to rent; or

(d) where there is any dispute between the landlord and the tenant regarding the amount of standard rent.

(2) If there is any dispute between the landlord and the tenant regarding the amount of permitted increase, the court may determine such amount.

(3) If any application for fixing the standard rent or for determining the permitted increase is made by a tenant,-

(a) the court shall forthwith specify the amount of rent, or permitted increase which are to be deposited in court by the tenant, and make an order directing the tenant to deposit such amount in court or, at the option of the tenant, make an order to pay to the landlord such amount thereof as the court may specify pending the final decision of the application. A copy of the order shall be served upon the landlord;

(b) out of any amount deposited in the court under clause (a), the court may make an order for payment

of such reasonable sum to the landlord towards payment of the rent or increases due to him as it thinks fit;

(c) if the tenant fails to deposit such amount or, as the case may be, to pay such amount thereof to the landlord, his application shall be dismissed.

(4) (a) Where at any stage of a suit for recovery of rent, whether with or without a claim for possession, of the premises, the court is satisfied that the rent is excessive and standard rent should be fixed, the court may, and in any other case, if it appears to the court that it is just and proper to make such an order, the court may make an order directing the tenant to deposit in court forthwith such amount of the rent as the court considers to be reasonable due to the landlord, or at the option of the tenant, an order directing him to pay to the landlord such amount thereof as the court may specify.

(b) The court may further make an order directing the tenant to deposit in court periodically such amount as it considers proper as interim standard rent, or at the option of the tenant, an order to pay to the landlord, such amount thereof as the court may specify, during the pendency of the suit;

(c) The court may also direct that if the tenant fails to comply with any order made as aforesaid, within such time as may be allowed by it, he shall not be entitled to appear in or defend the suit except with leave of the court, which leave may be granted subject to such terms and conditions as the court may specify.

(5) No appeal shall lie from any order of the court under sub-sections (3) and (4).

(6) An application under this section may be made jointly by all or any of the tenants interested in respect of the premises situated in the same building.

29. *Landlord not to cut-off or withhold essential supply or service*

(1) No landlord, either himself or through any person acting or purporting to act on his behalf, shall, without just or sufficient cause, cut-off or withhold any essential supply or service enjoyed by the tenant in respect of the premises let to him.

(2) A tenant in occupation of the premises may, if the landlord has contravened the provisions of sub-section (1), make an application to the court for a direction to restore such supply or service.

(3) Having regard to the circumstances of a particular case the court, may, if it is satisfied that it is necessary to make an interim order, make such order directing the landlord to restore the essential supply or service before the date specified in such order, before giving notice to the landlord of the enquiry to be made in the application under sub-section (3) or during the pendency of such enquiry. On the failure of the landlord to comply with such interim order of the court, the landlord shall be liable to the same penalty as is provided for in sub-section (4).

(4) If the court on inquiry finds that the tenant has been in enjoyment of the essential supply or service and that it was cut-off or withheld by the landlord without just or sufficient cause, the court shall make an order directing the landlord, to restore such supply or service before a date to be specified in the order. Any landlord who fails, to restore the supply or service before the date so specified, shall, for each day during which the default continues thereafter, be liable upon further directions by the court to that effect,

to fine which may extend to one hundred rupees.

(5) Any landlord, who contravenes, the provisions of sub-section (1), shall, on conviction, be punishable with imprisonment for a term which may extend to three months or with fine which may extend to one thousand rupees or with both.

(6) An application under this section may be made jointly by all or any of the tenants of the premises situation in the same building.

Explanation – In this section, -

(a) essential supply or service includes supply of water, electricity, lights in passages and on stair-cases, lifts and conservancy or sanitary service;

(b) withholding any essential supply or service shall include acts or omissions attributable to the landlord on account of which the essential supply or services is cut-off by the municipal authority or any other competent authority.

(7) Without prejudice to the provisions of sub-sections (1) to (6) or any other law for the time being in force, where the tenant, -

(a) who has been in enjoyment of any essential supply or service and the landlord has withheld the same, or

(b) who desires to have, at his own cost, any other essential supply or service for the premises in his occupation,

the tenant may apply to the Municipal or any other authority authorized in this behalf, for the permission or for supply of the essential service and it shall be lawful for that authority to grant permission for, supply of such essential

supply or service applied for without insisting on production of a "No Objection Certificate" from the landlord by such tenant."

The Public Premises Act (Eviction of Unauthorised Occupants) Act, 1971-

23. Now, when we turn to the Public Premises Act, the preamble of the Act states that it is an Act to provide for the eviction of unauthorized occupants from public premises and for certain incidental matters. It was enacted to deal with the problem of rampant unauthorised occupation of public premises by providing a speedy machinery for the recovery of these premises and the arrears of rent from the occupants thereof. Section 2 (e) of this Act defines the public premises, Section 2 (f) defines rent, and Section 2 (g) defines unauthorized occupation. Section 2 (g) is in two parts. The first part of the said section states, that it means the occupation by any person of the public premises without any authority for such occupation. The second part is inclusive in nature, and it expressly covers the continuation in occupation by any person of the public premises after his authority to occupy the same has expired or has been determined for any reason whatsoever. These sections read as follows:-

2(e) "public premises" means-

(1) any premises belonging to, or taken on lease or requisitioned by, or on behalf of the Central Government, and includes any such premises which have been placed by that Government, whether before or after the commencement of the Public Premises (Eviction of Unauthorised Occupants) Amendment Act, 1980 (61 of 1980), under the control of the Secretariat of either House of Parliament for providing residential accommodation to any member of the staff of that Secretariat;

(2) any premises belonging to, or taken on lease by, or on behalf of,-

(i) any company as defined in section 3 of the Companies Act, 1956 (1 of 1956), in which not less than fifty-one per cent of the paid up share capital is held by the Central Government or any company which is a subsidiary (within the meaning of that Act) of the first-mentioned company;

(ii) any corporation (not being a company as defined in section 3 of the Companies Act, 1956 (1 of 1956) or a local authority) established by or under a Central Act and owned or controlled by the Central Government;

(iii) any University established or incorporated by any Central Act.

(iv) any Institute incorporated by the Institutes of Technology Act, 1961 (59 of 1961);

(v) any Board of Trustees constituted under the Major Port Trusts Act, 1963 (38 of 1963);

(vi) the Bhakra Management Board constituted under section 79 of the Punjab Reorganisation Act, 1966 (31 of 1966), and that Board as and when re-named as the Bhakra-Beas Management Board under sub-section (6 of section 80 of that Act;

(vii) any State Government or the Government of any Union Territory situated in the National Capital Territory of Delhi or in any other Union Territory;

(viii) any Cantonment Board constituted under the Cantonments Act, 1924 (2 of 1924); and

(3) in relation to the [National Capital Territory of Delhi]-

(i) any premises belonging to the Municipal Corporation of Delhi, or any Municipal Committee or notified area committee;

(ii) any premises belonging to the Delhi Development Authority, whether such premises are in the possession of, or leased out by, the said Authority; and

(iii) any premises belonging to, or taken on lease or requisitioned by, or on behalf of any State Government or the Government of any Union Territory;]

2(f) "rent", in relation to any public premises, means the consideration payable periodically for the authorized occupation of the premises, and includes,-

(i) any charge for electricity, water or any other services in connection with the occupation of the premises,

(ii) any tax (by whatever name called) payable in respect of the premises,

where such charge or tax is payable by the Central Government or the corporate authority,

2(g) "unauthorized occupation", in relation to any public premises, means the occupation by any person of the public premises without authority for such occupation, and includes the continuance in occupation by any person of the public premises after the authority (whether by way of grant or any

other mode of transfer) under which he was allowed to occupy the premises has expired or has been determined for any reason whatsoever."

24. Section 3 of the Public Premises Act provides for the appointment of estate officers who have the authority to hold inquiries under this Act, Section 4 provides for issuance of show cause notice, which proposes an order of eviction. Section 5 provides for the inquiry in pursuance to the show cause notice, and the order of eviction to be passed thereafter. Section 7 deals with the power of the estate officer to pass orders concerning arrears of rent and damages in respect of unauthorized occupation, Section 9 provides for appeals against the order of the estate officers to the Appellate officer who shall be the District Judge of the District. Section 14 provides for the recovery of rent as arrears of land revenue, and Section 15 for the bar of jurisdiction of courts to entertain any suit or proceeding in respect of the matters mentioned in the Section. Thus, it is an act for speedy recovery of public premises and arrears of rent from the unauthorized occupants, and it provides a separate mechanism for the same. Section 5, 7 and 15 of this Act are relevant for our purpose. These sections read as follows:-

Section 5 - Eviction of unauthorised occupants

(1) If, after considering the cause, if any, shown by any person in pursuance of a notice under section 4 and any evidence produced by him in support of the same and after personal hearing, if any, given under clause (b) of sub-section (2) of section 4], the estate officer is satisfied that the public premises are in unauthorised occupation, the estate officer may make an order of eviction, for reasons to be recorded therein, directing that the public premises shall be vacated, on such date as may be specified in the order, by all persons who may be in occupation thereof or any part thereof, and cause a copy of the order to be affixed on the outer door or some other

conspicuous part of the public premises.

(2) If any person refused or fails to comply with the order of eviction [on or before, the date specified in the said order or within fifteen days of its publication under sub-section(1) whichever is later,] the estate officer or any other officer duly authorized by the estate officer in this behalf may evict that person from, and take possession of, the public premises and may, for that purpose, use such force as may be necessary.

Section 7 - Power to require payment of rent or damages in respect of public premises

(1) Where any person, is in arrears of rent payable in respect of any public premises, the estate officer may, by order, require that person to pay the same within such time and in such installments as may be specified in the order.

(2) Where any person is, or has at anytime been, in unauthorised occupation of any public premises, the estate officer may, having regard to such principles of assessment of damages as may be prescribed, assess the damages on account of the use and occupation of such premises and may, by order, require that person to pay the damages within such time and in such instalments as may be specified in the order.

1 [(2A) While making an order under sub-section (1) or sub-section (2), the estate officer may direct that the arrears of rent or, as the case may be, damages shall be payable together with simple interest at such rate as may be prescribed, not being a rate exceeding the current rate of interest within the meaning of the interest Act, 1978.]

(3) No order under sub-section (1) or sub-section (2) shall be made against any person until after the issue of a notice in writing to the person calling upon him to show cause within such time as may be specified in the notice, why

such order should not be made, and until his objections, if any, and any evidence he may produce in support of the same, have been considered by the estate officer.

Section 15 - Bar of jurisdiction

No Court shall have jurisdiction to entertain any suit or proceeding in respect of—

(a) the eviction of any person who is in unauthorised occupation of any public premises, or

(b) the removal of any building, structure or fixture or goods, cattle or other animal from any public premises under Section 5A, or

(c) the demolition of any building or other structure made, or ordered to be made, under Section 5B, or

[(cc) the sealing of any erection or work or of any public premises under Section 5C, or]

(d) the arrears of rent payable under sub-section (1) of section 7 or damages payable under subsection (2), or interest payable under sub-section (2A); of that section, or

(e) the recovery of—

(i) costs of removal of any building, structure or fixture or goods, cattle or other animal under Section 5A, or

(ii) expenses of demolition under Section 5B, or (iii) costs awarded to the Central Government or statutory authority under sub-section (5) of section 9, or (iv) any portion of such rent, damages, costs of removal, expenses of demolition or costs awarded to the Central Government or the statutory authority.]

Order passed by the Small Causes Court:-

25. Reverting to the order passed by the Small Causes Court, it is seen that it dismissed the application exhibit 14 filed by the respondent principally for the following reasons:-

(i) The public premises are not specifically exempted from the applicability of the MRC Act;

(ii) Since an application for fixation of standard rent is not a proceeding for eviction of a tenant, Small Causes Court can entertain it;

(iii) The respondent, LIC has framed guidelines for charging rent. These guidelines have a statutory force under Section 21 of the LIC Act. They require LIC to charge reasonable rent, and therefore the Bombay High Court has in Writ Petition No.2436 of 2003 (Persis Kothawala Versus LIC) held that these guidelines are binding on LIC. On that basis, the standard rent application would be maintainable.

(iv) Section 3 of the MRC Act does not exempt LIC and hence the provisions of MRC Act are applicable to its premises.

(v) Merely because the premises were covered under the Public Premises Act, the jurisdiction to entertain the Standard Rent Application under the MRC Act was not ousted. There was no conflict between the two Acts for that purpose.

The impugned judgment of the High Court and its reliance on the constitution bench judgment in Ashoka Marketing Ltd. -

26. The learned Single Judge who decided the petition principally relied upon the judgment of a constitution bench of this Court in *Ashoka Marketing Ltd. and Another Versus*

Punjab National Bank and Others [1990 (4) SCC 406], in support of his view. This judgment decided four Civil Appeals concerning the properties of four respondents situated in Delhi. Two of them were concerning the properties of Punjab National Bank, one of Union of India and one of LIC. In all these matters the respondents had initiated actions for eviction under the Public Premises Act. The question in those appeals was whether the occupants could be evicted under the Public Premises Act, or whether they could invoke the protection of Delhi Rent Control Act, 1958. This Court held that the proceedings under the Public Premises Act were valid and legal. Relying on this judgment the High Court held that in the present case the Public Premises Act will govern the field, and the Standard Rent Application was not maintainable. The learned Judge has observed in para 17 of the impugned judgment as follows:-

> "There may not be a provision in the said Act of 1971 for fixing standard rent but there are provisions in the said Act of 1971 which empower the authorities to pass an order for recovery of rent and/or compensation from the tenant".

This is a reference to the power of the estate officer under section 7 of the Public Premises Act for recovery of rent. Section 7(2) empowers the estate officer to assess the damages on account of use and occupation of the public premises by an unauthorized occupant. This assessment is to be made having regard to the principles that may be prescribed under the rules. This power is entirely different from the authority to fix the standard rent, which is no where provided in the Public Premises Act. Thus, this is not an answer to the issue raised before the learned Judge, viz. as to whether a standard rent application under the concerned Rent Control Act was maintainable, when there is no specific provision for the same under the Public Premises Act.

27. Besides, section 7 of the Act is a procedural provision as held by this Court in *New Delhi Municipal Committee Vs.*

Kalu Ram & Anr. reported in [AIR 1976 SC 1637] equivalent to [1976 (3) SCC 407]. In that matter the Municipality had contended that section 7 permitted it to recover arrears of rent which were even time barred. This Court rejected the contention and held that it was only a section for providing a special procedure for realization of arrears of rent, and which was a summary procedure. It did not constitute a source or foundation of a right to claim a debt which was otherwise time barred. The Learned Judge has, however, tried to get over this position by relying upon Section 15 of the Public Premises Act as follows:-

> "Apart from that, in view of the overriding effect of the said Act of 1971, an occupant of the public premises cannot claim protection under the Rent Control Legislation in as much as section 15 of the said Act of 1971 ousts the jurisdiction of the Courts under the Rent Control Legislation to deal with the matter of recovery of rent in respect of public premises."

Again, it is difficult to say that this approach is a correct one. That is because the High Court was not concerned with the recovery of arrears of rent by a public authority, an action against which would get ousted in view the provision of section 15 of the Public Premises Act, as also one against eviction. The question is whether a tenant's application for fixation of Standard Rent would get ousted. The respondents are claiming that what they are charging are permissible increases, whereas the appellant contends that what is charged is in excess of what should be the Standard Rent, and for that purpose it has filed an application for fixation of Standard Rent under the MRC Act. Would it, not be maintainable under that act?

28. In *Ashoka Marketing,* this Court noted that the rent control legislation would fall within the ambit of entries 6, 7 and 13 of List III (Concurrent List). The Public Premises Act would otherwise fall under entry 32 of List I being a law with respect to the property of Union of India. However, in relation to the properties belonging to the various legal entities, mentioned in

clauses (2) and (3) of Section 2 (e), the Public Premises Act would be covered under entries 6, 7 and 46 of List III. The Court, therefore, noted that both the statutes were enacted by the same legislature i.e. Parliament, in exercise of its legislative power in respect of matters enumerated in the concurrent list. It was, therefore, of the opinion that the question as to whether the Public Premises Act will override the Rent Control Act will have to be considered in the light of the principles of statutory interpretation applicable to the laws made by the same legislature. Having said that, the constitution bench noted the relevant principles in this behalf in paragraph 50 as follows:-

> "***50.*** One such principle of statutory interpretation which is applied is contained in the latin maxim : leges posteriors priores conterarias abrogant (later laws abrogate earlier contrary laws). This principle is subject to the exception embodied in the maxim : generalia specialibus non derogant (a general provision does not derogate from a special one.) This means that where the literal meaning of the general enactment covers a situation for which specific provision is made by another enactment contained in the earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the alter general one (Bennion, Statutory Interpretation pp. 433-34)."

The Court, therefore, examined the schemes of the two enactments, and noted the features of the two enactments in para 55 as follows:-

> "55.(i) The Rent Control Act makes a departure from the general law regulating the relationship of landlord and tenant contained in the Transfer of Property Act inasmuch as it makes provision for determination of standard rent, it specifies the grounds on which a landlord can seek the eviction of a tenant, it prescribes the forum for adjudication of disputes between landlords and tenants and the procedure which has to be followed in such proceedings.

The Rent Control Act can, therefore, be said to be a special statute regulating the relationship of landlord and tenant in the Union Territory of Delhi. (ii) The Public Premises Act makes provision for a speedy machinery to secure eviction of unauthorised occupants from public premises. As opposed to the general law which provides for filing of a regular suit for recovery of possession of property in a competent court and for trial of such a suit in accordance with the procedure laid down in the Code of Civil Procedure, the Public Premises Act confers the power to pass an order of eviction of an unauthorized occupant in a public premises on a designated officer and prescribes the procedure to be followed by the said officer before passing such an order. (iii) Therefore, the Public Premises Act is also a special statute relating to eviction of unauthorized occupants from public premises. In other words, both the enactments, namely, the Rent Control Act and the Public Premises Act, are special statutes in relation to the matters dealt with therein." ……(nos. to sub-paragraphs supplied)

Having noted the distinctive features of the two acts, the Court held that the principle that a subsequent general law cannot derogate from an earlier special law could not be invoked in that case because the later act, namely, Public Premises Act was also special statute and not a general enactment. Therefore, it further held that the Public Premises Act must prevail over the Rent Control Act in accordance with the principle that the later laws abrogate earlier contrary laws.

29. In view of the fact that both the enactments had non-obstante clauses, a reference was made to an earlier judgment of a bench of three judges on such a situation in the case of *Shri Sarwan Singh and another Versus Shri Kasturi Lal* reported in 1977 (1) SCC 750. In that mater the question before the Court was whether provisions of Slum Areas (Improvement and Clearance) Act, 1956 will override those of the Delhi Rent Control Act, 1958. If so, no person can initiate any suit or

proceeding for eviction of a tenant from any building or land in slum area without the permission in writing of the competent authority under the Slum Act. The respondent in that matter was a government employee and was staying in a quarter allotted to him, and he was asked to vacate this quarter on the ground that he owned another residential house. The house constructed by him was occupied by the appellant and it was in an area covered under the Slum Act. On being asked to vacate the quarter, the respondent gave a notice to the appellant to vacate his premises, and followed it up by filing an application under the Rent Control Act. The appellant pleaded that he cannot be asked to vacate unless permission from the authority under the Slum Clearance Act was obtained. This Court noted that although Section 19 (1) of the Slum Clearance Act required a permission of the competent authority before instituting proceeding for eviction of a tenant, notwithstanding that provision, by an amendment Section 14-A and Chapter III-A were brought into Delhi Rent Control Act. The Court examined the schemes of the two acts and then held that the provision of the Delhi Rent Control Act had to be given precedence, as in the present case although the government servant is asked to vacate his quarter, he will not be able to proceed against his tenant unless he obtains the permission from the Slum Clearance Authority. It is to obviate such difficulty that the amendment in the Delhi Rent Control Act had been brought in. In that context it was observed in para 20 as follows:-

"**20.** ……..When two or more laws operate in the same field and each contains a non-obstante clause stating that its provisions will override those of any other law, stimulating and incisive problems of interpretation arise. *Since statutory interpretation has no conventional protocol, cases of such conflict have to be decided in reference to the object and purpose of the laws under consideration……"*

(emphasis supplied)

Therefore, the Court concluded in para 23 as follows:-

"***23.*** ……Bearing in mind the language of the two laws, their object and purpose, and the fact that one of them is later in point of time and was enacted with the knowledge of the non-obstante clauses in the earlier law, we have come to the conclusion that the provisions of Section 14A and Chapter IIIA of the Rent Control Act must prevail over those contained in Sections 19 and 39 of the Slum Clearance Act."

30. Accordingly, in the context of the conflict between the two Acts, this Court held in *Ashoka Marketing,* as follows:-

"**61.** The principle which emerges from these decisions is that in the case of inconsistency between the provisions of two enactments, both of which can be regarded as special in nature, the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and the clear intendment conveyed by the language of the relevant provisions therein."

It becomes relevant to note the conclusion arrived at by this Court in *Ashoka Marking Co.'s* case, which is in following words:-

"**70.** For the reasons aforesaid, we are unable to accept the contention of the learned counsel for the petitioners that the provisions contained in the Public Premises Act cannot be applied to premises which fall within the ambit of the Rent Control Act. *In our opinion, the provisions of the Public Premises Act, to the extent they cover premises falling within the ambit of the Rent Control Act, override the provisions of the Rent Control Act* and a person in unauthorized occupation of public premises under Section 2(e) of the Act cannot invoke the protection of the Rent Control Act." … (emphasis supplied)

31. The impugned judgment in the present case relies

upon the above observations to hold that once the premises were covered under the Public Premises Act, that Act will override the Rent Control Act and therefore in the instant case, standard rent application was not maintainable. On the other hand, it was submitted on behalf of the appellant that the above statement in paragraph 70 of *Ashoka Marketing* Judgment, when it speaks of 'provisions to the extent they cover', it means the 'subject matter' covered by the provisions under the two acts. In this context, it must also be noted that the controversy in the case of *Ashoka Marketing* was with respect to the subject of eviction of the unauthorized occupants from the public premises. Eviction of tenants in general was a subject covered by both the statutes under considerations before the Court. However, the Public Premises Act contains the special provisions for the eviction of unauthorized occupants from the public premises, but for which they would fall within the ambit of the Rent Control Act. Consequently, in view of the above dicta, the proceedings under the Public Premises Act were held to be valid and legal, and not those under the Delhi Rent Control Act. The subject matter of controversy in our case is with respect to the fixation of standard rent, which is not covered under the provision in the Public Premises Act. On the other hand the same is very much covered under the MRC Act. The overriding effect given to Public Premises Act cannot mean overriding with reference to a matter which was not dealt with by that Act, since the Public Premises Act did not claim to cover the subject other than eviction of unauthorized occupants from public premises and recovery of arrears of rent. Therefore, it was submitted that the application for fixation of standard rent will be very much maintainable under the provisions of the MRC Act.

Public Premises Act vis-à-vis the Bombay Rent Act and the MRC Act on the issue of eviction of unauthorised occupants from Public Premises-

32. Before we deal with the rival submissions on the maintainability of the standard rent application, we may note

that with respect to the aspect of eviction of unauthorised occupants from the public premises, it is now well settled that the Public Premises Act will apply and not the Bombay Rent Act or the subsequent MRC Act.

(i) In *Kaiser-I-Hind Pvt. Ltd. & Anr. vs. National Textile Corpn. (Maharashtra North) Ltd. & Ors.* [2002 (8) SCC 182] one of the questions before the Constitution Bench was whether the provisions of Bombay Rent Act having been re-enacted after 1971 by the State Legislature with the assent of the President will prevail over the provisions of the Public Premises Act by virtue of Article 254 (2) of the Constitution. The court noted that although the Public Premises Act received the assent of President on 23.8.1971, in view of Section 1 (3) of Public Premises Act, it is deemed to have come into force from 16.9.1958. On the other hand, the duration of Bombay Rent Act was extended by Maharashtra Act No. 12 of 1970. Therefore, the Court held specifically in para 40 of its judgment that Article 254 (1) was the relevant one in the present case, and to the extent of repugnancy, the State law will not prevail under Article 254 (1), and the law made by the Parliament shall hold good.

(ii) Between the Public Premises Act and the MRC Act this Court held in *Crawford Bayley & Co. & Ors. v. Union of India & Ors.* [2006 (6) SCC 25] that to the extent specific provisions were made in the Public Premises Act for eviction of unauthorized occupants, that Act will apply with respect to the Premises of the State Bank of India which were in dispute in that matter and not the MRC Act.

Other submissions on behalf of the appellant -

33. The learned senior counsel for the appellant Mr. Hansaria relied upon quite a few judgments in support of his submission that the Standard Rent Application in the present case was very much maintainable under the MRC Act. We will refer to some of them which lay down the principles relevant for our purpose. In *M/s Jain Ink Manufacturing Company Vs.*

Life Insurance Corporation of India and Another which is a judgment of 3 Judges reported in [1980 (4) SCC 435], the provisions of the Public Premises Act were considered in the light of those of Delhi Rent Control Act 1958, and the Slum Areas (Improvement) and Clearance Act 1956. In that matter L.I.C had purchased the premises in question in which the appellant was a tenant inducted by the original owner of the premises. L.I.C had initiated the proceedings for the eviction of the tenant before the estate officer. The appellant had challenged the applicability of the Public Premises Act. This Court rejected that objection. The observations of this Court in paragraph 8 and 9 are relevant for our purpose which read as follows:-

> 8. …… So far as the Premises Act is concerned it operates in a very limited field in that it applies only to a limited nature of premises belonging only to particular sets of individuals, a particular set of juristic persons like companies, corporations or the Central Government. Thus, the Premises Act has a very limited application. Secondly, the object of the Premises Act is to provide for eviction of unauthorised occupants from public premises by a summary procedure so that the premises may be available to the authorities mentioned in the Premises Act which constitute a class by themselves. …….
>
> **9.** Thus, it would appear that both the scope and the object of the Premises Act is quite different from that of the Rent Act. *The Rent Act is of much wider application than the Premises Act* inasmuch as it applies to all private premises which do not fall within the limited exceptions indicated in Section 2 of the Premises Act. The object of the Rent Act is to afford special protection to all the tenants or private landlords or landlords who are neither a corporation nor government or corporate bodies. It would be seen that even under the Rent Act, by virtue of an amendment a special category has been carved out under

Section 25-B which provides for special procedure for eviction to landlords who require premises for their personal necessity. Thus, Section 25-B itself becomes a special law within the Rent Act. On a parity of reasoning, therefore, there can be no doubt that the Premises Act as compared to the Rent Act, which has a very broad spectrum, is a special Act and overrides the provisions of the Rent Act."

(emphasis supplied)

As is seen from this quotation, just as there is a special category carved out under the Rent Control Act in favour of the landlord who requires premises for his personal necessity, somewhat a similar provision is made under the Public Premises Act. The reasonable and bonafide requirement of the landlord to occupy the premises has been made a separate permissible ground for recovery of possession under section 16 (1) (g) of the MRC Act. This section 16 (1) (g) is similar to section 25 B referred into the above judgment, and it reads as follows:-

"16. When landlord may recovery possession

(1) Notwithstanding anything contained in this Act but subject to the provisions of section 25, a landlord shall be entitled to recover possession of any premises if the court is satisfied –

(a) .....

(b) .....

(c) .....

(d) .....

(e) .....

(f) .....

(g) that the premises are reasonably and bona fide required by the landlord for occupation by himself or by any person for whose benefit the premises are held or where the landlord is a trustee of a public charitable trust that the premises are required for occupation for the purposes of the trust; or"

The Public Premises Act creates a forum for eviction of the unauthorised occupants and provides for a special procedure for recovery of the premises from such occupants. Unauthorised occupation has been defined in a vide manner and it includes the continuation in occupation of any person of the public premises after his authority to occupy has expired or has been determined for any reason whatsoever. It would as well include the determination of the authority to occupy whenever the premises are required bonafide and reasonably by the public authority. There was no such special procedure for the public bodies until the Public Premises Act was enacted. When it comes to the requirement of the Government or the Public Corporation, now the public body will be taking steps under the Public Premises Act. It is, however, relevant to note as held in this judgment that the Public Premises Act has a very limited application as against the Rent Act which affords a special protection to the tenants by fixing standard rent and requiring the landlord to maintain the essential services. It was, therefore, submitted that the standard rent application under the Rent Act would remain available to the tenant even if the premises are otherwise covered under the Public Premises Act for the purposes of eviction and recovery of arrears of rent from the unauthorised occupants.

The question of Repugnancy -

34. The question is as to whether the provision for fixation of standard rent and the provision requiring landlord to maintain the essential services under the MRC Act, which is a subsequent Act passed by the State Legislature are in any way repugnant to the Public Premises Act which is an earlier Act

passed by the Parliament. The distribution of legislative powers between the Union of India and the States has been provided in the Seventh Schedule of the Constitution. It consists of **List I** which is the Union List, **List II** which is the State List and **List III** which is the Concurrent List. The question of repugnancy can arise only in connection with the subjects which are enumerated in the Concurrent List with respect to which both the Union and the State Legislatures have the concurrent power to legislate, and when the State Legislature makes a law on a subject on which the Parliament has already made a law. It is to deal which such a conflict that Article 254 has been enacted. Article 254 of the Constitution deals with the question of inconsistency between the laws made by the Parliament and laws made by the Legislatures of States. This Article reads as follows:-

" 254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States -

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

35. The question of repugnancy between the law made by the Parliament and the law made by the State Legislature may arise in cases when both the legislation occupy the same field with respect to one of the matters enumerated in List III and where a direct conflict is seen between the two. The Principles laid down by a bench of 3 Judges in *Hoechst Pharmaceuticals Ltd. Vs. State of Bihar* reported in [1983 (4) SCC 45] were reiterated by a Constitution Bench in *State of West Bengal Vs. Kesoram Industries Ltd. And Ors.* reported in [2004 (10) SCC 201]. Para 31 (5) thereof is instructive for our purpose and it reads as follows:-

"31 (5) Where the legislative competence of the legislature of any State is questioned on the ground that it encroaches upon the legislative competence of Parliament to enact a law, the question one has to ask is whether the legislation relates to any of the entries in List I or III. If it does, no further question need be asked and Parliament's legislative competence must be upheld. Where there are three lists containing a large number of entries, there is bound to be some overlapping among them. In such a situation the doctrine of pith and substance has to be applied to determine as to which entry does a given piece of legislation relate. Once it is so determined, any incidental trenching on the field reserved to the other legislature is of no consequence. The court has to look at the substance of the matter. The doctrine of pith and substance is sometimes expressed in terms of ascertaining the true character of legislation. The name given by the legislature to the legislation is immaterial. Regard must be had to the enactment as a whole, to its

main objects and to the scope and effect of its provisions. Incidental and superficial encroachments are to be disregarded."

36. The question therefore to be examined is as to whether the two legislations occupy the same field. If they do not, then there is no repugnancy. Unless the provisions are irreconcilable, there will be a presumption in favour of the constitutionality. In *Ch. Tika Ramji and Ors. etc. v. The State of Uttar Pradesh and Ors.* [AIR 1956 SC 676], the question before the Constitution Bench was as to whether the UP Sugarcane (Regulation of Supply and Purchase) Act, 1953 was repugnant to the Industries (Development and Regulation) Act of 1951 which was a Central Act. The Apex Court noted that Section 18G of the Central Act deals with finished products and not raw materials. This section did not cover the field of sugarcane which was covered under the UP Act. The Court held that there was no repugnancy between the two legislations, since one deals with the finished products whereas the other deals with raw materials.

37. In the case of *M. Karunanidhi vs. Union of India & Anr.* [1979 (3) SCC 431] a Constitution Bench was concerned with the question as to whether certain provisions of the Tamil Nadu Public Men (Criminal Misconduct) Act 1973, were repugnant to the provisions of Prevention of Corruption Act 1947 and the Criminal Law Amendment Act 1952. The appellant was being prosecuted under sections 161, 468 and 471 of Indian Penal Code and section 5 (2) read with section 5 (1) (d) of the Prevention of Corruption Act 1947. The Court referred to earlier decisions including the one in *Deep Chand Vs. State of U.P.* [AIR 1959 SC 648] wherein it was held that the repugnancy between the two statutes may be ascertained by considering whether the Parliament intended to lay down an exhaustive code in respect of the subject matter considered in the State Act replacing the Act of the State Legislature. The Constitution Bench then laid down the principles governing the rule of repugnancy in paragraph 35 which are as follows:-

35. On a careful consideration, therefore, of the authorities referred to above, the following propositions emerge:

1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.

2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.

3. That where the two statutes occupy a particular field, but there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.

4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field.

Consequently the Court held that there was no conflict amongst the legislations concerned.

38. The question with respect to conflict between two such legislations came up before a Bench of three Judges in the case of *Vijay Kumar Sharma and Ors. Vs. State of Karnataka and Ors.* reported in [1990(2) SCC 562], where the question was whether there was any conflict between the Karnataka Contract Carriages (Acquisition) Act 1976 and Motor Vehicles Act, 1988. This Court looked into the judgments holding the field and held that there was no conflict between the two. It laid down the law in paragraph 53 as follows:-

"53. The aforesaid review of the authorities makes it clear that whenever repugnancy between the State and Central legislation is alleged, what has to be first examined is whether the two legislations cover or relate to the same subject matter. The test for determining the same is the

usual one, namely, to find out the dominant intention of the two legislations. If the dominant intention, i.e. the pith and substance of the two legislations is different, they cover different subject matters. If the subject matters covered by the legislations are thus different, then merely because the two legislations refer to some allied or cognate subjects they do not cover the same field. The legislation, to be on the same subject matter must further cover the entire field covered by the other. 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). Both the legislations must be substantially on the same subject to attract the article."

In the event of two Acts governing a common field, whether both can apply for different purposes-

39. There could be provisions for certain purposes in one statute, and for another purpose in another statute, though both govern the common field. Thus, in *Krishna Distt. Coop. Mktg. Society Ltd. Vijayawada vs. N.V. Purnachandra Rao & Ors.* [1987 (4) SCC 99], the issue was, with respect to the application of section 25-F of Industrial Disputes Act, to the employees who were otherwise governed under the A.P. Shops and Establishments Act, 1966. In that context this Court had to examine whether there was any conflict between the two Acts and particularly when the A.P. Act was a later act and it had received the assent of the President. The question was whether compliance with Section 25-F of the Industrial Disputes Act could be insisted for establishments governed under the Shops and Establishments Act. This Court held that those provisions will be applicable and there was no conflict between the provisions of the two Acts. Section 25-F of the Central Act provided for the conditions precedent for retrenchment, and the non-compliance therewith made the order of retrenchment fatal.

Section 41 (1) and (3) of the A.P. Act provided for the authorities to settle the disputes arising out of retrenchment. Section 25 J (2) of the I.D. Act reads as follows:-

"25-J.Effect of laws inconsistent with this chapter.-(1).....

(2) For the removal of doubts, it is hereby declared that nothing contained in this chapter shall be deemed to affect the provisions of any other law for the time being in force in any State insofar as that law provides for the settlement of industrial disputes, but the rights and liabilities of employers and workmen insofar as they relate to lay off and retrenchment shall be determined in accordance with the provisions of this chapter."

The court noted in para 8 that "the State Act does not contain any express provision making the provision relating to retrenchment in the Central Act ineffective in so far as Andhra Pradesh is concerned". What is observed in para 6 is relevant for our purpose:-

"6..... Sub-section (1) of Section 25-J of the Central Act lays down that Chapter V-A, shall have effect notwithstanding anything inconsistent therewith contained in any other law. The proviso to that sub-section however saves any higher benefit available to a workman under any law, agreement or settlement or award. Sub-section (2) of Section 25-J however makes a distinction between any machinery provided by any State law for settlement of industrial disputes and the substantive rights and liabilities arising under Chapter V-A of the Central Act where a lay off or retrenchment takes place. It provides that while Section 25-J would not affect the provisions in a State law relating to settlement of industrial disputes, the rights and liabilities of employers and workmen insofar as they relate to lay off and retrenchment shall be determined in accordance with Chapter V-A of the Central Act. It is thus seen that Section 41(1) and Section 41(3) of the State Act

prescribe alternative authorities to settle a dispute arising out of a retrenchment. Those authorities may exercise their jurisdiction under the State Act but they have to decide such dispute in accordance with the provisions of Chapter V-A……."

40. Similarly, in the case of *National Engineering Industries Ltd. vs. Shri Kishan Bhageria & Ors.* [1988 Supp. SCC 82], the question was whether a Reference under Section 10 of the Industrial Disputes Act, 1947 could be sought by the employees covered under the Rajasthan Shops and Establishments Act, 1958. This Court held that it would be so. In a similar way in *Bharat Hydro Power Corpn. Ltd. & Ors. v. State of Assam & Anr.* [2004 (2) SCC 553], this Court held in the context of Electricity Act 1910, and Assam Act No. 1 of 1997 that if two legislations operate in different fields without encroaching upon each other fields there cannot be any repugnancy.

41. In the field of criminal law also the same approach has been adopted by this Court. In *State of Maharashtra v. Bharat Shanti Lal Shah and Ors.* [2008 (13) SCC 5], the question was with respect to the conflict between the Maharashtra Control of Organized Crime Act, 1999 (MCOC Act for short) and Telegraph Act, 1885. In *Zameer Ahmed Latifur Rehman Sheikh vs. State of Maharashtra & Ors.* [2010 (5) SCC 246], the question was with respect to the conflict between the MCOC Act and Unlawful Activities (Prevention Act), 1967. In both matters this Court took the view that mere difference in the two Acts is not sufficient, and an incidental encroachment is irrelevant. This Court held that there was no conflict in both the cases.

Fixation of Standard Rent in the context of exemptions from the Rent Control Laws – The question of remedy

42. Whatever be the object of granting exemption, where the object is to see that the properties of the State or semi-state bodies should not suffer by the rigours of the Rent Control

Laws or the possession of the public premises be recovered expeditiously, "the Courts have expressed their views that these authorities being public bodies should so behave as not to act contrary to the policies laid down in the Rent Control Laws namely not to increase the rent unreasonably or excessively, nor to evict their tenant unreasonably or arbitrarily, save and except in public interest." (J.H. Dalal in his Commentary on the Bombay Rent Act, Fifth Edition, Page 65).

43. In this context one of the earliest cases coming before the Bombay High court was *Rampratap Jaidayal Vs. Dominion of India* reported in [AIR 1953 Bom 170]. Central Government had served upon the appellant tenant a notice to quit and the suit for ejectment was decreed. In the first appeal filed by the defendant tenant the question arose with respect to the nature of exemption available to the Government under section 4 (1) of the Bombay Rent Act. The appeal filed was dismissed by the Division Bench consisting of Chagla C.J and Gajendragadkar, J (as he then was in the Bombay High Court). What was observed by Chagla C.J. in the judgment with respect to the rent to be charged by the public bodies is relevant for our purpose. Amongst other arguments the exemption granted to the State was challenged as amounting to unreasonable classification hit by Article 14 of the Constitution. The Division Bench repelled the argument by relying upon the judgment of a constitution bench of this Court in *State of Bombay Vs. F.N. Balsara* reported in [1951 SCR 682] equivalent to [53 Bom. LR 982 (SC)], wherein Fazl Ali, J had drawn seven principles on the meaning and scope of Article 14 of the Constitution from the earlier judgment of this Court in *'Chiranjitlal v. Union of India'* reported in [AIR 1951 SC 41], and relied upon the very first principle therefrom and observed as follows:-

"8. …. perhaps attention might be drawn to the very first where the Supreme Court emphasizes the fact that the presumption is always in favour of the constitutionality of an enactment and this presumption arises from the fact

that the Legislature understands and correctly appreciates the needs of its own people and that its laws are directed to problems made manifest by experience and therefore it must always be presumed that discriminations are based on adequate grounds……"

Thereafter what the Court observed at the end of this para 8 is relevant for our purpose:-

" …… it is clear that in this case the Legislature was not in any sense exempting the Government from the operation of the Act in order to permit the Government to do the very thing which the Legislature was prohibiting in the case of landlords who were not a local authority or Central or State Government. It is not too much to assume, as the Legislature did in this case assume, that the very Government whose object was to protect the tenants and prevent rent being increased and prevent people being ejected, would not itself when it was the landlord do those very things which it sought to prohibit its people from doing, and therefore the underlying assumption of this exemption is that Government would not increase rents and would not eject tenants unless it was absolutely necessary in public interest and unless a particular building was required for a public purpose."

44. In another case *Baburao Shantaram More Vs. The Bombay Housing Board* reported in [AIR 1954 SC 153] which came up before a Constitution Bench of this Court, the question was with respect to the eviction of a tenant of the then Bombay Housing Board, constituted under the Bombay Housing Board Act, 1948. A decree for eviction had been passed against the tenant which had been upheld by the High Court. The appeal therefrom was dismissed by this Court. While upholding the exemption of the Bombay Housing Board under section 4 of the Bombay Rent Act, the Court held that the classification was based on an intelligible differentia, and held that the tenant or the local authority or the board were not in need of such

protection as the tenants of private landlords. This was for the reason as stated by S.R. Das J (as he then was) for the Court:-

"6. …. It is not to be expected that the Government or Local authority or the Board would be actuated by any profit making motive so as to unduly enhance the rents or eject the tenants from their respective properties as private landlords are or are likely to be….."

45. In *M/s Dwarkadas Marfatia V. Bombay Port Trust* reported in [1989 (3) SCC 293], the trustees of Bombay Port had evicted the appellant from a plot of land and allotted it to another tenant, and obtained the decree of eviction. While upholding the decree, this Court examined the question of exemption of a local authority under section 4 of the Bombay Rent Act. In paragraph 14 and 15 of its judgment a Bench of 3 Judges quoted with approval the above referred quotation of Chagla C.J. and S.R. Das, J, and thereafter observed as follows in para 17:-

"17. It, therefore, follows that the public authorities which enjoy this benefit without being hidebound by the requirements of the Rent Act must act for public benefit. Hence, to that extent, this is liable to be gone into and can be the subject matter of adjudication."

(emphasis supplied)

What this Court observed further per Sabyasachi Mukharji, J. (as he than was) in paragraph 24 is relevant for our purpose:-

"24. The field of letting and eviction of tenants is normally governed by the Rent Act. The Port Trust is statutorily exempted from the operation of the Rent Act on the basis of its public/governmental character. The legislative assumption or expectation as noted in the observations of Chagla, C.J. in Rampratap Jaidayal case cannot make such conduct a matter of contract pure and simple. These corporations must act in accordance with

certain constitutional conscience and whether they have so acted, must be discernible from the conduct of such corporations….."

(emphasis supplied)

Thereafter, in para 27 the Court further observed in the following words:-

"27. We are inclined to accept the submission that every activity of a public authority especially in the background of the assumption on which such authority enjoys immunity from the rigours of the Rent Act, must be informed by reason and guided by the public interest. *All exercise of discretion or power by public authorities as the respondent, in respect of dealing with tenants in respect of which they have been treated separately and distinctly from other landlords on the assumption that they would not act as private landlords, must be judged by that standard.* If a governmental policy or action even in contractual matters fails to satisfy the test of reasonableness, it would be unconstitutional. See the observations of this Court in Kasturi Lal Lakshmi Reddy and R.D. Shetty v. International Airport Authority of India (SCC pp. 505-06 : SCR p. 1034)."

(emphasis supplied)

Yardstick for Standard Rent:-

46. Relying upon the above judgments Mr. Hansaria submitted that the Public authorities cannot raise rent arbitrarily. In this behalf he referred to the guidelines framed by the Central Government to prevent arbitrary use of the power under this Act. These guidelines are issued by the Central Government under resolution dated 30.5.2002 and published in the Government of India Gazette dated 8.6.2002. Guidelines No. 2 (1) and 2 (3) are relevant for our purposes. He relied upon the judgment of a Division Bench of Bombay High Court in **Persis**

Kothawala vs. LIC reported in **2004 (4) BCR 610** to submit that these guidelines are expected to be followed. We quote these guidelines which are as follows:-

"*MINISTRY OF URBAN DEVELOPMENT AND POVERTY ALLEVIATION*

(DIRECTORATE OF ESTATES)

RESOLUTION

New Delhi, the 30th May 2002

Subject: Guidelines to prevent arbitrary use of powers to evict genuine tenants from public premises under the control of Public Sector Undertakings/financial institutions.

No.21013/1/2000-Pol.I – The question of notification of guidelines to prevent arbitrary use of powers to evict genuine tenants from public premises under the control of Public Sector Undertakings/financial institutions has been under consideration of the Government for some time past.

2. To prevent arbitrary use of powers to evict genuine tenants from public premises and to limit the use of powers by the Estate Officers appointed under Section 3 of the P.P.(E) Act, 1971, it has been decided by Government to lay down the following guidelines:-

(i) The provisions of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 [P.P. (E) Act, 1971] should be used primarily to evict totally unauthorised occupants of the premises of public authorities or subletees, or employees who have ceased to be in their service and thus ineligible for occupation of the premises.

(ii) The provisions of the P.P.(E) Act, 1971 should

not be resorted to either with a commercial motive or to secure vacant possession of the premises in order to accommodate their own employees, where the premises were in occupation of the original tenants to whom the premises were let either by the public authorities or the persons from whom the premises were acquired.

(iii) A person in occupation of any premises should not be treated or declared to be an unauthorised occupant merely on service of notice of termination of tenancy, but the fact of unauthorised occupation shall be decided by following the due procedure of law. Further, the contractual agreement shall not be wound up by taking advantage of the provisions of the P.P. (E) Act, 1971. At the same time, it will be open to the public authority to secure periodic revision of rent in terms of the provisions of the Rent Control Act in each State or to move under genuine grounds under the Rent Control Act for resuming possession. In other words, the public authorities would have rights similar to private landlords under the Rent Control Act in dealing with genuine legal tenants.

(iv) It is necessary to give no room for allegations that evictions were selectively resorted to for the purpose of securing and unwarranted increase in rent, or that a change in tenancy was permitted in order to benefit particular individuals or institutions. In order to avoid such imputations or abuse of discretionary powers, the release of premises or change of tenancy should be decided at the level of Board of Directors of Public Sector Undertakings.

(v) All the Public Undertakings should immediately review all pending cases before the Estate Officer or Courts with reference to these guidelines, and withdraw eviction proceedings against genuine tenants on ground otherwise than as provided under these guidelines. The provisions under the P.P. (E) Act, 1971 should be used

henceforth only in accordance with these guidelines.

3. These orders take immediate effect.

VINEETA RAI

Additional Secy."

47. Mr. Hansaria pointed that when the MRC Act was being framed, LIC specifically represented to Maharashtra State Law Commission that it be exempted from the coverage of the proposed law. This is recorded in Twelth Report of July 1979 of the State Law Commission which finds a reference in paragraph 33 of the Bombay High Court judgment in *Minoo Framroze Balsara Vs. The Union of India & ors.* [AIR 1992 Bom 375]. However, that representation of L.I.C was not accepted. Lateron in view of the amendment of section 2 (e) of the Public Premises Act, L.I.C came to be covered under the Public Premises Act, but was not exempted from the MRC Act.

48. Lastly, Mr. Hansaria relied upon the judgment of a Division Bench of Karnataka High Court in the case of *Bharath Gold Mines Ltd vs. Kannappa* [ILR 1988 KAR 3092] equivalent to 1989 (2) All India Rent Control Journal 154, where the Division Bench has held that the power to evict does not include the power to fix rent. Fixation of rent was independent from eviction, and it was not dealt with under the Public Premises Act. The Public Premises Act does not override the provisions of the Karnataka Rent Control Act, 1961 regarding the fixation of fair rent. It is submitted that the same approach ought to be adopted in the present case.

Reply on behalf of L.I.C -

49. The learned Additional Solicitor General Mr. Rawal appearing for the respondents submitted that the appellant had agreed to 35% rise in the rent every five years. Section 7 of the Public Premises Act provides for payment of rent by the

authorized tenant, and makes a provision for damages for the unauthorized occupation. A hearing is provided for recovery of the arrears of rent and the damages under that section, and the order, if any, passed against the occupant is appealable under Section 9 of the Act. The order is given finality under Section 10 of the Act. He pointed out that as noted by this Court also in *Shangrila Food Products Ltd. and Another Vs. L.I.C. and Another* reported in [1996 (5) SCC 54], that "unless the occupant is first adjudged as an unauthorized occupant, his liability to pay damages does not arise. In other words, if he is an authorized occupant, he may be required to pay rent but not damages. The quality of occupation and the quality of recompense for the use and occupation of the public premises go hand in hand and are interdependent".

50. The rent was being fixed on one of the three yardsticks, i.e. (i) as per the document of lease, (ii) as per the contract between the parties, or (iii) as per the grant. If the arrears of rent remained to be recovered from the tenant, there is a power to recover the same even from the heirs and legal representatives under Section 13 of the Act, and if the rent or damages are not paid, they can be recovered as arrears of land revenue under Section 14 and an unlawful occupant can be prosecuted under Section 11 of the Act. This being the position the idea of standard rent was foreign to the Public Premises Act.

51. A reference was made to the rules which are framed under the Act alongwith the relevant forms framed thereunder. Thus, Form D contains the format for the notice under Section 7 (3) read with Sub-section (1) thereof which is to be issued by the Estate Officer for calling the tenant for an enquiry into the arrears of rent. Form F is the format of the notice for enquiry for determining the damages for unauthorized occupation to be assessed under Section 7 (3) read with Sub-section (2) thereof. It was, therefore, submitted that necessary mechanism is provided under the Act and the Rules.

52. Thereafter it was pointed out that all that the respondents had done was to pass on the amount of property tax demanded by the Municipal Corporation to the appellant. It was submitted that when the respondent received a notice dated 23.3.2006 from the Municipal Corporation of Mumbai to enhance the property tax, to begin with the respondent objected to the revision by their reply dated 13.4.2006. The officers of the respondent attended the proceedings in the municipal office whereafter the Municipal Corporation reduced their demand by 10%. It is only a proportion of this amount which was passed on to the appellant and which is sought to be recovered and they should not make any grievances about the same.

53. The respondents then relied upon the judgment of a Division Bench of Bombay High Court in *Minoo Framroze Balsara* (supra). In that matter the challenge to the validity of the Public Premises Act by invoking Article 14 was repelled by the High Court. It is however, material to note that this judgment was essentially concerning eviction of unauthorized occupants and did not deal with the aspect of fixation of standard rent.

54. Mr. Rawal then referred to us two judgments of this Court. Firstly, he referred to para 10 of *Jain Ink Mfg. Co. vs. LIC* (supra), wherein this Court had held that once the Public Premises Act applies, the Delhi Rent Control Act will stand superseded. He then referred to *Prithipal Singh v. Satpal Singh (dead) thr. its Lrs.* [2010 (2) SCC 15] where in para 29 this court has held that the Delhi Rent Control Act and the Maharashtra Act are pari-materia, and therefore, on that footing he submitted that by applying the judgment in Jain Ink Mfg. Co. (supra), Maharashtra Act also gets eclipsed by the Public Premises Act. We have already referred to the judgment in Jain Ink Mfg. Co. (supra). The judgment was in the context of eviction from Public Premises and not concerning fixation of standard rent, and therefore, the observations in para 10 thereof will have to be looked into from that point of view.

55. The submission of Mr. Rawal was that an exclusionary clause has to be read strictly. In the present case Section 2 (f) read with Section 15 (d) of the Act dealt with the definition of rent and exclusion of proceedings for recovery of rent by way of Civil suit, and there was no non-obstante clause in the MRC Act. In this context, he relied upon a judgment of this Court in *Church of North India Vs. Lavajibhai Ratanjibhai* reported in [2005 (10) SCC 760]. In that matter, after examining the scheme of Bombay Public Trusts Act, 1950 and relying upon the dicta of the constitution bench in *Dhulabhai Vs. State of M.P.* reported [AIR 1969 SC 78], this Court had held that a suit for declaration as to the succession to a public trust was not maintainable, since the authorities under the Bombay Public Trusts Act had exclusive jurisdiction. A similar approach was suggested in the present case.

56. It was then submitted that the MRC Act excludes some tenants from the protection of the rent Act such as the Banks, Insurance Companies and Multi National Companies being rich tenants. In the same way, under the Public Premises Act, fixing of standard rent has been excluded, and that should be held to be permissible. If a tenant is aggrieved by the rent fixed, his remedy will be to invoke Article 226 of the Constitution, but one cannot permit part of the proceedings regarding arrears of rent before the Court of the Estate Officer, and another part concerning fixation of standard rent before the Rent Controller.

57. With respect to the guidelines framed by the Central Government, it was submitted by Mr. Rawal that non-statutory guidelines are to be treated as advisory in character and present guidelines need not be read as conferring any legal rights on the tenants. He relied upon paragraph 23 of the judgment of a Bench of two Judges of this court in *New India Assurance Co. Ltd. Vs. Nusli Neville Wadia* reported in [2008 (3) SCC 279] in this behalf.

Consideration of rival submissions

The issue with respect to maintainability of the Standard Rent Application and the question of conflict with the provisions of the Public Premises Act-

58. As we have noted earlier, the question for our considerations is whether the application of the appellant for fixation of standard rent was maintainable under the MRC Act, notwithstanding the fact that the premises of the appellant were otherwise covered under the Public Premises Act for the purposes of that Act. Again, as we have noted earlier, the appellants do not dispute that for the purposes of eviction of unauthorised occupants, and for the recovery of arrears of rent from them, the proceedings to be initiated by the respondents would be fully competent under the Public Premises Act, and that in such an eventuality the occupants will not be entitled to seek any remedy under the MRC Act, since the jurisdiction of the Civil Court has been ousted under Section 15 of the Public Premises Act in this behalf. It is also already held by this Court in the cases of **Kaiser-I-Hind** and **Crawford Bayley** (supra) that as far as the issue of eviction of unauthorised occupants from Public Premises is concerned, the authorities under the Public Premises Act alone will have jurisdiction to deal therewith, and no proceedings will lie either under the Bombay Rent Act or the MRC Act. The question in the present matter is with respect to the maintainability of the Standard Rent Application by the occupants of these premises under the MRC Act. Mr. Hansaria, learned counsel for the appellants points out that this issue has not been decided by this Court so far.

59. Before we deal with the rival submissions, we may state once again that under the general law of landlord and tenant also, the landlord had the obligation to charge only the rent agreed under the lease agreement, and to carry out the repairs to the property which were necessary, failing which the tenant would be entitled to carry out the same and deduct the expenses from the rent [see Section 108 (B) (f) of the Transfer of Property Act]. As we have noted earlier, due to the problems of the scarcity of accommodation following the Second World War, special protection was made available to the tenants

against unjustified increases in rent and ejectment from the tenancies. This protection was reflected in the provisions of various Rent Control Acts such as the Bombay Rent Act, 1947 which governed the premises of the appellant for all purposes prior to the coming into force of the Public Premises Act, 1971. When the Public Premises Act was enforced, it covered the subject of eviction of unauthorised occupants of the public premises and recovery of arrears of rent from them, and those subjects no longer remained covered under the Bombay Rent Act. The question is whether the remedies for fixation of Standard Rent and getting the essential services restored when necessary, no longer remained available to the tenants like the appellant merely because the Public Premises Act came to be applied. And secondly, after the MRC Act came into force from 31st March, 2000 whether these remedies once again came to be reinforced.

60. We have noted the observations from the leading judgment of the Constitution Bench in *Ashoka Marketing.* In that matter this Court was concerned with the question as to whether the proceedings for eviction initiated under the Public Premises Act were maintainable or whether they had to be taken under the Delhi Rent Control Act, 1958. As we have noted earlier this Court has held that since both the acts were concerning entries no. 6, 7 and 13 of the Concurrent List, and since the Public Premises Act was a subsequent Act, and governing the particular subject, the same will override, and the eviction proceedings thereunder were valid and competent.

61. The question in this case is different in the sense that the MRC Act which is a State Act, is an Act subsequent to the Public Premises Act, and has been assented by the President, notwithstanding the existence of the Public Premises Act. The situation, therefore, would be governed by Sub-article (2) of Article 254 of the Constitution, and we will have to see whether the provisions of MRC Act with respect to the fixing of the standard rent and restoring the essential supplies and services

are in any way repugnant to the Public Premises Act. In *Vijay Kumar Sharma Vs. State of Karnataka* (supra) a Bench of three Judges of this Court has laid down that whenever repugnancy is alleged, what has to be first examined is whether the two legislations cover or relate to the same subject matter. The test for that is to find out the dominant intention of the two legislations. If the subject matters covered by the legislations are different, merely because the two legislations refer to some allied or cognate subjects they do not cover the same field.

62. We have noted the observations of a Bench of three Judges of this Court in *M/s Jain Ink Mfg. Co.* (supra) that the Public Premises Act has a very limited application, whereas the Rent Act is an Act with much wider application than the Public Premises Act. In the present case, the subjects of fixation of Standard Rent and restoration of essential services by the landlord are covered under the MRC Act, but in no way under the Public Premises Act. The Public Premises Act, in fact does not claim to cover these subjects. As held by the Constitution Bench in **Kesoram Industries Ltd.** (supra), the Court has to look at the substance of the matter. Regard must be had to the enactment as a whole, to its main objects and scope of its provisions. Incidental and superficial encroachments are to be disregarded. Eviction and recovery of arrears of rent are alone covered under the Public Premises Act. The subject of fixation of rent is different and independent from eviction as held by the division bench of the Karnataka High in **Bharath Gold Mines**. That being the position, there is no conflict between the MRC Act and the Public Premises Act when it comes to the provisions in the MRC Act with respect to fixation of Standard Rent and requiring the landlord to maintain the essential services and supplies. Therefore, the provisions of MRC Act in that behalf cannot in any way be said to be repugnant to those under the Public Premises Act. The presumption is in favour of constitutionality, and the Court is not expected to strike down a provision unless the conflict is a real one. In the present matter there is no such real conflict.

On ouster of the jurisdiction of the Civil Courts-

63. We may next deal with the contention of the respondents that the exclusionary clauses are to be read strictly. In the case of *Church of North India* (supra), relied upon by the respondents, this Court was concerned with a suit for declaration as to the succession to a particular trust governed under the Bombay Public Trust Act. Such a suit was squarely covered under that Act and, therefore, it was held that the Civil Court will not have the jurisdiction to entertain the suit. The seven principles laid down by the Constitution Bench in *Dhulabhai Vs. State of M.P.* (supra) were relied upon in that case. It is sufficient to refer to the first two principles therefrom which are as follows:-

> "(1) Where the statute gives a finality to the orders of the special Tribunals the civil courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure.
>
> (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court."

If we apply these two tests and examine the scheme of the Public Premises Act, it will be seen that section 10 of the Act does give a finality to the orders passed by the Estate Officers or the Appellate Officers, and states that 'the same shall not be called in question in any original suit, application or execution proceeding, and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act'.

Section 15 of the Act specifically states that no court shall have jurisdiction to entertain any suit or proceeding in respect of the subjects, amongst others concerning, '(a) the eviction of any person who is in unauthorised occupation of any public premises, and (d) the arrears of rent payable under sub-section (1) of section 7 or damages payable under sub-section (2), or interest payable under sub-section (2A), of that section'. Therefore, to that extent the jurisdiction of the Civil Court is ousted. The actions which are covered under the Public Premises Act are concerning eviction of unauthorised occupants and recovery of arrears of rent. The Act however does not claim to speak anything about the fixation of Standard Rent or maintenance of essential services. For these purposes no remedy is provided under the Public Premises Act. Therefore, the jurisdiction of the Civil Court for these remedies cannot be held to be ousted.

64. It was submitted on behalf of the respondent that if the submission of the appellant is accepted it will mean permitting proceedings before the Court of Estate Officer for recovery of arrears of rent, and before the Rent Controller for fixation of standard rent, and the same is not desirable. In our view, this by itself can be no reason to hold the Standard Rent Application to be not maintainable before the Court of Small Causes. We have referred to the judgment in the case of *National Engineering Industries Ltd. Vs. Shri Kishan Bhageria* (supra). In that ease the establishment wherein the respondent/ workman was employed was covered under the Rajasthan Shops and Establishment Act, 1958. It was also covered under the Industrial Disputes Act, 1947. Dismissal of his application for reinstatement under Section 28A of the Rajasthan Act on the ground of limitation was held as not preventing a reference under Section 10 of the Industrial Disputes Act. The observation of this Court at the end of para 12 of that judgment is relevant for our purposes, and which reads as follows:-

> "**12**……It appears to us that it cannot be said that these two Acts do not tread the same field. Both these Acts deal

with the rights of the workman or employee to get redressal and damages in case of dismissal or discharge, but there is no repugnancy because there is no conflict between these two Acts, in pith and substance. There is no inconsistency between these two Acts. These two Acts, in our opinion, are supplemental to each other."

65. Same is the position with respect to the Labour Laws in various States. Thus, for example, where an industry is covered under a State Act such as the Bombay Industrial Relation Act, 1946 in Maharashtra, the workmen engaged therein will be required to raise the disputes concerning reinstatement and backwages in the event of dismissal, retrenchment, removal or termination before the authority under that Act. At the same time, whenever any money, including unpaid wages is due to the workmen, they also have the right to file the claim applications under section 33 C (2) of the Industrial Disputes Act, 1947, in the Labour Courts constituted under that Act, since similar provision is not made under the said Bombay Act. The MRC Act being a welfare statute like the labour laws is enacted after considering the requirements of the tenants, and contains the provisions for fixation of standard rent and for restoring essential services and supplies when necessary. The public premises are not specifically exempted from the applicability of the MRC Act. That being so, there is no reason to hold that these remedies will not be available to the tenants of the public premises, though for the purposes of eviction of unauthorised occupants and recovery of arrears of rent, the proceedings will lie only under the Public Premises Act. It is also to be noted that the proceedings for the recovery of arrears of rent are at the instance of landlord, whereas those for fixation of standard rent are at the instance of the tenant. Both these proceedings are quite different in their prayers and scope of consideration. The fact that the proceeding for one purpose is provided under one statute can not lead to an automatic conclusion that the remedy for a

different purpose provided under another competent statute becomes unavailable.

Expectations from Public Bodies -

66. Although the question of maintainability of the Standard Rent Applications concerning the public premises is only coming up now before this Court, we have referred to the views of Courts when different facets of this issue came up for consideration from time to time. The exemption from the Bombay Rent Act to the government premises was upheld in *Rampratap Jaidayal* (supra), on the basis of the presumption in favour of the constitutionality of the enactment which was also on the footing that Legislature correctly appreciates the needs of its own people. Chief Justice Chagla has clearly observed in that matter that the Legislature was not in any sense exempting the Government from the operation of the Act in order to permit the Government to do the very thing which the Legislature was prohibiting the landlords from doing, viz. not to increase rents and not to eject tenants unless it was absolutely necessary in the public interest. S.R. Das, J. (as he then was) has also observed similarly in *Baburao Shantaram More* (supra) that it was not expected that the Government or the Local Authority would be actuated by any profit making motive so as to unduly enhance the rents or eject the tenants from their respective properties as private landlords are or are likely to be. Sabyasachi Mukharji, J (as he then was) has gone further in *Dwarkadas Marfatia* (supra), and observed that when public authorities enjoy this benefit of being hidebound by the requirements of the Rent Act, they must act for public benefit, and to that extent this issue is liable to be gone into and can be the subject-matter of adjudication. He has stated in no uncertain terms that the legislative expectations as observed by the Chagla, C.J. in *Rampratap Jaidayal* (supra) cannot make such conduct a matter of contract pure and simple. He has further observed that the exercise of discretion of public authorities must be tested on the assumption that they would not act as private landlords and they must be judged by that

standard. We may however, add that these principles will have no relevance while considering a dispute between a statutory body as landlord and an affluent tenant in regard to a commerical or non-residential premises.

On the relevance of the Guidelines -

67. In the instant case, the activities of the respondent/L.I.C are controlled by the LIC Act. Section 21 of the LIC Act lays down that the Corporation shall be guided by the directions issued by the Central Government. This Section reads as follows:-

> *"21. Corporation to be guided by the directions of Central Government-*
>
> In the discharge of its functions under this Act, the Corporation shall be guided by such directions in matters of policy involving public interest as the Central Government may give to it in writing; and if any question arises whether a direction relates to a matter of policy involving public interest the decision of the Central Government thereon shall be final."

The guidelines dated 30.5.2002 are not directions under section 21 of the LIC Act.

68. We have referred to the guidelines laid down by the Central Government in this behalf. Guidelines no. 2(i) and 2 (iii) are relevant for our purpose. Guideline no. 2 (i) states that the provisions of the Public Premises Act, 1971 should be used primarily to evict totally unauthorised occupants. Guideline No. 2 (iii) specifically states that it will be open to the public authority to secure periodic revision of rent in terms of the provisions of the Rent Control Act in each State, or to move under genuine grounds under the Rent Control Act for resuming possession. Thus, these guidelines specifically recognise the relevance of certain provisions of Rent Control Acts for their application to the properties covered under the Public Premises Act. It is

stated in the guidelines that the public authorities would have rights similar to private landlords under the Rent Control Acts in dealing with genuine legal tenants. It follows that the public authorities will have the obligations of the private landlords also. It is relevant to note that the purpose of these guidelines is to prevent arbitrary use of powers under the Public Premises Act. The relevance of the guidelines will depend upon the natureof guidelines and the source of power to issue guidelines. The source of the right to apply for determination of standard rent is the Rent Control Act, and not the guidelines.

69. We may also note by subsequent clarificatory order dated 23.7.2003, the Central Government has made it clear that the guidelines dated 30.5.2002 will not apply to affluent tenants:

> "The Government resolution dated 30.5.2002 embodies the guidelines dated 14.1.1992 for observance by the public sector undertakings. However, clarification was issued vide OM No. 21011/790 Pol-I IV H. 11 dated 7.7.1993 that the guidelines are meant for genuine non-affluent tenants and these are not applicable to the large buisiness housesand commerical entrepreneours."

70. It was submitted on behalf of the respondents that if the appellant or the tenants are aggrieved by the fixation of the rent, their remedy is to invoke the writ jurisdiction of the High Court. In making this submission, the respondents are ignoring that the writ jurisdiction is a discretionary jurisdiction. Besides, normally oral evidence is not recorded while exercising the writ jurisdiction. Although part of the evidence to be examined in the process of rent fixation would be documentary, such as the provisions of the contract between the parties and those governing properties of the government, there would also be many other factors which may require oral evidence, particularly with respect to the comparable properties. An appropriate remedy, forum and procedure are therefore necessary in the interest of fairness and proper adjudication. That apart, there is no reason to insist upon such an interpretation which will

deny to the tenants of the public premises, a remedy and a forum which are otherwise available to the tenants under the MRC Act,.

71. In view of what is stated above, the interpretation as canvassed by the respondents will deny the appropriate remedy to the petitioner and the like tenants, to have the rent of their premises being fixed by filing a Standard Rent Application, and also to get the essential services restored in the event of any difficulty. There is no reason to accept any such interpretation because as stated above there is no conflict between this provisions of the MRC Act with those under the Public Premises Act, when it comes to fixation of standard rent and restoring the essential supplies. Otherwise it will expose the provisions of Public Premises Act to the vires of unreasonableness also. The interpretation canvassed by the respondents is not in consonance with the welfare state that is contemplated under the Indian Constitution. Accordingly, we hold that the impugned judgment of the learned Single Judge of Bombay High Court does not lay down the correct position in law. As against that we approve the approach and the interpretation adopted by the Karnataka High Court in *Bharath Gold Mines Ltd.* (supra).

72. In the circumstances, we hold as follows:-

(a) The provisions of the Maharastra Rent Control Act, 1999 with respect to fixation of Standard Rent for premises, and requiring the landlord not to cut off or withhold essential supply or service, and to restore the same when necessary, are not in conflict with or repugnant to any of the provisions of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971.

(b) The provisions of the Public Premises Act, 1971 shall govern the relationship between the public undertakings covered under the Act and their occupants to the extent they provide for eviction of unauthorised occupants from public

premises, recovery of arrears of rent or damages for such unauthorised occupation, and other incidental matters specified under the Act.

(c) The provisions of the Maharashtra Rent Control Act, 1999 shall govern the relationship between the public undertakings and their occupants to the extent this Act covers the other aspects of the relationship between the landlord and tenants, not covered under the Public Premises Act, 1971.

(d) The application of appellant and similar applications of the tenants for fixation of Standard Rent or for restoration of essential supplies and services when necessary, shall be maintainable under the Maharashtra Rent Control Act, 1999.

73. Hence, we pass the following order-

(a) This appeal is allowed, and the order dated 8.9.2009 passed by the learned Single Judge of Bombay High Court, in Writ Petition No. 5023/2009 filed by the respondents is set aside. The said Writ Petition shall stand dismissed.

(b) The order dated 30.3.2009 passed by the Court of Small Causes, Mumbai rejecting respondents' application objecting to the maintainability of appellant's Application No.RAN24/SR/08 for fixation of Standard Rent is upheld. The said Standard Rent Application will now be heard and decided on its merits and in accordance with law.

(c) In the facts of this case, there will be no order as to costs.

N.J. Appeal allowed.