SADHWI PRAGYNA SINGH THAKUR
v.
STATE OF MAHARASHTRA
(Criminal Appeal No. 1845 of 2011)

SEPTEMBER 23, 2011

[J.M. PANCHAL AND H.L. GOKHALE, JJ.]

BAIL:

Bomb blast – Arrest of appellant – Bail application on the ground that the arrest of appellant violated the mandate of Article 22(1) and 22(2) of the Constitution and also on the ground that no charge sheet was filed within 90 days as contemplated u/ s.167(2), Cr.P.C. – Special court and High Court rejected the bail application – On appeal, held: The case of appellant that she was arrested on October 10, 2008 and charge sheet was filed on January 20, 2009 which was beyond 90th day from date of first remand order was not established and was rightly rejected by lower courts – Appellant was arrested on October 23, 2008 and was produced before the Magistrate the next day on which date the appellant was remanded to Police custody till November 3, 2008 – Both the courts below concurrently so held which is well founded and is not liable to be interfered with – Code of Criminal Procedure, 1973 – s.167(2) – Constitution of India, 1950 – Article 22(2) – MCOC Act.

Grant of bail – Consideration for – Held: Considerations for grant of bail at the stage of investigation and after the charge sheet is filed are different – Once a person is arrested and is in judicial custody, the prayer for bail will have to be considered on merits – Prayer for bail cannot be automatically granted on establishing that there was procedural breach irrespective of the merits of matter.

CODE OF CRIMINAL PROCEDURE, 1973:

s.167(2) – Held: The right u/s.167(2) to be released on bail on default if charge sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right – The said right would be lost if charge sheet is filed and would not survive after the filing of the charge sheet – After the filing of the charge sheet, if the accused is to be released on bail, it can be only on merits.

Relevant date of counting 90 days for filing charge sheet – Held: Is the date of first order of the remand and not the date of arrest.

CONSTITUTION OF INDIA, 1950: Article 22(2) – Held: Right u/Article 22(2) is available only against illegal detention by police – It is not available against custody in jail of a person pursuant to a judicial order – Article 22(2) does not operate against the judicial order.

A bomb blast took place on September 29, 2008 in Malegaon city killing six persons and injuring more than hundred persons. The initial investigations revealed that the bomb was planted on a scooter. The investigation of the case was transferred to Anti Terrorists Squad (ATS). The investigation conducted by police official 'S' revealed that the scooter belonged to the appellant who was originally resident of Surat and had renounced material world and become Sadhwi in a religious ceremony and was settled in Jabalpur. The police official 'S' called up the appellant to enquire about the scooter. The appellant told him that she had sold the scooter long back. 'S' was not satisfied with the explanation and asked her to come down to Surat. The appellant came to Surat. 'S' repeatedly asked the appellant as to how that vehicle reached Malegaon and how it was used in the bomb blasts to which the appellant could not give satisfactory answers. 'S' disbelieved her and asked her to accompany her to

Mumbai. 'S' suggested to her to take her father along with her but she declined the said offer on the ground of ill health of her father. She expressed her desire to be accompanied by her disciple. 'S' granted the same. The appellant with her disciple 'BB' reached Mumbai in a vehicle belonging to 'S'. The case of the appellant was that she was taken to ATS office on 11th October, 2008 and interrogated. On 12th October 2008, the ATS team became more aggressive and asked 'BB' to beat the appellant and when 'BB' refused, he was beaten up and so he reluctantly complied with the order by beating the appellant. On 13th October 2008, she was beaten up whole day and subjected to vulgar abuses. On 15th October 2008, she and the disciple was taken to the Hotel Rajdoot. Thereafter she developed bad health and was admitted in hospital.

On November 20, 2008, the provisions of Maharashtra Control of Organised Crime Act, 1999 were invoked. The appellant filed an application for bail before the Special Judge under Section 167(2), Cr.P.C. and 21(4) MCOCA and also under Section 439 Cr.P.C. The Special Judge rejected the said bail application. The appellant unsuccessfully filed an application before the High Court.

In the instant appeal, it was contended for the appellant that she was under detention from October 10, 2008 and though the 90th day expired on January 09, 2009 the charge-sheet was filed on January 20, 2009; that there was violation of Section 160, Cr.P.C.; that there was no written notice requiring her attendance to appear for any investigation or interrogation and absence of such written notice established her illegal custody by officers of A.T.S., Mumbai. The case of the respondent-State was that the charge sheet was filed on January 20, 2009 which was 89th day from the date of first remand order i.e. October 24, 2008; and that the appellant had agreed to

come to Surat and Bombay and therefore the point of issuance or non-issuance of notice under Section 160, Cr.P.C. was not relevant.

Dismissing the appeal, the Court

HELD: 1.1. The courts below upheld the case of the respondent-State that the appellant was arrested on October 23, 2008 and not on October 10, 2008 as alleged by the appellant. Normally, concurrent findings of facts are not interfered with in an appeal arising by grant of special leave. However, the appellant had made grievance that her rights guaranteed under Article 22(1) and 22(2) of the Constitution were violated by not producing her before the Magistrate within 24 hours of her arrest which was effected on October 10, 2008 and, therefore, in order to find out whether there was any violation of the rights guaranteed under Article 22(1) and 22(2) of the Constitution, this Court undertook exercise of ascertaining whether the appellant was arrested, as claimed by her, on October 10, 2008 or whether she was arrested on October 23, 2008, as claimed by the respondent. [Para 6]

1.2. On re-appreciation of the evidence on record, this Court found that the case of the appellant that she was arrested on October 10, 2008 was not correct and was rightly rejected by the Special Judge as well as by the High Court. The appellant was arrested on October 23, 2008 and was produced before the CJM, Nasik on October 24, 2008 on which date the appellant was remanded to Police custody till November 3, 2008. On the said date, there was no complaint made to the CJM that the appellant was arrested on October 10, 2008 nor there was any complaint about the ill-treatment meted out to her by the officers of A.T.S. Mumbai. Also there was no challenge at any time to the order of remand dated October 24, 2008 on the ground that the appellant was

not produced before the C.J.M. within 24 hours of her arrest. The appellant was next produced before the C.J.M., Nasik on November 3, 2008. On that date an application was filed that she was picked up on October 10, 2008 and was illegally detained at the ATS Office, Mumbai. The reply was filed on behalf of the respondent on that very date denying the said allegation. The order of remand dated November 3, 2008, noticed the allegation and thereafter the appellant was remanded to judicial custody till November 17, 2008. This order was also not challenged by the appellant. A detailed affidavit was filed by the appellant on November 17, 2008 setting out in detail the events from October 10, 2008 up to October 23, 2008. A perusal of the said affidavit showed that even if all the allegations in the said affidavit were taken on their face value, a case of arrest on October 10, 2008 was not made out. It is clear from the language of the affidavit that the appellant understood that her going to Mumbai was for interrogation and in her capacity as a potential witness and not as an accused. Further the appellant was not arrested on October 10, 2008 is made clear by her own statement in Para 9 – "It is significant to mention that I was not formally arrested on October 10, 2008". . In para 10 she had claimed that for the next two days she was detained and interrogated by the ATS team in Mumbai. There is no manner of doubt that this statement was factually incorrect. The record showed that after reaching Mumbai at midnight i.e. the beginning of the October 11, 2008, the appellant and 'BB' stayed in Hotel Satguru from October 11th to 15th, 2008. The relevant entry in the station diary for October 11, 2008 also mentions about the stay of the appellant in a lodge. The fact that the appellant and her companion attended the office of A.T.S. on the 11th and on subsequent dates and left after interrogation was also recorded in the station diary for 11th to 15th October, 2008. In para 11 of the affidavit it was mentioned

by the appellant that during interrogation the police had asked 'BB' to beat her with sticks etc. This would show that 'BB' was with the appellant. If a person is arrested, the person is isolated from others and is completely deprived of his/her personal liberty. A person who is arrested and kept in police custody is not provided any companion. The averments in the affidavit would show that disciple 'BB' was all along with the appellant, which would negate her case that she was illegally arrested and detained by the police. In para 17 of the affidavit, the appellant clearly and expressly averred that no female constable was by her side either in Hotel Rajdoot or in either of the two hospitals. This statement of appellant was very important in as much as this clearly showed that the appellant was alone and was not under custody or detention of police. If this was a case of arrest of the appellant, a police constable would have always been around, which is not the case. This positive averment of the appellant belied her plea raised later on about her arrest on August 10, 2008. The Hospital documents of the Shushrusha Hospital showed that the appellant was admitted in the hospital on October 15, 2008 and was discharged on October 17, 2008. It also showed that all the medical investigation reports were handed over to the patient's relative. If it was a case of arrest and police admitting the appellant to the hospital, all hospital records would have been handed over to the Police and the appellant also would have been handed over to the police which is not the case. The letter of the doctor of the chest clinic showed that the appellant was brought to the hospital by 'BB', described as a relative of the appellant. If the appellant was under arrest she would have been brought to the hospital by the police and doctor would have so recorded it, in medical papers which was not the case. The doctor only recorded that a Police Officer merely had called up for the same patient i.e. made enquiries about the condition of the patient. The

doctor further recorded that the appellant was transferred to Vaze Hospital for further treatment. The appellant was in Vaze Hospital between October 17, 2008 and October 20, 2008 which is evident from the payments made to the said hospital. The hospital receipts were in the name of the appellant and not in the name of police. Her case that she was in police custody and she did not have sufficient means to foot the bill of the two hospitals did not inspire confidence of this Court because firstly her disciple 'BB'was never in custody of the police and secondly panchnama prepared at the time of the arrest of the appellant on October 23, 2008 mentioned the articles seized from the appellant including one hundred notes, each of which was of denomination of rupees one hundred i.e. in all Rs. 10,000/-. It was no where pleaded by the appellant that the said amount did not belong to her. Even assuming that amount mentioned in the bills of the two hospitals was paid by the police such payment itself would not indicate illegal arrest and custody of the appellant. [Paras 8-11]

1.3. In so far as October 21st and 22nd, 2008 were concerned the appellant had not given any specific details except claiming that she was brought back to the ATS Office. This appeared to be factually incorrect. In para 18 of the report sent to the National Human Rights Commission it was specifically stated by the respondent that after being discharged from Vaze Hospital on October 20, 2008 the appellant had checked into Hotel Parklane. As per the records of the said hotel, the appellant remained in the said Hotel till she was arrested on October 23, 2008. It was averred in the affidavit that after questioning on October 20th, 21st and 22nd, 2008 the appellant was allowed to go. These facts would clearly show that there was no arrest of the appellant on October 10, 2008. In paragraph 19, the appellant herself has stated that she "was finally arrested on 23.10.2008 and produced before the CJM on 24.10.2008". This was her specific case namely that she was arrested on October 23, 2008. However, at a later stage, before the Special Judge in her application for default bail dated January 14, 2009, the word "finally" was changed to "officially" and before the High Court it was sought to be pleaded that the appellant was "formally" arrested instead of the expression "finally" arrested on October 23, 2008. The findings recorded by the Special Judge as well as by the High Court that the appellant was not arrested on October 10, 2008 but was arrested on October 23, 2008 and was thereafter produced before the CJM are concurrent findings of facts. There was no substance in the contention that the appellant was arrested on October 10, 2008 and therefore the findings recorded by the Special Judge and the High Court are not liable to be interfered in this appeal. [Paras 12-14]

2.1. The issue whether the issuance or non-issuance of notice under Section 160 Cr.P.C. was relevant or not was considered in detail by the High Court. The High Court noticed that the appellant was not detained or taken into custody but was only questioned and was thereafter allowed to go. The High Court observed that once the applicant's movements were not restricted nor was she confined to the ATS Office after interrogation, then it is difficult to hold that in the garb of interrogating and questioning her she was taken into custody by the ATS. The High Court explained that assuming that the custody and arrest are synonymous terms, yet in the facts of this case, it was not possible to conclude that the appellant was in custody and was arrested by the ATS. Every single act and movement was of her own volition and no force was used. The High Court, therefore, did not go into the wider question as to whether the non-compliance with Section 160(1) including its proviso

would enable the appellant to apply for release on bail. Once a person is arrested and is in judicial custody the prayer for Bail will have to be considered on merits. Prayer for Bail cannot be automatically granted on establishing that there was procedural breach irrespective of, the merits of matter. The appellant had not claimed bail on merits. Therefore, even if assuming that procedure mentioned in Section 160 was not followed, the prayer of bail cannot be granted at this stage. [Para 13-14]

Nandini Satpathy vs. P.L. Dani and another **AIR 1978 SC 1025: 1978 (3) SCR 608 – held inapplicable.**

2.2. So far as allegation of torture was concerned, it was found that when the appellant was produced before the CJM on October 24, 2008, there was no allegation of any ill treatment by the Police. When the appellant was again produced on November 3, 2008, there was no allegation of any torture in Police custody. Allegation of ill treatment in the Police custody was made for the first time, in the affidavit dated November 17, 2008, a perusal of which would show that it was not believable as primarily it was alleged that the Police made her companion 'BB' to beat her. No injury was found on her body by any of the doctors in the two hospitals. [Paras 15, 16]

2.3. So far as merits of the case are concerned under the Criminal Procedure Code, bail has to be only on consideration of merits, except default bail which is under Section 167(2). Section 21 of the MCOC Act is to the effect that unless the Court is satisfied that the accused is not guilty of the offence alleged, bail shall not be granted, which is similar to Section 37 of the NDPS Act. Considerations for grant of bail at the stage of investigation and after the charge sheet is filed are

different. In the instant case, charge sheet was filed on January 20, 2009 and the application for bail before the High Court, if it is to be treated as not merely a revision from the order of the Special Judge declining bail but also as a fresh application, was an application dated August 24, 2009, after the filing of the charge sheet on January 20, 2009 and, therefore, filed after right, if any, under Section 167(2) is lost and having regard to the provisions of Section 21 of the MCOC Act, the appellant was not entitled to grant of bail. As far as Section 167(2), Cr.P.C. was concerned, no case for grant of bail was made out under the said provision as charge sheet was filed before the expiry of 90 days from the date of first remand. In any event, right in this regard of default bail is lost once charge sheet is filed. There was no violation of Article 22(2) of the Constitution, because on being arrested on October 23, 2008, the appellant was produced before the CJM on October 24, 2008 and subsequent detention in custody was pursuant to order of remand by the Court, which orders were not being challenged, apart from the fact that Article 22(2) is not available against a Court i.e. detention pursuant to an order passed by the Court. The appellant was not able to establish that she was arrested on October 10, 2008. Both the courts below concurrently so held which was well founded and did not call for any interference by this Court. Even assuming that the appellant was arrested on October 10, 2008 as claimed by her and not on October 23, 2008, she is not entitled to grant of default bail because the charge sheet was filed within 90 days from the date of first order of remand. In other words, the relevant date of counting 90 days for filing charge sheet is the date of first order of the remand and not the date of arrest. Section 167(2) is one, dealing with the power of the CJM to remand an accused to custody. The 90 days limitation is as such one relating to the power of the CJM. In other words the Magistrate cannot remand an accused to custody for a period of

more than 90 days in total. Accordingly, 90 days would start running from the date of first remand. It is not in dispute in this case that the charge sheet is filed within 90 days from the first order of remand. Therefore, the appellant is not entitled to default bail. [Paras 17-20]

Chaganti Satyanarayana and Others vs. State of Andhra Pradesh **(1986) 3 SCC 141: 1986 (2) SCR 1128;** *Central Bureau of Investigation, Special Investigation Cell-I, New Delhi vs. Anupam J. Kulkarni* **(1992) 3 SCC 141: 1992 (3) SCR 158;** *State through CBI vs. Mohd. Ashraft Bhat and another* **(1996) 1 SCC 432: 1995 (6) Suppl. SCR 300;** *State of Maharashtra Vs. Bharati Chandmal Varma (Mrs)* **(2002) 2 SCC 121: 2001 (5) Suppl. SCR 422;** *State of Madhya Pradesh vs. Rustom and Others* **1995 Supp. (3) SCC 221: 1995 (1) SCR 897 – relied on.**

3. There is yet another aspect of the matter. The right under Section 167(2) of Cr.P.C. to be released on bail on default if charge sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right. The said right would be lost if charge sheet is filed and would not survive after the filing of the charge sheet. In other words, even if an application for bail is filed on the ground that charge sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if charge sheet is filed, the said right to be released on bail would be lost. After the filing of the charge sheet, if the accused is to be released on bail, it can be only on merits. [para 21]

Sanjay Dutt vs. State **(1994) 5 SCC 410;** *State of M.P.vs. Rustamand Others* **1995 Supp. (3) SCC 221;** *Dr. Bipin Shantilal Panchal vs. State of Gujarat* **(1996) 1 SCC 718;** *Dinesh Dalmia vs. CBI* **(2007) 8 SCC 770;** *Mustaq Ahmed Mohammed Isak and others vs. State of Maharashtra* **(2009) 7 SCC 480 – relied on.**

4. The plea that the appellant was arrested on October 10, 2008 and was in police custody since then is factually found to be incorrect by this Court. The appellant was arrested only on October 23, 2008 and within 24 hours thereof, on October 24, 2008 she was produced before the CJM, Nasik. As such there is no violation of either Article 22(2) of the Constitution or Section 167 Cr.P.C. An enquiry as to exactly when the accused was arrested is neither contemplated nor provided under the Code. Even if it is assumed for the sake of argument that there was any violation by the police by not producing the appellant within 24 hours of arrest, the appellant could seek her liberty only so long as she was in the custody of the police and after she is produced before the Magistrate, and remanded to custody by the Magistrate, the appellant cannot seek to be set at liberty on the ground that there had been non-compliance of Article 22(2) or Section 167(2) of the Cr.P.C. by the police. [para 24]

Uday Mohanlal Acharya vs. State of Maharashtra **(2001) 5 SCC 453;** *Union of India vs. Thamisharasi and Others* **(1995) 4 SCC 190;** *Saptawna vs. The State of Assam* **AIR (1971) SC;** *V.L. Rohlua vs. Deputy Commissioner, Aijal, District Mizo* **(1970) 2 SCC 908 – referred to.**

5. Whereas, an accused may be entitled to be set at liberty if it is shown that the accused at that point of time is in illegal detention by the police, such a right is not available after the Magistrate remands the accused to custody. Right under Article 22(2) is available only against illegal detention by police. It is not available against custody in jail of a person pursuant to a judicial order. Article 22(2) does not operate against the judicial order. [Para 26]

Manoj vs. State of M.P. **(1999) 3 SCC 715: 1999 (2) SCR 402;** *In the matter of Madhu Limaye and Others* **(1969) 1 SCC 292: 1969 (3) SCR 154;** *Bhim Singh, MLA vs. State of J & K and Others* **(1985) 4 SCC 677;** *Khatri and Others (II) vs. State of Bihar and Others* **(1981) 1 SCC 627: 1981 (2) SCR 408;** *The State of Bihar vs. Ram Naresh Pandey and another* **AIR 1957 SC 389: 1957 SCR 279 – relied on.**

6. At the time when the appellant moved for bail she was in judicial custody pursuant to orders of remand passed by the CJM/Special Judge. The appellant did not challenge the orders of remand dated October 24, 2008, November 3, 2008, November 17, 2008 and subsequent orders. In the absence of challenge to these orders of remand passed by the competent court, the appellant cannot be set at liberty on the alleged plea that there was violation of Article 22(2) by the police. The plea that Article 22(2) of the Constitution was violated is based on the averment by the appellant that she was arrested on October 10, 2008. Factually this plea was not found to be correct. The appellant was in fact arrested only on October 23, 2008. The affidavit filed by the appellant on November 17, 2008, on a careful perusal shows that the appellant was not arrested on October 10, 2008. Prayer in the said application did not ask for being set at liberty at all and only ask for an enquiry. Finding recorded by both the Courts i.e. the trial court and the High Court is that the appellant could not make out a case of her arrest on October 10, 2008. Having regard to the totality of the facts and circumstances of the case, the question of violation of Article 22(2) did not arise. [Paras 29, 30]

Case Law Reference:

1978 (3) SCR 608	**held inapplicable**	**Para 14**
1986 (2) SCR 1128	**relied on**	**Para 20, 24**

1992 (3) SCR 158	**relied on**	**Para 20**
1995 (6) Suppl. SCR 300	**relied on**	**Para 20**
2001 (5) Suppl. SCR 422	**relied on**	**Para 20**
1995 (1) SCR 897	**relied on**	**Para21**
1996 (1) SCR 193	**relied on**	**Para 21**
2007 (9) SCR 1124	**relied on**	**Para 21**
2009 (8) SCR 465	**relied on**	**Para 21**
2001 (2) SCR 878	**relied on**	**Para 21**
1995 (3) SCR 905	**relied on**	**Para 22**
AIR (1971) SC 813	**relied on**	**Para 25**
(1970) 2 SCC 908	**relied on**	**Para 25**
1999 (2) SCR 402	**relied on**	**Para 27**
1969 (3) SCR 154	**relied on**	**Para 27**
(1985) 4 SCC 677	**relied on**	**Para 27**
1981 (2) SCR 408	**relied on**	**Para 28**
1957 SCR 279	**relied on**	**Para 28**

CIVIL APPELLATE JURISDICTION : Criminal Appeal No. 1845 of 2011.

From the Judgment and Order dated 12.3.2010 of the High Court of Bombay in Criminal Appeal No. 3878 of 2009.

S.B. Sanyal, Ganesh Sovani, Anand De, Rajashree N. Reddy and Dr. Sushil Balwada for the Appellant.

A. Mariarputham, P.K. Dey, Padmalakshmi Nigam, Asha Gopalan Nair, Shreekant N. Terdal, Yusuf Khan and Rohini Saliyan for the Respondent.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. Leave granted.

2. This appeal, by grant of special leave, challenges the judgment dated March 12, 2010 rendered by the learned single Judge of the High Court of Judicature at Bombay in Criminal Application No. 3878 of 2009 by which prayer made by the appellant to enlarge her on bail on the ground of violation of the mandate of Article 22(1) and 22(2) of the Constitution of India and also on the ground of non-filing of charge sheet within 90 days as contemplated by Section 167(2) of the Code of Criminal Procedure, is rejected.

3. The appellant claims to be the original resident of Surat. According to her she renounced material world and became Sadhwi in a religious ceremony, which was performed at Prayag, Uttar Pradesh and has settled herself at Jabalpur, Madhya Pradesh, in the premises offered by one Agrawal family.

On September 29, 2008 a bomb blast took place at about 9.30 PM in Azad Nagar locality of Malegaon city, killing six persons and injuring more than hundred persons. With reference to the said bomb blast A.C.R. I-130/08 is registered with Azad Nagar Police Station on September 30, 2008 against unknown persons under Sections 302, 307, 324, 427 and 153 of Indian Penal Code as well as under Sections 3, 4 and 5 of Explosive Substances Act and Sections 16, 18 and 23 of Unlawful Activities (Prevention) Act, 1957. The initial investigations revealed that the explosion was carried out by making use of a two wheeler (scooter) on which the bombs were fitted and blasted with the help of a timer.

In October, 2008 the investigation of the case was transferred to Anti Terrorists Squad (ATS), Mumbai headed by ACP Mohan Kulkarni. The investigation by the ATS revealed that the scooter had its origin in Gujarat. The name of dealer

to whom manufacturer had sold the same was traced. On October 7, 2008 team headed by P.I. Sawant went to Surat to contact the two wheeler dealer to ascertain the name of the person to whom the scooter was sold. After contacting the dealer, it was learnt that the two wheeler was sold by the dealer to the appellant and it was registered at R.T.O., Surat, and its registration number being GJ 5 JR 1920. It was also learnt that the appellant was staying in an Ashram at Jabalpur. P.I. Sawant made a call to the appellant to know about her vehicle. The appellant told P.I. Sawant that she had sold the same long back. P.I. Sawant was not satisfied with the explanation given by the appellant. Therefore, he asked the appellant to come down to Surat. The appellant expressed her inability to go to Surat and asked P.I. Sawant to come to Jabalpur, but P.I. Sawant refused to do so and insisted that the appellant should come to Surat. Therefore, the appellant arrived at Surat Railway Station on October 10, 2008. After reaching Surat Railway Station, the appellant straightaway went to the residence of her disciple Mr. Bhim Bhai. At about 10 AM P.I. Sawant met the appellant and revealed to the appellant that her two wheeler had been used in Malegaon blast and it was planted with explosives. The appellant told P.I. Sawant that she had sold the two wheeler in October, 2004 to one Mr. Sunil Joshi for Rs.24,000/- and she had also signed R.T.O. TT transfer form and had no control over the vehicle. P.I. Sawant repeatedly asked the appellant as to how that vehicle reached Malegaon and how it was used to blast bombs, to which the appellant could not give satisfactory answers. P.I. Sawant, therefore, disbelieved the appellant and asked her to accompany him to Mumbai. Initially, P.I. Sawant had suggested to the appellant to take her father along with her, but the appellant had declined the said offer on the ground that physical condition of her father was not well. The appellant expressed her desire to be accompanied by her disciple and P.I. Sawant had granted the same. The appellant with her disciple Bhim Bhai reached Mumbai in the vehicle belonging to P.I. Sawant at 11.30 PM The case of the appellant is that she was taken to Kala Chowki office of ATS whereas the case

of P.I. Sawant is quite different. On October 11, 2008 repetitive questions were put to the appellant pointing out her alleged involvement in Malegaon blast to which the appellant had said that she had no connection with the blast. According to the appellant on October 12, 2008, A.T.S. team became aggressive and asked Bhim Bhai to beat the appellant and when Bhim Bhai refused to do so, he was beaten up and, therefore, Bhim Bhai had reluctantly complied the order by beating the appellant. According to the appellant on October 13, 2008 the appellant was beaten up day and night and subjected to vulgar abuse by senior officers. The case of the appellant is that on October 15, 2008 the appellant and her disciple were taken in ATS vehicle to Hotel Rajdoot in Nagpada and kept in room No. 315 and were made to sign hotel entry register. According to the appellant, money was paid by the ATS and while in hotel the appellant was asked to call from mobile No. 9406600004 to her friends and acquaintances to say that she was fine. The case of the appellant is that she developed bad health due to custodial violence and had acute abdominal and kidney pain as a result of which she was admitted in a hospital known as Shushrusha Hospital at Dadar. According to her after half an hour her disciple Bhim Bhai was also brought to the hospital and admission form of the appellant and other documents were got signed by him. The case of the appellant is that officer Khanwilkar deposited money at the hospital and the disciple of the appellant left hospital after which his whereabouts are not known to the appellant.

The case pleaded by the appellant is that she was formally arrested on October 23, 2008, but reasons of her arrest were not communicated to her nor the names of her relations were ascertained from her to inform them about her arrest. The grievance made by the appellant is that no legal assistance was made available to her and on October 24, 2008 she was produced before learned Chief Judicial Magistrate, Nasik, where the police custody was sought which was granted upto November 3, 2008. According to her, her relations knew about her arrest only through media when news about her arrest appeared in the newspapers on October 25, 2008. Thereupon Bhagwan Jha, brother-in-law of the appellant and her sister met A.T.S. officers to permit them to meet the appellant but were not allowed to do so. According to the appellant, they could meet her on November 2, 2008 when the appellant was allowed to sign Vakalatnama of a lawyer engaged by her sister. The claim of the appellant is that on November 1, 2008 she was subjected to a polygraphic test without her permission. The case pleaded by the appellant is that on November 3, 2008, she was produced before learned Chief Judicial Magistrate, Nasik and her police custody was sought but the same was declined by the learned Magistrate and she was remanded to judicial custody. According to the appellant her advocate moved an application seeking her medical examination, and demanding an enquiry into her illegal detention as well as treatment meted out to her. The advocate also prayed to direct BSNL to furnish outgoing call details from mobile of the appellant on October 15, 2008. The case pleaded by the appellant is that on November 3, 2008 the appellant got opportunity to have a dialogue with her advocate and she narrated atrocities committed by ATS on her. According to her, she filed a detailed affidavit-cum-complaint before the learned Chief Judicial Magistrate on November 17, 2008 and prayed to take action against police officers.

On November 20, 2008, the provisions of Maharashtra Control of Organised Crime Act, 1999 were invoked on the basis of permission granted by DIG, ATS, but application filed by ATS seeking police custody of the appellant was rejected on November 24, 2008.

4. According to the appellant she was under detention from October 10, 2008 and though the 90th day was to expire on January 09, 2009 the charge-sheet was filed on January 20, 2009. Therefore, the appellant filed an application for bail before the learned Special Judge under Section 167(2) Cr.P.C.

and 21(4) MCOCA and also under Section 439 Cr.P.C. Subsequently, according to the appellant, opening part of the application was amended to read as an application for grant of Bail under Section 21(2)(b) of MCOCA.

It is relevant to note that the above application was not an application for bail on merits, but on the plea that charge sheet was required to be filed within 90 days from the date of arrest and as no charge sheet was filed within 90 days, she was entitled to bail under Section 21(2)(b) of MCOCA / Section 167(2) Cr.P.C. The case of the respondent is that the charge sheet was filed on January 20, 2009 which was 89th day from the date of first remand order i.e. October 24, 2008. The respondent had filed reply to the above application on 05.05.2009. The learned Special Judge rejected the said Bail Application by order dated July 09, 2009. Thereupon, the appellant filed Criminal Application No. 3878 of 2009 in the High Court of Mumbai. This was a petition under Sections 401 and 439 Cr.P.C against the order of the learned Special Judge. Prayer (b) was to set aside the order dated July 09, 2009 and, therefore, it was essentially a Revision Petition. The main ground on which bail was sought was that charge sheet was required to be filed within 90 days from the date of her arrest but it was filed beyond 90 days from the date of arrest which was on October 10, 2008. Most of the other grounds pleaded were challenging the correctness of the findings of the learned Special Judge. The application filed in the High Court was rejected by judgment dated March 12, 2010 which has given rise to the present appeal.

5. This Court has heard the learned counsel for the parties at great length and in detail. This Court has also considered the documents forming part of the present appeal.

6. The judgment delivered by the learned Special Judge indicates that the appellant had failed to make out a case that she was in police custody from October 10, 2008 to October 22, 2008. The High Court has also held that the appellant was

not arrested by the police on October 10, 2008 and has upheld the case of the respondent-State that the appellant was arrested on October 23, 2008. Normally, concurrent findings of facts are not interfered with in an appeal arising by grant of special leave. However, the appellant has made grievance that her rights guaranteed under Article 22(1) and 22(2) of the Constitution were violated by not producing her before the learned Magistrate within 24 hours of her arrest which was effected on October 10, 2008 and, therefore, in order to find out whether there is any violation of the rights guaranteed under Article 22(1) and 22(2) of the Constitution, this Court has undertaken exercise of ascertaining whether the appellant was arrested, as claimed by her, on October 10, 2008 or whether she was arrested on October 23, 2008, as claimed by the respondent.

7. Mr. Mahesh Jethmalani, learned senior counsel for the appellant, argued that all the facts and circumstances pertaining to visit of the appellant to Surat on October 08, 2008 and her submission to the ATS custody at Surat on that day and the complete restraint on her freedom of movement from that day onwards by the ATS till October 23, 2008, unambiguously disclose that the appellant had been arrested by the ATS on October 10, 2008 and was illegally detained in their custody till October 24, 2008 when the appellant was produced before the learned Chief Judicial Magistrate, Nasik. It was argued by the learned counsel that the High Court failed to realise that the appellant was a stranger to Mumbai and had come to Mumbai from Surat at the instance of ATS without having any knowledge of the geography of Mumbai and, particularly, the location of lodging houses around the ATS office and, therefore, the High Court should not have held that between October 10, 2008 and October 23, 2008 while in Mumbai the appellant resided at lodging houses in Mumbai. According to the learned counsel, it was stated on oath by the appellant that throughout the period from October 10, 2008 to October 23, 2008 she was in illegal detention in the ATS office located at Kala Chowki, Mumbai

and, therefore, onus should have been shifted to ATS to establish the fact that the appellant had resided at lodging houses in Mumbai. It was contended that no bills of the stay of the appellant in the lodging houses where she had allegedly resided were produced by the ATS nor was it explained how the hotel bills could have been paid by the appellant and, therefore, the case of the respondent that between October 10, 2008 and October 23, 2008 the appellant had resided at lodging houses in Mumbai should have been disbelieved. The learned counsel emphatically pleaded that no notice was issued to the appellant under Section 160 of the Code of Criminal Procedure, 1973 requiring her attendance before Mr. Sawant to interrogate her and in view of the requirements of the proviso to sub-section(1) of the Section 160, the appellant could not have been summoned at police station for the purpose of interrogation and, therefore, it was evident that the appellant was in illegal custody and detention of the ATS between October 10, 2008 and October 23, 2008. The learned counsel emphasised that the circumstances pertaining to the case of the appellant from October 7, 2008, when she was first contacted in Jabalpur till October 23, 2008 when she was produced before the learned Chief Judicial Magistrate, Nasik, leave no room for doubt on any judicious appreciation of the facts that the appellant was manifestly illegally detained by the ATS. What was stressed was that because of third degree methods adopted by the officers of ATS, the appellant had to be admitted in hospital and, therefore, the High Court committed obvious error in coming to the conclusion that the appellant was not in illegal custody of the ATS, Mumbai from October 10, 2008 to October 23, 2008. After referring to the two separate complaints : one filed by Mr. Dharmendra Bairagi and another filed by Mr. Dilip Nahar before the learned Judicial Magistrate First Class, Indore against the officers of A.T.S. Mumbai, in which allegations about their kidnapping, beating, illegal custody etc. from October 14, 2008 to November 3, 2008 are made, the learned counsel for the appellant submitted that in the complaints it is also stated that the appellant who was kept

in a room adjoining the room in which they were confined, was also beaten up day and night by the accused named in the complaints and they had heard screams of the appellant and, therefore, the case of illegal arrest and custody from August 10, 2008 as pleaded by the appellant should be accepted by this Court. The learned counsel read out affidavit dated November 17, 2008 filed by the appellant wherein it was mentioned that she was in illegal custody of ATS from October 10, 2008 and was produced before the learned Chief Judicial Magistrate on October 23, 2008 which according to the learned counsel indicate violation of provisions of Article 22(1) and 22(2) of the Constitution. According to the learned counsel after the appellant was finally arrested on October 23, 2008, ATS had not made any effort to comply with the provisions of Section 50-A of the Code of Criminal Procedure nor the ATS had enlightened the appellant about the grounds/reasons of her arrest and her right to engage a lawyer, but on the contrary till November 2, 2008, ATS had denied to the appellant access to any lawyer and also to her relations when she was at Kala Chowki Police Station though she was remanded to police custody for eight days on October 24, 2008 and, therefore, case of illegal custody, as pleaded by the appellant, should have been accepted by the Court. It was pointed out that the first meeting of the appellant with her immediate relation, i.e., her sister took place only on the evening of Sunday, i.e., November 2, 2008, when a blank Vakalatnama tendered by her sister was allowed to be signed in the ATS Police Station at Kala Chowki and, therefore, the case of illegal custody pleaded by the appellant could not have been disbelieved by the High Court.

8. On re-appreciation of the evidence on record this Court finds that the case of the appellant that she was arrested on October 10, 2008 is not correct and has been rightly rejected by the learned Special Judge as well as by the High Court, in view of the following circumstances.

The appellant was arrested on October 23, 2008 and was produced before the CJM, Nasik on October 24, 2008 on which date the appellant was remanded to Police custody till November 3, 2008. On the said date, there was no complaint made to the learned CJM that the appellant was arrested on October 10, 2008 nor there was any complaint about the ill-treatment meted out to her by the officers of A.T.S. Mumbai. Also there was no challenge at any time to the order of remand dated October 24, 2008 on the ground that the appellant was not produced before the learned C.J.M. within 24 hours of her arrest.

The appellant was next produced before the learned C.J.M., Nasik on November 3, 2008. On that date an application was filed that she was picked up on October 10, 2008 and was illegally detained at the ATS Office, Mumbai. The reply was filed on behalf of the respondent on that very date denying the said allegation. The order of remand dated November 3, 2008, noticed the allegation and thereafter the appellant was remanded to judicial custody till November 17, 2008. This order was also not challenged by the appellant.

9. A detailed affidavit was filed by the appellant on November 17, 2008 setting out in detail the events from October 10, 2008 up to October 23, 2008. A perusal of the said affidavit shows that even if all the allegations in the said affidavit are taken on their face value, a case of arrest on October 10, 2008 is not made out. Paragraph 3 of the said affidavit states that on October 7, 2008 when the appellant was at Jabalpur Ashram, she had received a call from the police about her LML Freedom Motor Cycle and that the Police insisted that she should come to Surat as the Police Officer "wanted to question me at length about it". It is important to note that according to the appellant, she herself was asked to come to Surat as the Police only wanted to question her. Para 4 of the affidavit is to the effect that the appellant travelled from Jabalpur to Ujjain and arrived at Surat on October 10, 2008 and stayed with her

disciple, Bhim Bhai Pasricha. Para 6 speaks of her interrogation whereas para 8 speaks of the Police Officer telling the appellant that she would have to accompany him to Mumbai for "further interrogation" and that she would be free to go to the Ashram thereafter. Para 9 is to the effect that the Police Officer told the appellant to take her father along with her but due to his old age the appellant suggested that her disciple Bhim Bhai Pasricha could accompany her to Mumbai. Paras 8 and 9 make it clear that the appellant had understood that her coming to Surat and going to Mumbai were for interrogation only. She further states, "Even though no formal summons to attend as a witness was served upon me to make myself available for interrogation in Mumbai........ I agreed to accompany the ATS team to Mumbai". This makes it clear that the appellant understood that her going to Mumbai was for interrogation and in her capacity as a potential witness and not as an accused. Further the appellant was not arrested on October 10, 2008 is made clear by her own statement in Para 9 – "It is significant to mention that I was not formally arrested on October 10, 2008".

10. According to the appellant, she, Bhim Bhai Pasricha and others reached Mumbai on the night of October 10, 2008. In para 10 she had claimed that for the next two days she was detained and interrogated by the ATS team in Mumbai. There is no manner of doubt that this statement is factually incorrect. The record shows that after reaching Mumbai at midnight i.e. the beginning of the October 11, 2008, the appellant and Bhim Bhai Pasricha stayed in Hotel Satguru from October 11th to 15th, 2008. This is noticed by the learned Special Judge. It is also so stated by the respondent in the reply sent to the National Human Rights Commission which is produced on the record of the case. The relevant entry in the station diary for October 11, 2008 also mentions about the stay of the appellant in a lodge. The fact that the appellant and her companion attended the office of A.T.S. on the 11th and on subsequent dates and left after interrogation is also recorded in the station

diary for 11th to 15th October, 2008. In para 11 of the affidavit it is mentioned by the appellant that during interrogation the police had asked Bhim Bhai Pasricha to beat her with sticks etc. This would show that Bhim Bhai Pasricha was with the appellant. If a person is arrested, the person is isolated from others and is completely deprived of his/her personal liberty. A person who is arrested and kept in police custody is not provided any companion. The averments in the affidavit would show that disciple Bhim Bhai Pasricha was all along with the appellant, which would negate her case that she was illegally arrested and detained by the police.

11. In para 14 of the affidavit, the appellant had stated that on 15th the appellant and Bhim Bhai Pasricha had stayed in Hotel Raajdoot in room nos. 314 and 315. Para 16 of the affidavit is to the effect that within few hours of shifting to Hotel Raajdoot the appellant became unwell and she was admitted in Shushrusha Hospital. According to the appellant, she had undergone treatment in the hospital for 3-4 days and since her condition had not improved, she was taken to another hospital known as Dr. Vaze's Hospital. What is important is that in para 17 of the affidavit, the appellant has clearly and expressly averred as under: -

> "I say that no female constable was by my side either in Hotel Rajdoot or in either of the two hospitals".

This statement of appellant is very important in as much as this clearly shows that the appellant was alone and was not under custody or detention of police. If this was a case of arrest of the appellant, a police constable would have always been around, which is not the case. This positive averment of the appellant belies her plea raised later on about her arrest on August 10, 2008.

The Hospital documents of the Shushrusha Hospital would show that the appellant was admitted in the hospital on October 15, 2008 and was discharged on October 17, 2008. It also

shows that all the medical investigation reports were handed over to the patient's relative. If it was a case of arrest and police admitting the appellant to the hospital, all hospital records would have been handed over to the Police and the appellant also would have been handed over to the police which is not the case. The letter dated November 20, 2008 of Doctor P.K. Solanki of the chest clinic shows that the appellant was brought to the hospital by Bhim Bhai Pasricha, described as a relative of the appellant. If the appellant was under arrest she would have been brought to the hospital by the police and doctor would have so recorded it, in medical papers which is not the case. The doctor only records that a Police Officer merely had called up for the same patient i.e. made enquiries about the condition of the patient. The doctor has further recorded that the appellant was transferred to another hospital namely Vaze Hospital for further treatment. The appellant was in Vaze Hospital between October 17, 2008 and October 20, 2008 which is evident from the payments made to the said hospital. It may be mentioned that hospital receipts are in the name of the appellant and not in the name of police. Her case that she was in police custody and she did not have sufficient means to foot the bill of the two hospitals does not inspire confidence of this Court because firstly her disciple Bhim Bhai was never in custody of the police and secondly panchnama prepared at the time of the arrest of the appellant on October 23, 2008 mentions the articles seized from the appellant including one hundred notes, each of which was of denomination of rupees one hundred i.e. in all Rs. 10,000/-. It is no where pleaded by the appellant that the said amount did not belong to her. Even if it is assumed that amount mentioned in the bills of the two hospitals was paid by the police such payment itself would not indicate illegal arrest and custody of the appellant.

12. In so far as October 21st and 22nd, 2008 are concerned the appellant has not given any specific details except claiming that she was brought back to the ATS Office. This appears to be factually incorrect. In para 18 of the report

sent to the National Human Rights Commission it has been specifically stated by the respondent that after being discharged from Vaze Hospital on October 20, 2008 the appellant had checked into Hotel Parklane. As per the records of the said hotel, the appellant remained in the said Hotel till she was arrested on October 23, 2008. Further in paras 18 and 19 of the counter affidavit to the SLP it has been specifically stated that the appellant checked into Hotel Parklane after being discharged from Vaze hospital. It is further averred that after questioning on October 20th, 21st and 22nd, 2008 the appellant was allowed to go. In para 36 the Rejoinder which is reply to what is stated in paras 18 and 19 of the counter affidavit, there is no specific denial of the above averment. The contention that the averments made in the complaints filed by Mr. Dharmendra Bairagi and Mr. Dilip Nahar support the case of the appellant that she was illegally detained by the officers of A.T.S. Mumbai and subjected to third degree interrogation cannot be accepted because the averments made in the complaints are untested and no action, till date, is taken by the learned Judicial Magistrate, on those complaints.

13. The above facts would clearly show that there was no arrest of the appellant on October 10, 2008 as is sought to be claimed now. The appellant was called for interrogation which is not equivalent to her arrest and detention. All throughout between October 10, 2008 and prior to her arrest on October 23, 2008 her disciple, Bhim Bhai Pasricha was with her. The averments made by the appellant indicate that the appellant had stayed in three different lodges and was admitted in two different hospitals along with Bhim Bhai Pasricha. Her own specific case is that there was no female Police with her either in the lodges or in the hospitals which cannot be ignored. After detailed discussion of the materials on the record, both, the Trial Court and High Court have held that the case of her arrest on October 10, 2008 is not made out by the appellant. In paragraph 19, the appellant herself has stated that she "was finally arrested on 23.10.2008 and produced before the learned Chief Judicial

Magistrate, Nasik on 24.10.2008". This is her specific case namely that she was arrested on October 23, 2008. However, at a later stage, before the learned Special Judge in her application for default bail dated January 14, 2009, the word "finally" was changed to "officially" and before the High Court it was sought to be pleaded that the appellant was "formally" arrested instead of the expression "finally" arrested on October 23, 2008.

14. The findings recorded by the learned Special Judge as well as by the High Court that the appellant was not arrested on October 10, 2008 but was arrested on October 23, 2008 and was thereafter produced before the learned Chief Judicial Magistrate, Nasik are concurrent findings of facts. This Court does not find substance in the contention that the appellant was arrested on October 10, 2008 and therefore the findings recorded by the learned Special Judge and the High Court are liable to be interfered in this appeal which arises by grant of special leave. It was agreed by the learned counsel for the appellant that if this Court comes to the conclusion that the appellant was arrested on October 23, 2008 then the charge sheet was submitted within 90 days from the date of first order of the remand and therefore there would neither be breach of provisions of Section 167(2) of the Criminal Procedure Code nor would there be breach of Articles 22(1) and 22(2) of the Constitution.

As this Court has come to the conclusion that the appellant was arrested on October 23, 2008, the appeal is liable to be dismissed. However, alleged violation of Section 160 of Criminal Procedure Code and allegations of torture etc. are argued by the learned counsel for appellant at length and, therefore, this Court proposes to advert to the same at this stage itself.

According to the appellant there was no written notice requiring her attendance to appear for any investigation or interrogation. The further argument of the appellant is that

absence of a written notice requiring her attendance for interrogation would establish that she was kept in illegal custody by officers of A.T.S., Mumbai. However, according to the prosecution, she had agreed to come to Surat and Bombay and therefore the point of issuance or non-issuance of notice u/s 160 Cr.P.C. is not relevant.

This issue has been considered in detail by the High Court. The High Court has held that "assuming that she was called for interrogation and questioned by the ATS without any order or notice, still, such attendance is only for interrogation and questioning and nothing more. The High Court has noticed that the appellant was not detained or taken into custody but was only questioned and was thereafter allowed to go. It was also noticed that she had stayed in different lodges and was in hospitals and was free to move around and contact everybody. According to the High Court, the appellant was in touch with her disciple and was using her mobile phone which was not disputed. The High Court has observed that once the applicant's movements were not restricted nor was she confined to the ATS Office after interrogation, then it is difficult to hold that in the garb of interrogating and questioning her she was taken into custody by the ATS. The High Court has explained that assuming that the custody and arrest are synonymous terms, yet in the facts of this case, it is not possible to conclude that the appellant was in custody and was arrested by the ATS. After recording above conclusions, the High Court has ultimately observed that assuming that the appellant was not told by an order in writing to attend the office of A.T.S. at Kala Chowki, Mumbai, yet it is clear that she accompanied the officer of A.T.S. from Surat to Mumbai on her own volition. Every single act and movement is of her own volition and no force was used. High Court, therefore, did not go into the wider question as to whether the non-compliance with 160(1) including its proviso would enable the appellant to apply for release on bail. It may be stated that the prosecution has produced and relied upon written intimation dated October 10, 2008 and

entries from the Station Diary to show that Section 160 of Cr.P.C. was substantially complied with but it is not necessary to refer to the same in detail as this Court broadly agrees with the view taken by High Court mentioned above. Essentially Section 160 of Cr.P.C. deals with the procedure to be adopted by Police Officer at pre-arrest stage. Once a person is arrested and is in judicial custody the prayer for Bail will have to be considered on merits. Prayer for Bail cannot be automatically granted on establishing that there was procedural breach irrespective of, the merits of matter. The appellant has not claimed bail on merits. Therefore, even if assuming that procedure mentioned in Section 160 was not followed, the prayer of bail cannot be granted at this stage. The reliance on the decision *Nandini Satpathy vs. P.L. Dani and another* AIR 1978 SC 1025, by the appellant is misconceived. In the said case, the Court quashed the proceedings, mainly having regard to the nature of allegations and the context in which such allegations were made.

15. So far as allegations of torture etc. are concerned. this Court finds that when the appellant was produced before the Chief Judicial Magistrate, Nasik on October 24, 2008, there was no allegation of any ill treatment by the Police. When the appellant was again produced on November 3, 2008, there was no allegation of any torture in Police custody.

16. Allegation of ill treatment in the Police custody was made for the first time, in the affidavit dated November 17, 2008, a perusal of which would show that it is not believable as primarily it has been alleged that the Police made her companion Bhim Bhai Pasricha to beat her. No injury was found on her body by any of the doctors in the two hospitals. The High Court has noticed that the allegations of ill treatment are pending examination before the National Human Rights Commission and in Para 11 the High Court has recorded as under :-

"I am not concerned with allegations of ill-treatment and

harassment, as also alleged torture, in as much as I am informed that a separate application in that behalf is made and is pending before the National Human Rights Commission".

17. So far as merits of the case are concerned under the Criminal Procedure Code, bail has to be only on consideration of merits, except default bail which is under Section 167(2). Section 21 of the MCOC Act is to the effect that unless the Court is satisfied that the accused is not guilty of the offence alleged, bail shall not be granted, which is similar to Section 37 of the NDPS Act. Considerations for grant of bail at the stage of investigation and after the charge sheet is filed are different. In the present case, charge sheet has been filed on January 20, 2009 and the application for bail before the High Court, if it is to be treated as not merely a revision from the order of the learned Special Judge declining bail but also as a fresh application, is an application dated August 24, 2009, after the filing of the charge sheet on January 20, 2009 and therefore filed after right, if any, under Section 167(2) is lost and having regard to the provisions of Section 21 of the MCOC Act the appellant is not entitled to grant of bail, apart from the fact that no argument had been addressed on the merits of the case and only technical pleas under Section 167(2) of the Criminal Procedure Code and Article 22(2) of the Constitution have been taken.

18. As far as Section 167(2) of the Criminal Procedure Code is concerned this Court is of the firm opinion that no case for grant of bail has been made out under the said provision as charge sheet was filed before the expiry of 90 days from the date of first remand. In any event, right in this regard of default bail is lost once charge sheet is filed. This Court finds that there is no violation of Article 22(2) of the Constitution, because on being arrested on October 23, 2008, the appellant was produced before the Chief Judicial Magistrate, Nasik on October 24, 2008 and subsequent detention in custody is

pursuant to order of remand by the Court, which orders are not being challenged, apart from the fact that Article 22(2) is not available against a Court i.e. detention pursuant to an order passed by the Court.

19. The appellant has not been able to establish that she was arrested on October 10, 2008. Both the Courts below have concurrently so held which is well founded and does not call for any interference by this Court.

20. Though this Court has come to the conclusion that the appellant has not been able to establish that she was arrested on October 10, 2008, even if it is assumed for the sake of argument that the appellant was arrested on October 10, 2008 as claimed by her and not on October 23, 2008 as stated by the prosecution, she is not entitled to grant of default bail because this Court finds that the charge sheet was filed within 90 days from the date of first order of remand. In other words, the relevant date of counting 90 days for filing charge sheet is the date of first order of the remand and not the date of arrest. This proposition has been clearly stated in the *Chaganti Satyanarayana and Others vs. State of Andhra Pradesh* (1986) 3 SCC 141. If one looks at the said judgment one finds that the facts of the said case are set out in paragraphs 4 and 5 of the judgment. In paragraph 20 of the reported decision it has been clearly laid down as a proposition of law that 90 days will begin to run only from the date of order of remand. This is also evident if one reads last five lines of Para 24 of the reported decision. Chaganti Satyanarayana and Others (Supra) has been subsequently followed in the following four decisions of this Court :

(1) *Central Bureau of Investigation, Special Investigation Cell-I, New Delhi vs. Anupam J. Kulkarni* (1992) 3 SCC 141, para 9 placitum d-e, para 13 placitum c where it has been authoritatively laid down that :

"The period of 90 days or 60 days has to be computed

from the date of detention as per the orders of the Magistrate and not from the date of arrest by the police".

(2) State through *State through CBI vs. Mohd. Ashraft Bhat and another* (1996) 1 SCC 432, Para 5. (3) *State of Maharashtra Vs. Bharati Chandmal Varma (Mrs)* (2002) 2 SCC 121 Para 12, and (4) *State of Madhya Pradesh vs. Rustom and Others* 1995 Supp. (3) SCC 221, Para 3.

Section 167(2) is one, dealing with the power of the learned Judicial Magistrate to remand an accused to custody. The 90 days limitation is as such one relating to the power of the learned Magistrate. In other words the learned Magistrate cannot remand an accused to custody for a period of more than 90 days in total. Accordingly, 90 days would start running from the date of first remand. It is not in dispute in this case that the charge sheet is filed within 90 days from the first order of remand. Therefore, the appellant is not entitled to default bail.

21. There is yet another aspect of the matter. The right under Section 167(2) of Cr.P.C. to be released on bail on default if charge sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right. The said right would be lost if charge sheet is filed and would not survive after the filing of the charge sheet. In other words, even if an application for bail is filed on the ground that charge sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if charge sheet is filed, the said right to be released on bail would be lost. After the filing of the charge sheet, if the accused is to be released on bail, it can be only on merits. This is quite evident from Constitution Bench decision of this Court in *Sanjay Dutt vs. State* (1994) 5 SCC 410 [Paras 48 and 53(2)(b)]. The reasoning is to be found in paras 33 to 49. This principle has been reiterated in the following decisions of this Court :

(1) *State of M.P. vs. Rustam and Others* 1995 Supp. (3) SCC 221, para 4, (2) *Dr. Bipin Shantilal Panchal vs. State of Gujarat* (1996) 1 SCC 718 para 4. It may be mentioned that this judgment was delivered by a Three Judge Bench of this Court. (3) *Dinesh Dalmia vs. CBI* (2007) 8 SCC 770 para 39, and (4) *Mustaq Ahmed Mohammed Isak and others vs. State of Maharashtra* (2009) 7 SCC 480 para 12.

In *Uday Mohanlal Acharya vs. State of Maharashtra* (2001) 5 SCC 453, a Three Judge Bench of this Court considered the meaning of the expression "if already not availed of" used by this court in the decision rendered in case of Sanjay Dutt and held in para 48 and held that if an application for bail is filed before the charge sheet is filed, the accused could be said to have availed of his right under Section 167(2) even though the Court has not considered the said application and granted him bail under Section 167(2) Cr.P.C. This is quite evident if one refers para 13 of the reported decision as well as conclusion of the Court at page 747.

22. It is well settled that when an application for default bail is filed, the merits of the matter are not to be gone into. This is quite evident from the principle laid down in *Union of India vs. Thamisharasi and Others* (1995) 4 SCC 190 para 10 placitum c-d.

23. From the discussion made above, it is quite clear that even if an application for bail is filed on the ground that charge sheet was not filed within 90 days, before the consideration of the same and before being released on bail if charge sheet is filed, the said right to be released on bail, can be only on merits. So far as merits are concerned the learned counsel for the appellant has not addressed this Court at all and in fact bail is not claimed on merits in the present appeal at all.

24. According to the appellant, she was arrested on October 10, 2008 and was not produced within 24 hours of her arrest and, therefore, she is entitled to be released from custody.

As held earlier the plea that the appellant was arrested on October 10, 2008 and was in police custody since then is factually found to be incorrect by this Court. The appellant was arrested only on October 23, 2008 and within 24 hours thereof, on October 24, 2008 she was produced before the learned CJM, Nasik. As such there is no violation of either Article 22(2) of the Constitution or Section 167 Cr.P.C.

In the grounds seeking bail either before the Trial Court or before the High Court, bail was not sought for on the ground of violation of Article 22(2) of the Constitution but it was confined only to the plea that charge sheet was not filed within 90 days and, therefore, this issue cannot be gone into in the S.L.P. more particularly in view of weighty observations made by this Court in para 14 of *Chaganti Satyanarayana and Others* (Supra) wherein it is clearly laid down that an enquiry as to exactly when the accused was arrested is neither contemplated nor provided under the Code. Even if it is assumed for the sake of argument that there was any violation by the police by not producing the appellant within 24 hours of arrest, the appellant could seek her liberty only so long as she was in the custody of the police and after she is produced before the Magistrate, and remanded to custody by the learned Magistrate, the appellant cannot seek to be set at liberty on the ground that there had been non-compliance of Article 22(2) or Section 167(2) of the Cr.P.C. by the police.

25. In *Saptawna vs. The State of Assam* AIR (1971) SC 813, this Court has observed as under in paras 2 and 3 of the reported decision :

> "2. The learned counsel for the petitioner says that the petitioner is entitled to be released on three grounds : (1) The original date of arrest being January 10, 1968 and the petitioner not having been produced before a Magistrate within 24 hours, the petitioner is entitled to be released; (2) The petitioner having been arrested in one case on January 24 1968 and he having been discharged from that case, he is entitled to be released; and (3) As the petitioner was not produced for obtaining remand he is entitled to be released.
>
> 3. A similar case came before this Court from this very District V.L. Rohlua v. Dy. Commr. Aijal Dist. Writ Petitin No.238 of 1970, D/- 29-9-1970 (SC) (reported in 1971 Cri LJ (N) 8) and the first point was answered by a Bench of five Judges thus :
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> > "If the matter had arisen while the petitioner was in the custody of the Armed Forces a question might well have arisen that he was entitled to be released or at least made over to the police. However, that question does not arise now because he is an undertrial prisoner."
> >
> > It seems to us that even if the petitioner had been under illegal detention between January 10 to January 24, 1968 – though we do not decide this point – the detention became lawful on January 24, 1968 when he was arrested by the Civil Police and produced before the Magistrate on January 25, 1968. He is now an undertrial prisoner and the fact that he was arrested in only one case does not make any difference. The affidavit clearly states that he was also treated to have been arrested in the other cases pending against him."

Again a Constitution Bench of this Court has made following observations in paragraphs 5, 6 and 8 of *V.L. Rohlua vs. Deputy Commissioner, Aijal, District Mizo* (1970) 2 SCC 908.

> "5. The State authorities have produced the order-sheets from the cases. From them it appears that the petitioner was charged in the Court of the Additional District Magistrate on March 3, 1968, and was kept in judicial

custody. He has since been remanded to jail custody from time to time. On July 28, this Court in the habeas corpus petition ordered his production in Court and appointed Mr. Hardev Singh, Advocate, as amicus curiae.

6. The petitioner then filed a second affidavit on August 3, 1970. In that affidavit he has alleged that he was handed over to the Civil Authorities by the Armed Forces after 2 months from his arrest, his confessional statement was obtained at gun-point, that no order was served on him under the Assam Maintenance of Public Order Act, 1953, that he was tortured, that the detention order was vague and that as the remand order expired on July 18, 1970, his further detention became illegal.

8. From the order-sheets produced before us it is clear that the petitioner was first produced before the Magistrate on March 3, 1968. That was roughly two months after his arrest by the Armed Forces. Under Section 5 of the Armed Forces (Assam and Manipur) Special Powers Act, he had to be made over to the officer in-charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest. What is the least possible delay in a case depends upon the facts, that is to say, how, where and in what circumstances the arrest was effected. From the affidavit of Mr. Poon, it prima facie appears that the petitioner is connected with the Mizo hostiles who are waging war against India. It was, therefore, necessary to question him about his associates, his stores of arms and like matters. The difficulty of the terrain, the presence of hostile elements in the area must be considered in this connection. Although it seems to us that the Armed Forces delayed somewhat his surrender to the Civil Authorities, which is not the intention of the law, there is not too much delay. If the matter had arisen while the petitioner was in the custody of the Armed Forces a question might well have arisen that he was entitled to be

released or at least made over to the police. However, that question does not arise now because he is an undertrial prisoner. The only question is one of remand. Here, too, if the matter had been for the application of the Rules of the Code of Criminal Procedure, no remand could have been longer than 15 days at a time. The fact of the matter, however, is that the Criminal Procedure Code is not applicable by reason of the Sixth Schedule to the Constitution in this area. This was laid down in *State of Nagaland* v. *Rattan Singh* (1996) 3 SCR 830. Only the spirit of the Criminal Procedure Code applies. In this view of the matter we cannot insist on a strict compliance with the provisions of Section 344 of the Code of Criminal Procedure. The petitioner had to be kept at Dibrugarh for want of space at Aijal. Long distances, difficult terrain and hostile country, are considerations to take into account. The period each time was slightly longer than 15 days but not so unconscionably long as to violate the spirit of the Code. There was a gap when the petitioner was in the custody of this Court but no request was made for his release then. Now he is on a proper remand and in fact has been remanded to the custody of the Magistrate by us. We cannot now hold his detention to be illegal."

26. The decisions relied upon by the learned counsel for the appellant do not support the plea that in every case where there is violation of Article 22(2) of the Constitution, an accused has to be set at liberty and released on bail. Whereas, an accused may be entitled to be set at liberty if it is shown that the accused at that point of time is in illegal detention by the police, such a right is not available after the Magistrate remands the accused to custody. Right under Article 22(2) is available only against illegal detention by police. It is not available against custody in jail of a person pursuant to a judicial order. Article 22(2) does not operate against the judicial order.

27. The decision in *Manoj vs. State of M.P.* (1999) 3 SCC

715 relied upon by the learned counsel for the appellant was a case where the accused was not produced before the Magistrate in the second case and, therefore, was directed to be released. It was not a case where the person was produced before the learned Magistrate and remanded to custody and then directed to be released because there was infraction by the police.

Similarly, the decision relied upon in the case *In the matter of Madhu Limaye and Others* (1969) 1 SCC 292 is not relating to arrest and detention without being produced before the Magistrate, but is relating to non-communication of the grounds of arrest. Further the decision in *Bhim Singh, MLA vs. State of J & K and Others* (1985) 4 SCC 677, relied upon by the learned counsel for the appellant was a case where the person had already been released on bail and the Court finding that there was infraction of law by the police directed an amount of Rs.50,000/- to be paid to him by way of compensation.

28. In *Khatri and Others (II) vs. State of Bihar and Others* (1981) 1 SCC 627 persons were in jail without being produced before the Judicial Magistrate. It was not a case where the persons were in Jail after being remanded to custody by the Judicial Magistrate. Similarly the decision in *The State of Bihar vs. Ram Naresh Pandey and another* AIR 1957 SC 389 was one relating to withdrawal from the prosecution when the learned Magistrate is required to apply his mind and not one relating to Article 22(2).

29. At the time when the appellant moved for bail she was in judicial custody pursuant to orders of remand passed by the learned CJM/Special Judge. The appellant did not challenge the orders of remand dated October 24, 2008, November 3, 2008, November 17, 2008 and subsequent orders. In the absence of challenge to these orders of remand passed by the competent court, the appellant cannot be set at liberty on the alleged plea that there was violation of Article 22(2) by the police.

30. The plea that Article 22(2) of the Constitution was violated is based on the averment by the appellant that she was arrested on October 10, 2008. Factually this plea has not been found to be correct. The appellant was in fact arrested only on October 23, 2008. The affidavit filed by the appellant on November 17, 2008, on a careful perusal shows that the appellant was not arrested on October 10, 2008. Prayer in the said application did not ask for being set at liberty at all and only ask for an enquiry. Finding recorded by both the Courts i.e. the Trial Court and the High Court is that the appellant could not make out a case of her arrest on October 10, 2008. Having regard to the totality of the facts and circumstances of the case, this Court is of the opinion that question of violation of Article 22(2) does not arise.

31. The result of the above discussion is that this Court does not find any merits in the present appeal and the same is liable to be dismissed. Therefore, the appeal fails and is dismissed.

D.G. Appeal dismissed.

UNION OF INDIA AND ANR.
v.
ASSOCIATION OF UNIFIED TELECOM SERVICE PROVIDERS OF INDIA AND ORS.
(Civil Appeal No. 5059 of 2007)

OCTOBER 11, 2011

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

Telecom Regulatory Authority of India Act, 1997:

s.14(a)(i) – Jurisdiction of Tribunal to decide the terms and conditions of license finalised by the Central Government and incorporated in the license agreement including the definition of Adjusted Gross Revenue – Held: Tribunal has no jurisdiction to decide upon the validity of the terms and conditions incorporated in the license of a service provider, but it will have jurisdiction to decide "any" dispute between the licensor and the licensee on interpretation of the terms and conditions of the license – Once the licensee had accepted in the license agreement that the license fee would be a percentage of gross revenue which would be the total revenue of the licensee company and had also accepted that the Government would take a final decision not only with regard to the percentage of revenue share but also the definition of revenue for this purpose, the licensee could not have approached the Tribunal questioning the validity of the definition of Adjusted Gross Revenue in license agreement – The incorporation of the definition of Adjusted Gross Revenue in the license agreement was part of the terms regarding payment which had been decided upon by the Central Government as a consideration for parting with its rights of exclusive privilege in respect of telecommunication activities and having accepted the license and availed the exclusive privilege of the Central Government to carry on telecommunication activities, the licensees could not have approached the Tribunal for an alteration of the definition of Adjusted Gross Revenue in the license agreement – As the Central Government has already considered the fresh recommendations of the TRAI and has not accepted the same and is not agreeable to alter the definition of Adjusted Gross Revenue, the decision of the Central Government on the point was final under the first proviso and the fifth proviso to s.11(1) of the Act – Telegraph Act, 1885.

s.11(1)(a) – Recommendations of the TRAI under – Held: TRAI has been conferred with the statutory power to make recommendations on the terms and conditions of the license to a service provider and the Central Government is bound to seek the recommendations of the TRAI on such terms and conditions at different stages, but the recommendations of the TRAI are not binding on the Central Government and the final decision on the terms and conditions of a license to a service provider rested with the Central Government – If there is a difference between the TRAI and the Central Government with regard to a particular term or condition of a license, the recommendations of the TRAI will not prevail and instead the decision of the Central Government will be final and binding.

s.11(1)(b), (c), (d) – Recommendations of the TRAI under – Held: The functions of the TRAI under clause (b) of sub-section (1) of s.11 of the TRAI Act are not recommendatory.

s.11(1)(a) and s.11(1)(b) – Distinction between – Discussed.

s.14(a)(i) – Stage when dispute can be raised regarding the computation of Adjusted Gross Revenue made by the licensor – Held: The dispute can be raised by the licensee, after the license agreement has been entered into and the appropriate stage when the dispute can be raised is when a particular demand is raised on the licensee by the licensor – When such a dispute is raised against a particular demand,

the Tribunal will have to go into the facts and materials on the basis of which the demand is raised and decide whether the demand is in accordance with the license agreement and in particular the definition of Adjusted Gross Revenue in the license agreement and can also interpret the terms and conditions of the license agreement.

Appeal: Whether after dismissal of appeal of the Union of India against the order of the Tribunal by Supreme Court, Union of India could re-agitate the question decided in the order of Tribunal that the Adjusted Gross Revenue will include only revenue arising from licensed activities and not revenue from activities outside the license of the licensee – Held: While dismissing the appeal, express liberty was granted by Supreme Court to the appellant that all contentions raised before it could be urged before the Tribunal – Therefore, appellant could urge before the Tribunal all the contentions including the contention that the definition of Adjusted Gross Revenue as given in the license could not be challenged by the licensee before the Tribunal and will include all items of revenue mentioned in the definition of Adjusted Gross Revenue in the license – Telecom Regulatory Authority of India Act, 1997

Telegraph Act: s.4(1), proviso – Held: A license granted in favour of any person under proviso to sub-section (1) of s.4 of the Act is in the nature of a contract between the Central Government and the licensee – Consequently, the terms and conditions of the license are part of a contract between the licensor and the licensee – Telecom Regulatory Authority of India Act, 1997

The National Telecom Policy 1994 provided for fixed license fee which was payable by the service providers every year. During the period 1994 to 1999, the telecom licensees made representations to the Government of India, Ministry of Telecommunications for relief against the high license fee. The Government of India considered the representations and offered a new package, known as the "National Telecom Policy 1999 - Regime" giving an option to the licensees to migrate from fixed license fee to revenue sharing fee. Accordingly, letters dated 22.07.1999 were sent to different licensees offering them a change over to NTP-99 regime.

After receipt of the letter dated 22.07.1999, some of the service providers took new licenses which provided that the licensee would have to pay a certain percentage of the Gross Revenue as license fee annually. After the Ministry of Telecommunications finally took the final decision on the definition of Adjusted Gross Revenue, the license agreement was amended and signed by the licensees and the amended license agreement was effective from 01.08.1999.

In the year 2003, some of the licensees questioned the validity of the definition of Adjusted Gross Revenue in the license agreement before the Telecom Disputes Settlement and Appellate Tribunal. In its order dated 07.07.2006, the Tribunal held that under Section 4 of the Telegraph Act, the Central Government can take percentage of the share of gross revenue of a licensee realised from activities of the licensee under the license and, therefore, revenue received by licensee from activities beyond licensed activities would be outside the purview of Section 4 of the Telegraph Act; that Section 11(1)(a) of the TRAI Act mandates the Central Government to seek recommendations from the Telecom Regulatory Authority (TRAI) on the license fee payable by the licensee and as no effective constitution had been made by the TRAI, the matter should be remanded to the TRAI and the TRAI can consider the matter and send its recommendations to the Tribunal.

The Union of India challenged the said order before the Supreme Court in Civil Appeal No. 84 of 2007 under Section 18 of the TRAI Act. While this Civil Appeal was pending before the Supreme Court, the TRAI sent its recommendations on the incorporation of the Adjusted Gross Revenue which was sought by the Tribunal by its order dated 07.07.2006. Accordingly, when Civil Appeal No. 84 of 2007 came up for hearing before the Supreme Court on 19.01.2007, the Court took the view that as the TRAI had already submitted its recommendations to the Tribunal, there was no reason to interfere and dismissed the appeal giving liberty to the Union of India to urge all the contentions raised in the Civil Appeal before the Tribunal. In its fresh order dated 30.08.2007, the Tribunal held that its earlier order dated 07.07.2006 having become final, it cannot be re-opened after the dismissal of Civil Appeal No.84 of 2007 by the Supreme Court and its finding in the earlier order dated 07.07.2006 that Adjusted Gross Revenue will include only revenue arising from licensed activity and not revenue from activities outside the license cannot be re-agitated by the Union of India. The Tribunal in the impugned order considered the recommendations of the TRAI regarding the heads of revenue to be included/excluded from the Adjusted Gross Revenue.

In the instant appeals, the questions which arose for consideration were: (i) Whether after dismissal of Civil Appeal No.84 of 2007 of the Union of India against the order dated 07.07.2006 of the Tribunal, by the Supreme Court by order dated 19.01.2007, the Union of India could re-agitate the question decided in the order dated 07.07.2006 that the Adjusted Gross Revenue will include only revenue arising from licensed activities and not revenue from activities outside the license of the licensee; (ii) Whether the TRAI and the Tribunal have jurisdiction to decide whether the terms and conditions of license which had been finalised by the Central Government and incorporated in the license agreement including the definition of Adjusted Gross Revenue; (iii) Whether as a result of the Union of India not filing an appeal against the order dated 07.07.2006 of the Tribunal passed in favour of some of the licensees, the said order dated 07.07.2006 had not become binding on the Union of India with regard to the issue that revenue realised from activities beyond the licensed activities cannot be included in the Adjusted Gross Revenue; (iv) Whether the licensee can challenge the computation of Adjusted Gross Revenue, and if so, at what stage and on what grounds.

Disposing of the appeals, the Court

HELD: 1. It is clear from the language of the order dated 19.01.2007 that while dismissing the appeal, the Court gave liberty to the appellant, namely, Union of India, to urge the contentions raised in Civil Appeal No.84 of 2007 before the Tribunal. Hence, even if it is held that the order dated 07.07.2006 of the Tribunal got merged with the order dated 19.01.2007 of this Court passed in Civil Appeal No.84 of 2007, by the express liberty granted by this Court in the order dated 19.01.2007, Union of India could urge before the Tribunal all the contentions including the contention that the definition of Adjusted Gross Revenue as given in the license could not be challenged by the licensee before the Tribunal and will include all items of revenue mentioned in the definition of Adjusted Gross Revenue in the license. [Paras 25-26]

2.1. A bare perusal of sub-section (1) of Section 4 of the Telegraph Act shows that the Central Government has the exclusive privilege of establishing, maintaining and working telegraphs. This would mean that only the Central Government, and no other person, has the right

to carry on telecommunication activities. The proviso to sub-section (1) of Section 4 of the Telegraph Act, however, enables the Central Government to part with this exclusive privilege in favour of any other person by granting a license in his favour on such conditions and in consideration of such payments as it thinks fit. A license granted in favour of any person under proviso to sub-section (1) of Section 4 of the Telegraph Act is in the nature of a contract between the Central Government and the licensee. Consequently, the terms and conditions of the license including the definition of Adjusted Gross Revenue in the license agreement are part of a contract between the licensor and the licensee. [Paras 28, 29, 30]

State of Orissa and Others v. Harinarayan Jaiswal and Others **(1972) 2 SCC 36: 1972 (3) SCR 784;** *Har Shankar & Ors. v. The Deputy Excise & Taxation Commissioner & Others* **(1975) 1 SCC 737: 1975 (3) SCR 254;** *State of Punjab & Anr. v. Devans Modern Breweries Ltd. & Ors.* **(2004) 11 SCC 26: 2003 (5) Suppl. SCR 930;** *Panna Lal v. State of Rajasthan* **(1975) 2 SCC 633: 1976 (1) SCR 219 – relied on.**

2.2. Section 11(1)(a)(ii) of the TRAI Act states that notwithstanding anything contained in the Telegraph Act, the TRAI shall have the function to make recommendations, either *suo motu* or on a request from a licensor on terms and conditions of license to a service provider. The first proviso, however, states that the recommendations of the TRAI shall not be binding upon the Central Government. The second, third, fourth and fifth provisos deal with the procedure that has to be followed by the TRAI and the Central Government with regard to recommendations of the TRAI. At the end of fifth proviso, it is stated that after receipt of further recommendation, if any, the Central Government shall take the final decision. These provisions in the TRAI Act

show that notwithstanding sub-section (1) of Section 4 of the Telegraph Act vesting exclusive privilege on the Central Government in respect of telecommunication activities and notwithstanding the proviso to sub-section (1) of Section 4 of the Telegraph Act vesting in the Central Government the power to decide on the conditions of license including the payment to be paid by the licensee for the license, the TRAI has been conferred with the statutory power to make recommendations on the terms and conditions of the license to a service provider and the Central Government was bound to seek the recommendations of the TRAI on such terms and conditions at different stages, but the recommendations of the TRAI are not binding on the Central Government and the final decision on the terms and conditions of a license to a service provider rested with the Central Government. The legal consequence is that if there is a difference between the TRAI and the Central Government with regard to a particular term or condition of a license, as in the present case, the recommendations of the TRAI will not prevail and instead the decision of the Central Government will be final and binding. [Para 31]

2.3. In contrast to this recommendatory nature of the functions of the TRAI under clause (a) of sub-section (1) of Section 11 of the TRAI Act, the functions of the TRAI under clause (b) of sub-section (1) of Section 11 of the TRAI Act are not recommendatory. This will be clear from the very language of clause (b) of sub-section (1) of Section 11 of the TRAI Act which states that the TRAI shall discharge the functions enumerated under sub-clauses (i), (ii) and (ix) under clause (b) of sub-section (1) of Section 11 of the TRAI Act. Under clause (c) of sub-section (1) of Section 11 of the TRAI Act, the TRAI performs the function of levying fees and other charges in respect of different services and under clause (d) of sub-section (1) of Section 11, the Central Government can

entrust to the TRAI other functions. These functions of the TRAI under clauses (c) and (d) of sub-section (1) of Section 11 of the TRAI Act are also not recommendatory in nature. That the functions of the TRAI under clause (a) are recommendatory while the functions of the TRAI under clauses (b), (c) and (d) are not recommendatory will also be clear from the provisos 1st to 5th which refer to the recommendations of the TRAI under clause (a) of sub-section (1) of Section 11 of the TRAI Act and not to clauses (b), (c) and (d) of sub-section (1) of Section 11 of the TRAI Act. The scheme of TRAI Act therefore is that the TRAI being an expert body discharges recommendatory functions under clause (a) of sub-section (1) of Section 11 of the TRAI Act and discharges regulatory and other functions under clauses (b), (c) and (d) of sub-section (1) of Section 11 of the TRAI Act. TRAI being an expert body, the recommendations of the TRAI under clause (a) of sub-section (1) of Section 11 of the TRAI Act have to be given due weightage by the Central Government but the recommendations of the TRAI are not binding on the Central Government. On the other hand, the regulatory and other functions under clauses (b), (c) and (d) of sub-section (1) of Section 11 of the TRAI Act have to be performed independent of the Central Government and are binding on the licensee subject to only appeal in accordance with the provisions of the TRAI Act. [Para 32]

2.4. A reading of Section 14 (a)(i) of the TRAI Act would show that the Tribunal has the power to adjudicate any dispute between a licensor and a licensee. A licensor has been defined under Section 2(ea) of TRAI Act to mean the Central Government or the Telegraph Authority who grants a license under Section 4 of the Telegraph Act and a licensee has been defined in Section 2(e) of the TRAI Act to mean any person licensed under sub-section (1) of Section 4 of the Telegraph Act providing specified

telecommunication services. The word 'means' in Sections 2(e) and 2(ea) of the TRAI Act indicates that the definitions of licensee and licensor in Sections 2(e) and 2(ea) of the TRAI Act are exhaustive and therefore would not have any other meaning. A dispute between a licensor and a licensee referred to in Section 14(a)(i) of the TRAI Act, therefore, is a dispute after a person has been granted a license by the Central Government or the Telegraph Authority under sub-section (1) of Section 4 of the Telegraph Act and has become a licensee and not a dispute before a person becomes a licensee under the proviso to sub-section (1) of Section 4 of the Telegraph Act. In other words, the Tribunal can adjudicate the dispute between a licensor and a licensee only after a person had entered into a license agreement and become a licensee and the word "any" in Section 14(a) of the TRAI Act cannot widen the jurisdiction of the Tribunal to decide a dispute between a licensor and a person who had not become a licensee. The result is that the Tribunal has no jurisdiction to decide upon the validity of the terms and conditions incorporated in the license of a service provider, but it will have jurisdiction to decide "any" dispute between the licensor and the licensee on the interpretation of the terms and conditions of the license. [para 33]

'*Principles of Statutory Interpretation*' **12th Edition - referred to.**

2.5. Clause (iii) of the letter dated 22.07.1999 of the Ministry of Communications to the licensees made it clear that the license fee was payable with effect from 01.08.1999 as a percentage of gross revenue under the license and the gross revenue for this purpose would be total revenue of the licensee company excluding the PSTN related call charges paid to DOT/MTNL and service tax calculated by the licensee on behalf of the

Government from the subscribers. It was also made clear in the said clause (iii) that the Government was to take a final decision after receipt of the TRAI's recommendation on not only the percentage of revenue share but also the definition of revenue. In accordance with this clause (iii) the Government took the final decision on the definition of Adjusted Gross Revenue and incorporated the same in the license agreement. Once the licensee had accepted clause (iii) of the letter dated 22.07.1999 that the license fee would be a percentage of gross revenue which would be the total revenue of the licensee company and had also accepted that the Government would take a final decision not only with regard to the percentage of revenue share but also the definition of revenue for this purpose, the licensee could not have approached the Tribunal questioning the validity of the definition of Adjusted Gross Revenue in license agreement on the ground that Adjusted Gross Revenue cannot include revenue from activities beyond the license. If the wide definition of Adjusted Gross Revenue so as to include revenue beyond the license was in any way going to affect the licensee, it was open for the licensees not to undertake activities for which they do not require license under clause (4) of the Telegraph Act and transfer these activities to any other person or firm or company. The incorporation of the definition of Adjusted Gross Revenue in the license agreement was part of the terms regarding payment which had been decided upon by the Central Government as a consideration for parting with its rights of exclusive privilege in respect of telecommunication activities and having accepted the license and availed the exclusive privilege of the Central Government to carry on telecommunication activities, the licensees could not have approached the Tribunal for an alteration of the definition of Adjusted Gross Revenue in the license agreement. [para 34]

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2.5. Regarding the recommendations of the TRAI under Section 11(1)(a)(i) of the TRAI Act, the Tribunal in its order dated 07.07.2006 has held that the opinion of the renowned expert in the accountancy that any other definition of Adjusted Gross Revenue would lead to reduction of license fee liability by way of accounting jugglery was not placed before the TRAI and as a result there was no proper and effective consultation with the TRAI and the weightage that was due to the recommendations of the TRAI was not given effect to. If the Tribunal found that there was no effective consultation with the TRAI on the opinion of the expert on accountancy, the Tribunal could have at best, if it had the jurisdiction to decide the dispute, directed the TRAI to consider the opinion of the expert on accountancy and send its recommendations to the Central Government and directed the Central Government to consider such fresh recommendations of the TRAI as provided in the provisos to section 11(1) of the TRAI Act. Instead the Tribunal has considered the recommendations of the TRAI and passed the fresh impugned order dated 30.08.2007 contrary to the very provisions of Section 11(1)(a) of the TRAI Act and the provisos thereto. At any rate, as the Central Government has already considered the fresh recommendations of the TRAI and has not accepted the same and is not agreeable to alter the definition of Adjusted Gross Revenue, the decision of the Central Government on the point was final under the first proviso and the fifth proviso to Section 11(1) of the TRAI Act, 1997. Once a licensee has accepted the terms and conditions of a license, he cannot question the validity of the terms and conditions of the license before the Court. The TRAI and the Tribunal had no jurisdiction to decide on the validity of the definition of Adjusted Gross Revenue in the license agreement and to exclude certain items of revenue which were included in the definition of

Adjusted Gross Revenue in the license agreement between the licensor and the licensee. [Paras 35, 34]

Government of A.P. vs. M/s Anabeshahi Wine & Distilleries Pvt. Ltd **(1988) 2 SCC 25;** *Assistant Excise Commissioner & Anr. vs. Issac Peter & Ors.* **(1994) 4 SCC 104: 1994 (2) SCR 67;** *State of M.P. & Ors. vs. KCT Drinks Ltd.* **(2003) 4 SCC 748: 2003 (2) SCR 574 – relied on.**

Cellular Operators Association of India & Ors. v. Union of India & Ors. **(2003) 3 SCC 186: 2002 (5) Suppl. SCR 222;** *Delhi Science Forum and Others v. Union of India* **(1996) 2 SCC 405: 1996 (2) SCR 767;** *State of U.P. v. Devi Dayal Singh* **(2000) 3 SCC 5: 2000 (1) SCR 1205;** *Union of India v. Tata Teleservices (Mahrashtra) Ltd.* **(2007) 7 SCC 517: 2007 (9) SCR 285 – held inapplicable.**

3. The Tribunal in its order dated 07.07.2006 has not just decided a dispute on the interpretation of Adjusted Gross Revenue in the license, but has decided on the validity of the definition of Adjusted Gross Revenue in the license. The Tribunal had no jurisdiction to decide on the validity of the terms and conditions of the license including the definition of Adjusted Gross Revenue incorporated in the license agreement. Hence, the order dated 07.07.2006 of the Tribunal in so far as it decides that revenue realized by the licensee from activities beyond the license will be excluded from Adjusted Gross Revenue *dehors* the definition of Adjusted Gross Revenue in the license agreement is without jurisdiction and is a nullity and the principle of *res judicata* will not apply. The order dated 07.07.2006 of the Tribunal was not binding on the Union of India even in those cases in which the Union of India did not file any appeal against the order dated 07.07.2006 before this Court. [Para 41]

Chandrabhai K. Bhoir and Others v. Krishna Arjun Bhoir and Others **(2009) 2 SCC 315: 2008 (15) SCR 652;** *Chief Justice of A.P. v. L.V.A. Dixitulu* **(1979) 2 SCC 34: 1979 (1) SCR 26;** *Union of India v. Pramod Gupta* **(2005) 12 SCC 1: 2005 (3) Suppl. SCR 48;** *National Institute of Technology v. Niraj Kumar Singh* **(2007) 2 SCC 481: 2007 (2) SCR 184 – relied on.**

4. Section 14(a)(i) of the TRAI Act provides that the Tribunal can adjudicate any dispute between the licensor and the licensee. One such dispute can be that the computation of Adjusted Gross Revenue made by the licensor and the demand raised on the basis of such computation is not in accordance with the license agreement. This dispute however can be raised by the licensee, after the license agreement has been entered into and the appropriate stage when the dispute can be raised is when a particular demand is raised on the licensee by the licensor. When such a dispute is raised against a particular demand, the Tribunal will have to go into the facts and materials on the basis of which the demand is raised and decide whether the demand is in accordance with the license agreement and in particular the definition of Adjusted Gross Revenue in the license agreement and can also interpret the terms and conditions of the license agreement. It is apparent from the order dated 07.07.2006 that instead of challenging any demands made on them, the licensees have questioned the validity of the definition of Adjusted Gross Revenue in the licenses given to them and the Tribunal has finally decided in its order dated 30.08.2007 as to what items of revenue would be part of Adjusted Gross Revenue and what items of revenue would not be part of Adjusted Gross Revenue without going into the facts and materials relating to the demand on a particular licensee. [para 42]

Isabella Johnson vs. M.A. Susai (Dead) by LRs. **(1991) 1 SCC 494: 1990 (2) Suppl. SCR 213;** *Shyam Telelink Limited vs. Union of India* **(2010) 10 SCC 165: 2010 (12) SCR**

927; *Bharti Cellular Limited vs. Union of India & Ors.* **(2010) 10 SCC 174: 2010 (12) SCR 725;** *K. Vidya Sagar v. State of U.P. and Others* **(2005) 5 SCC 581;** *Indian Oil Corporation Limited v. Collector of Central Excise, Baroda* **(2007) 13 SCC 803;** *Kamla Bakshi v. Khairati Lal* **(2000) 3 SCC 681: 2000 (2) SCR 773;** *P.V. George v. State of Kerala* **(2007) 3 SCC 557: 2007 (1) SCR 1198;** *Kunhay Ahmed & Ors. v. State of Kerala & Anr.* **(2000) 6 SCC 359: 2000 (1) Suppl. SCR 538;** *Supreme Court Employees' Welfare Association v. Union of India & Anr.* **(1989) 4 SCC 187: 1989 (3) SCR 488;** *State of Manipur v. Thingujam Brojen Meetei* **(1996) 9 SCC 29: 1996 (2) Suppl. SCR 738;** *Medley Pharmaceuticals Limited v. Commissioner of Central Excise and Customs* **(2011) 2 SCC 601: 2011 (1) SCR 741 – referred to.**

Case Law Reference:

1990 (2) Suppl. SCR 213	**referred to**	**Para 8**
2008 (15) SCR 652	**relied on**	**Para 8**
1975 (3) SCR 254	**relied on**	**Para 9, 28,40,**
(1988) 2 SCC 25	**relied on**	**Para 9, 40,**
1994 (2) SCR 67	**relied on**	**Para 9,40**
2003 (2) SCR 574	**relied on**	**Para 9,40**
2003 (5) Suppl. SCR 930	**relied on**	**Para 9, 29,40**
2010 (12) SCR 927	**referred to**	**Para 10, 40**
2010 (12) SCR 725	**referred to**	**Para 10, 40**
(2005) 5 SCC 581	**referred to**	**Para 12**

(2007) 13 SCC 803	**referred to**	**Para 12**
2002 (5) Suppl. SCR 222	**held inapplicable**	**Para13,24,36**
2000 (1) SCR 1205	**held inapplicable**	**Para 13, 38**
1996 (2) SCR 767	**held inapplicable**	**Para 14, 37**
2000 (2) SCR 773	**referred to**	**Para 15**
2007 (9) SCR 285	**held inapplicable**	**Para 17, 39**
2007 (1) SCR 1198	**referred to**	**Para 22**
2000 (1) Suppl. SCR 538	**referred to**	**Para 23**
1989 (3) SCR 488	**referred to**	**Para 23**
1996 (2) Suppl. SCR 738	**referred to**	**Para 23**
2011 (1) SCR 741	**referred to**	**Para 23**
1972 (3) SCR 784	**relied on**	**Para 28**
1976 (1) SCR 219	**relied on**	**Para 29**
1979 (1) SCR 26	**relied on**	**Para 41**
2005 (3) Suppl. SCR 48	**relied on**	**Para 41**
2007 (2) SCR 184	**relied on**	**Para 41**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5059 of 2007.

From the Judgment & Order dated 30.8.2007 of the Telecom Disputes Settlement & Appellate Tribunal, New Delhi in Petition No. 7 of 2003.

WITH

Civil Appeal No. 179-180, 363, 1229-1230, 2065, 2479, 1552 of 2009, 3868 of 2009, 7049 of 2010, 7062, 7063-7064, 7443, 7446, 7126, 7444, 7445, 8627-8628 of 2011, 1786-1787 of 2009, 8625-8686 of 2011, SLP (C) Nos. 6641-6642 of 2010, Civil Appeal No. 9646-9661 of 2010, 2030 of 2011, 2031, 2270, 3245, 5450-5450-5451 of 2011, 311-314 & 317-318 of 2008

Meet Malhotra, D.S. Mahra, Abhijat P. Medh, Meenakshi Arora, Rajiv Mehta, B.V. Balram Das, Lawyer's Knit & Co, Bina Gupta, Shiraz Contractor Patodia, Anil Katiyar, B. Krishna Prasad, Binu Tamta, Arvind Kumar Sharma, Naveen, Arun Kumar Beriwal, Sunil Kumar Jain, Sumita Hazarika, Rajan Narain, Gaurav Kejriwal for the appearing parties.

The Judgment of the Court was delivered by

A. K. PATNAIK, J.

Civil Appeal Nos. 5059 of 2007, 179-180 of 2008, 311-314, 317-318 of 2008, 363 of 2008, 2065 of 2008, 1229-1230 of 2008 and 3868 of 2009:

1. These are appeals under Section 18 of the Telecom Regulatory Authority of India Act, 1997 (for short "the TRAI Act") against the common judgment and order dated 30.08.2007 of the Telecom Disputes Settlement and Appellate Tribunal, New Delhi (for short "the Tribunal") in Petition No. 7 of 2003.

2. The relevant facts very briefly are that with the introduction of the National Telecom Policy, 1994 liberalizing the Telecom Sector, telecom licenses were issued to different service providers. The licenses granted to the service providers stipulated a fixed license fee, which was payable by the service providers every year. During the period 1994 to 1999, the licensees defaulted in payment of license fee and made a representation to the Government of India, Ministry of

Telecommunications for relief against the high license fee for the survival of the telecom industry. The Government of India considered the representations and after a number of deliberations with the licensees offered a new package, known as the "National Telecom Policy 1999 - Regime" giving an option to the licensees to migrate from fixed license fee to revenue sharing fee. Accordingly, letters dated 22.07.1999 were sent to different licensees offering them a change over to NTP-99 regime, which *inter alia* stated:

> "(i) The cut off date for change over to NTP-99 regime will be 01.08.1999.
>
> (ii) The licensee will be required to pay one time Entry Fee and License Fee as a percentage share of gross revenue under the license. The Entry Fee chargeable will be the license fee dues payable by existing licensees upto 31.07.1999, calculated upto this date duly adjusted consequent upon notional extension of effective date as in para (ix) below, as per the conditions of existing license.
>
> (iii) The license fee as percentage of gross revenue under the license shall be payable w.e.f. 01.08.1999. The Government will take a final decision about the quantum of the revenue share to be charged as license fee after obtaining recommendations of the Telecom Regulatory Authority of India (TRAI). In the meanwhile, Government have decided to fix 15% of the gross revenue of the Licensee as provisional license fee. The gross revenue for this purpose would be the total revenue of the licensee company excluding the PSTN related call charges paid to DOT/MTNL and service tax collected by the licensee on behalf of the Government from their subscribers. On receipt of TRAI's recommendation and Government's final decision, final adjustment of provisional dues will be effected depending upon the percentage of revenue share and the definition of revenue for this purpose as may be

finally decided."

3. After receipt of the letter dated 22.07.1999, some of the service providers applied and took new licenses which provided that the licensee will have to pay a certain percentage of the Gross Revenue as license fee annually. After the Government of India, Ministry of Telecommunications finally took the final decision on the definition of Adjusted Gross Revenue, the license agreement was amended and signed by the licensees and the amended license agreement was effective from 01.08.1999. Clause 19 of the amended license agreement, which defines Adjusted Gross Revenue, is extracted hereinbelow:

"19. Definition of 'Adjusted Gross Revenue':

19.1 Gross Revenue:

The Gross Revenue shall be inclusive of installation charges, late fees, sale proceeds of handsets [or any other terminal equipment etc.', revenue on account of interest, dividend, value added services, supplementary services, access or interconnection charges, roaming charges, revenue from permissible sharing of infrastructure and any other miscellaneous revenue, without any setoff for related item of expense, etc.

19.2 For the purpose of arriving at the 'Adjusted Gross Revenue [AGR]' the following shall be excluded from the Gross Revenue to arrive at the AGR:

I. PSTN related call charges [Access Charges] actually paid to other eligible/ entitled telecommunication service providers within India;

II. Roaming revenues actually passed on to other eligible/ entitled telecommunication service providers and;

III. Service Tax on provision of service and Sales Tax actually paid to the Government if gross revenue had included as component of Sales Tax and Service Tax."

4. In the year 2003, some of the licensees questioned the validity of the definition of Adjusted Gross Revenue in the license agreement before the Tribunal and contended that Adjusted Gross Revenue can only relate to the revenue directly arising out of telecom operations licensed under Section 4 of the Indian Telegraph Act, 1885 (for short "the Telegraph Act") after adjustment of expenses and write offs and revenues directly not attributable to the licensed telecom activities. They also contended that miscellaneous and other items including interest income, and dividend income, value of rebates, discounts, free calls and reimbursement from USO fund etc. ought not to be included in the Adjusted Gross Revenue for the purpose of computation of license fee. The Union of India filed its reply before the Tribunal contending that the licensees having unconditionally accepted the migration package and having taken the benefit of the same are bound by the terms and conditions of the license agreement and cannot be permitted to resile from the same. In its order dated 07.07.2006, the Tribunal rejected the contentions of the Union of India and held that under Section 4 of the Telegraph Act, the Central Government can take percentage of the share of gross revenue of a licensee realised from activities of the licensee under the license and therefore revenue received by a licensee from activities beyond licensed activities would be outside the purview of Section 4 of the Telegraph Act. The Tribunal further held that Section 11 (1) (a) of the TRAI Act mandates the Central Government to seek recommendations from the Telecom Regulatory Authority (for short 'the TRAI') on the license fee payable by the licensee and as no effective constitution had been made by the TRAI, the matter should be remanded to the TRAI and the TRAI can consider the matter and send its recommendations to the Tribunal. The Tribunal however made

it clear that the TRAI will bear in mind the findings of the Tribunal that revenue of the licensee derived from non-license activities will not be included in the Adjusted Gross Revenue for the purpose of determining the license fee payable by the licensee.

5. The Union of India, challenged the order dated 07.07.2006 of the Tribunal before this Court in Civil Appeal No. 84 of 2007 under Section 18 of the TRAI Act. While this Civil Appeal was pending before this Court, the TRAI sent its recommendations on the incorporation of the Adjusted Gross Revenue which had been sought by the Tribunal by its order dated 07.07.2006. Accordingly, when Civil Appeal No. 84 of 2007 came up for hearing before this Court on 19.01.2007, this Court took the view that as the TRAI had already submitted its recommendations to the Tribunal, there was no reason to interfere and dismissed the appeal giving liberty to the Union of India to urge all the contentions raised in the Civil Appeal before the Tribunal.

6. When the Tribunal heard the parties on the recommendations of the TRAI, the Union of India contended that as this Court had given liberty to urge all the contentions raised in the Civil Appeal before the Tribunal, the Union of India was entitled to re-open the issue whether the validity of the definition of Adjusted Gross Revenue in the license agreement could be questioned before the Tribunal. The licensees, on the other hand, contended before the Tribunal that as the Civil Appeal of Union of India has been dismissed by this Court, the Union of India was not entitled to argue the matter *de novo* and the earlier order dated 07.07.2006 of the Tribunal had become final. In its fresh order dated 30.08.2007 (for short 'the impugned order') the Tribunal held that its earlier order dated 07.07.2006 having become final, it cannot be re-opened after the dismissal of Civil Appeal No.84 of 2007 by this Court. The Tribunal held that its finding in the earlier order dated 07.07.2006 that Adjusted Gross Revenue will include only revenue arising from licensed activity and not revenue from activities outside the

license cannot be re-agitated by the Union of India.

7. Having held that Adjusted Gross Revenue will include only revenue arising from licensed activity, the Tribunal in the impugned order considered the recommendations of the TRAI regarding the heads of revenue to be included and the heads of revenue to be excluded from the Adjusted Gross Revenue and decided as follows:

(i) The Tribunal accepted the recommendation of the TRAI that income from dividend even though part of the revenue does not represent revenue from licensed activity and, therefore, cannot be included in the Adjusted Gross Revenue.

(ii) The Tribunal accepted the recommendation of the TRAI that interest earned on investment of savings made by a licensee after meeting all liabilities including liability on account of the share of the Government in the gross revenue cannot be included in the Adjusted Gross Revenue, but, interest on investment of funds received by a licensee by way of deposits from customers on account of security against charges and on account of concessions given in the charges payable for using the telecom services have to be included in the Adjusted Gross Revenue as these are related to telecom service, which is part of the licensed activity.

(iii) The Tribunal did not fully accept the recommendation of the TRAI on capital gains and held that sale of assets of a licensee such as immovable properties, securities, warrants or debt instruments are not part of the licensed activity and, therefore, capital gains earned by a licensee on such sale of assets cannot form part of the Adjusted Gross Revenue.

(iv) The Tribunal accepted the recommendation of the TRAI that gains from Foreign Exchange rates fluctuations are

also not part of the licensed activity of telecom service providers and, therefore, cannot constitute part of the Adjusted Gross Revenue.

(v) The Tribunal did not fully accept the recommendation of the TRAI on reversal of provisions like bad debts, taxes and vendors' credits and held that all these reversals have to be excluded from the Adjusted Gross Revenue.

(vi) The Tribunal also accepted the recommendation of the TRAI that rent from property owned by the licensee should be excluded from the Adjusted Gross Revenue, provided it is clearly established that the property is not in any way connected with establishing, maintaining and working of telecommunication.

(vii) The Tribunal accepted the recommendation of the TRAI that income from renting and leasing of passive infrastructures like towers, dark fibre, etc. should be part of the Adjusted Gross Revenue as they are parts of the licensed activity of the licensee.

(viii) The Tribunal accepted the recommendation of the TRAI that revenue from sale of tenders, directories, forms, forfeiture of deposits/earnest money in relation to telecom service should form part of the Adjusted Gross Revenue, but held that management fees, consultancy fees and training charges from telecom service should not form part of the Adjusted Gross Revenue as these activities do not require a license.

(ix) The Tribunal held that payments received on behalf of third party should not form part of the Adjusted Gross Revenue and did not accept the recommendation of the TRAI in this regard.

(x) The Tribunal did not accept the recommendation of the TRAI that the revenue from TV up-linking and Internet

service should form part of the Adjusted Gross Revenue as these activities are covered under a separate license.

(xi) The Tribunal accepted the recommendation of the TRAI that sale of handsets or telephone equipment bundled with telecom service should be part of the Adjusted Gross Revenue because such sale comes within the licensed activity.

(xii) The Tribunal accepted the recommendation of the TRAI that receipts from USO Fund will not form part of the Adjusted Gross Revenue.

(xiii) The Tribunal accepted the recommendation of the TRAI that revenue receipts on account of ADC (Access Deficit Charge) should form part of the Adjusted Gross Revenue.

(xiv) The Tribunal accepted the recommendation of the TRAI that costs on account of port charges, interconnection set-up charges, leased lines sharing of infrastructure, roaming signaling charges and content charges should form part of the Adjusted Gross Revenue.

(xv) The Tribunal did not accept the recommendation of the TRAI that bad debts, waivers and discounts should form part of the Adjusted Gross Revenue and held that such losses incurred by a licensee should be excluded from the Adjusted Gross Revenue.

(xvi) The Tribunal accepted the recommendation of the TRAI that service tax payable by the licensee should be included or excluded from the Adjusted Gross Revenue on accrual basis and also accepted the recommendation of the TRAI that interconnection usage should also be included or excluded from the Adjusted Gross Revenue on accrual basis.

(xvii) The Tribunal did not accept the recommendation of the TRAI that its recommendations with regard to items, which are to be included or excluded from the gross revenue, should be effective from a prospective date and instead held that the findings of the Tribunal with regard to items, which are included or excluded from the Adjusted Gross Revenue, will be effective from the date the licensee approached the Tribunal.

8. Mr. Soli Sorabjee and Mr. Rakesh Dwivedi, learned senior counsel appearing for the Union of India in the different Civil Appeals before us submitted that the Union of India had challenged the order dated 07.07.2006 of the Tribunal before this Court in Civil Appeal No.84 of 2007 and this Court while disposing of the Civil Appeal gave liberty to the Union of India to urge all the contentions raised in the Civil Appeal before the Tribunal. They submitted that the Tribunal was thus not correct in coming to the conclusion that Union of India could not re-open the issue decided in the order dated 07.07.2006 that revenue realised from activities beyond the licensed activities cannot form part of the Adjusted Gross Revenue when the said issue had been raised by the Union of India in the Civil Appeal before this Court. They further submitted that in any case the Union of India had taken a specific ground in ground No.4 of the Memorandum of Appeal in Civil Appeal No.84 of 2007 that the Tribunal had no jurisdiction or power to examine the correctness of the terms of the license which had been unconditionally accepted and acted upon the licensee. They submitted that it is well settled by decisions of this Court that the rule of *res judicata* or *estoppel* is not applicable to pure question of law relating to the jurisdiction of the court and in support of their submissions cited the decisions of this Court in *Isabella Johnson* vs. *M.A. Susai (Dead) by LRs.* [(1991) 1 SCC 494] and *Chandrabhai K. Bhoir and Others* vs. *Krishna Arjun Bhoir and Others* [(2009) 2 SCC 315] in which this Court has taken a view that an order without jurisdiction is a nullity and it is not binding on the parties. They argued that as the order dated 07.07.2006 of the Tribunal questioned the definition of Adjusted Gross Revenue in the license agreement, the order of the Tribunal was without jurisdiction and was a nullity.

9. Mr. Sorabjee and Mr. Dwivedi next submitted that the Tribunal failed to appreciate that license fee or payment made under the license agreement is really in the nature of price or consideration for parting with the exclusive privilege of the Central Government and is binding on the Central Government and the licensee and the licensee having signed the contract and agreed to the terms and conditions therein including the payment to be made cannot question the terms of the payment before the Tribunal. They submitted that this Court has consistently taken this view while deciding matters of exclusive privilege of the Government in *Har Shankar & Ors.* vs. *The Deputy Excise & Taxation Commissioner & Others* [(1975) 1 SCC 737], *Government of A.P.* vs. *M/s Anabeshahi Wine & Distilleries Pvt. Ltd* [(1988) 2 SCC 25], *Assistant Excise Commissioner & Anr.* vs. *Issac Peter & Ors.* [(1994) 4 SCC 104], *State of Orissa & Ors.* vs. *Narain Prasad & Ors.*[(1996) 5 SCC 740], *State of M.P. & Ors.* vs. *KCT Drinks Ltd.* [(2003) 4 SCC 748] and *State of Punjab & Anr.* vs. *Devans Modern Breweries Ltd. & Ors.* [(2004) 11 SCC 26]

10. Mr. Sorabjee and Mr. Dwivedi further submitted that the definitions of Gross Revenue and Adjusted Gross Revenue are part of the package comprising the terms and conditions of the license and a licensee cannot take the license on the one hand and dispute the definitions of Gross Revenue and Adjusted Gross Revenue on the other hand. They submitted that if the licensee wants to operate the telecom license he has to accept the definitions of Gross Revenue and Adjusted Gross Revenue for the purpose of computing the fee that he will have to pay for the license to the Central Government. They relied on the decisions of this Court in *Shyam Telelink Limited* vs. *Union of India* [(2010) 10 SCC 165] and in *Bharti Cellular Limited* vs. *Union of India & Ors.* [(2010) 10 SCC 174] for the

proposition that a person taking advantage under an instrument which both grants a benefit and imposes the burden, cannot take the benefit without discharging the burden.

11. Mr. Sorabjee and Mr. Dwivedi finally submitted that under Section 11(1)(a)(ii) of the TRAI Act, 1977, the TRAI makes recommendations, either *suo motu* or on a request from the licensor, on the terms and conditions of license to a service provider and the first proviso to Section 11(1) of the TRAI Act clearly states that such recommendations of the TRAI shall not be binding upon the Central Government. They submitted that the recommendations of the TRAI with regard to what heads of revenue should be included and what heads of revenue should be excluded from the Adjusted Gross Revenue, therefore, are not binding on the Central Government. They submitted that notwithstanding the aforesaid clear statutory provision the Tribunal has considered the recommendations of the TRAI and accepted most of these recommendations, notwithstanding the fact that the Central Government filed its objections to the recommendations of the TRAI before the Tribunal and hence the impugned order of the Tribunal is not sustainable in law.

12. Mr. C.S. Vaidyanathan, learned senior counsel appearing for the Cellular Operators Association, which is an association of some of the licensees, submitted that the Tribunal in its earlier order dated 07.07.2006 had merely interpreted the definition of Adjusted Gross Revenue to cover revenue from all activities of the licensee under the license and that the finding in its order dated 07.07.2006 that revenue realized from activities of the licensee which are beyond the licensed activities cannot form part of the Adjusted Gross Revenue for the purpose of license fee could not be re-agitated after Civil Appeal No.84 of 2007 filed by the Union of India against the order dated 07.07.2006 of the Tribunal had been dismissed by this Court on 19.01.2007. In support of the submission, he relied on *K. Vidya Sagar* v. *State of U.P. and Others* [(2005) 5 SCC 581] in which this Court has held that the reliefs claimed by the petitioner under Article 32 of the Constitution cannot be granted if he had claimed the same reliefs in a writ petition filed in the High Court under Article 226 of the Constitution and the writ petition had been dismissed and the Special Leave Petition preferred against the decision of the High Court had also been disposed of by this Court with the directions that he may ventilate his grievance in accordance with law. He also relied on *Indian Oil Corporation Limited* v. *Collector of Central Excise, Baroda* [(2007) 13 SCC 803] wherein this Court has held that if the Revenue had not appealed against an earlier order or not pressed an earlier appeal involving an identical issue, it was disentitled from pressing the appeal involving the same question in a subsequent case.

13. Mr. Vaidyanathan next submitted that the TRAI had opined that Adjusted Gross Revenue for the purpose of levy of license fee shall mean the Gross Revenue accruing to the licensee by way of operations mandated under the license, but the Central Government had rejected this opinion of the TRAI on 10.10.2000. He submitted that this Court had held in *Cellular Operators Association of India & Ors.* v. *Union of India & Ors.* [(2003) 3 SCC 186] that the TRAI's recommendations have to be given weightage because the TRAI was a specialized body and if the Central Government rejected the recommendation of the TRAI, it has to be based on logical and concrete reasoning. He submitted that the recommendations of the TRAI that only revenues arising out of the activities carried out under the license cannot be found fault with and, therefore, the revenue realized from non-telecom activities cannot form part of the Adjusted Gross Revenue. He submitted that the view taken by the Tribunal that the revenue realized from activities outside the license of the licensee cannot be included in the Adjusted Gross Revenue for the purpose of levy of license fee is absolutely correct. He submitted that under the proviso to Section 4 of the Telegraph Act, the Central Government has

the power to determine the conditions including the payment for grant of license 'as it thinks fit', but the expression 'as it thinks fit' does not give a *carte blanche* to the Central Government to levy license fee on non-telecom activities. He cited *State of U.P.* v. *Devi Dayal Singh* [(2000) 3 SCC 5] in which Ruma Pal, J. writing the judgment for the Court, interpreted Section 2 of the Indian Tolls Act, 1851 which enables the State Government to levy toll at such rates 'as it thinks fit' and held that it is only with reference to the meaning of the word 'toll' that the State Government must justify the levy on the public by the construction of the bridge. Mr. Vaidyanathan argued that the expression 'as it thinks fit' in the proviso to Section 4 of the Telegraph Act would therefore have to be interpreted in the context of the license granted by the Central Government under Section 4 of the Telegraph Act for telecom activities and as the license granted under Section 4 of the Telegraph Act is only for carrying on telecom activities, revenues realized from non-telecom activities cannot be included in the Adjusted Gross Revenue for the purpose of levy of license fee.

14. Mr. Vaidyanathan next submitted that in any case the discretion vested in the Central Government under the proviso to Section 4 of the Telegraph Act has to be exercised in accordance with law and in a reasonable manner. In support of the submission, he cited the decision in *Delhi Science Forum and Others v. Union of India* [(1996) 2 SCC 405] in which this Court interpreting the first proviso to Section 4(1) of the Telegraph Act held that the power to grant license on such conditions and for such considerations mentioned in the proviso to Section 4(1) of the Telegraph Act can be exercised by the Central Government only on well-settled principles and norms which can satisfy the test of Article 14 of the Constitution. He vehemently argued that the judgments of this Court for grant of exclusive privilege for liquor license cited by Mr. Sorabjee and Mr. Dwivedi have no application to grant of a license under the proviso to Section 4 of the Telegraph Act.

15. Mr. Vaidyanathan submitted that the appellants have filed Civil Appeal Nos.1229-1230 of 2008 against the impugned order of the Tribunal because they are mainly aggrieved with the conclusion of the Tribunal in the impugned order that the items which are to included or excluded from the Adjusted Gross Revenue as recommended by the TRAI and as accepted by the Tribunal would be effective from the date the licensee approached the Tribunal. He submitted that the reliefs granted by the Tribunal to the licensees should relate back to the date of wrongdoing and in support of this submission he relied on *Kamla Bakshi* v. *Khairati Lal* [(2000) 3 SCC 681]. He submitted that the Tribunal does not possess the power of prospective overruling and, therefore, the impugned order of the Tribunal should relate back to the date of the license agreement.

16. Mr. Shyam Diwan, learned counsel appearing for the Reliance Communications Ltd. in Civil Appeal Nos. 9946-9961 of 2010 submitted that the orders dated 07.07.2006 and 30.08.2007 are really declaratory in nature and are within the powers of the Tribunal and all licensees are entitled to benefit from the aforesaid orders of the Tribunal and this would ensure a level playing field for all the licensees.

17. Mr. Ramji Srinivasan, learned counsel appearing for the Association of Telecom Service Providers of India, submitted that the Union of India is not right in its contention that the Tribunal did not have the jurisdiction to pass the order dated 07.07.2006 holding that revenue realized from activities by the licensee which are beyond the licensed activities cannot form part of the Adjusted Gross Revenue for the purpose of license fee. He argued that Section 14 (a)(i) of the TRAI Act conferred power on the Tribunal to adjudicate "any" dispute between a licensor and a licensee and it is in exercise of this power conferred by Section 14(a)(i) of the TRAI Act that the Tribunal has passed the order dated 07.07.2006. He relied on the decision of this Court in *Union of India* v. *Tata Teleservices*

(Mahrashtra) Ltd. [2007) 7 SCC 517] in support of this contention. He submitted that the order dated 07.07.2006 of the Tribunal was within the powers of the Tribunal and had become final after the dismissal of Civil Appeal No.84 of 2007 of the Union of India by this Court on 19.01.2007.

18. Mr. Srinivasan next submitted that the fifth proviso to Section 11(1) of the TRAI Act states that if the Central Government having considered the recommendation of the TRAI, comes to a *prima facie* conclusion that such recommendation cannot be accepted or needs modification, it shall refer the recommendation back to the TRAI for its reconsideration and the TRAI may, within fifteen days from the receipt of such reference, forward to the Central Government its recommendation after considering the reference made by the Central Government and it is only after receipt of such further recommendation, if any, of the TRAI that the Central Government shall take a final decision. He submitted that the Tribunal in its order dated 07.07.2006 has found that the initial recommendation of the TRAI to include only revenue derived from the licensee from the licensed activities as part of the gross revenue was not acceptable to the Central Government and hence the Central Government referred the issue back to the TRAI and the TRAI, after considering the views of the Central Government, made some changes but in principle again recommended that the gross revenue should be only that revenue which was derived from the licensed activities. He submitted that the Tribunal in its order dated 07.07.2006 has further found that this second recommendation of the TRAI was not accepted by the Central Government because it had obtained the opinion of a renowned expert in accountancy, who advised the Central Government that the definition of Adjusted Gross Revenue should be such as to be less prone to reduction of license fee liability by way of accounting jugglery and something which is easy to verify. He submitted that the Tribunal held in the order dated 07.07.2006 that this recommendation of the renowned expert was not communicated to the TRAI and

as a result, the TRAI could not consider this opinion of the renowned expert and give its views. He argued that the Tribunal rightly held in the order dated 07.07.2006 that the opinion of the renowned expert in accountancy not having been placed before the TRAI has vitiated the proceedings contemplated under Section 11(1)(a) of the TRAI Act, which mandates the Central Government to seek recommendations of the TRAI.

19. Mr. Srinivasan next submitted that the definition of Adjusted Gross Revenue in the license agreement so as to include in gross revenue items, which according to the Accounting Standard 9 (nine), do not come within the definition of revenue. He referred to the Format of Statement of Revenue and License Fee (Appendix-II to Annexure-II of the License Agreement) to show that the licensee is required to give information in a statement on various items which are not truly of a revenue nature and which fall totally outside the licensed activities of the telecom license.

20. Mr. Srinivasan submitted that since the Tribunal in the impugned order confined the relief to the licensees who had approached the Tribunal and that too with effect from the date the licensees approached the Tribunal, the Association of Telecom Service Providers of India filed a Review Application before the Tribunal praying that the relief granted by the Tribunal should be extended to all members of the Association and that the relief should be effective from the date of the demand and not from the date the licensee approached the Tribunal, but by order dated 14.09.2007 the Tribunal dismissed the Review Application and, therefore, the Association of Telecom Service Providers of India have filed Civil Appeal Nos.179-180 of 2008. He vehemently argued that the Tribunal ought to have granted the relief to all members of the Association and should have made the relief effective from the date of the agreement and not from the date when the licensee approached the Tribunal.

21. Mr. Gopal Jain, learned counsel appearing for M/s Bharti Broadband, submitted that the Tribunal in its order dated

07.07.2006 had already decided Petition No. 98 of 2005 of M/s Bharti Broadband and the Union of India had not filed any appeal against M/s Bharti Broadband and, therefore, the order dated 07.07.2006 of the Tribunal so far as M/s Bharti Broadband is concerned, had become final. He relied on a recent judgment of this Court in *State of Uttaranchal & Anr.* v. *Sunil Kumar Vaish & Ors.* in Civil Appeal No.5374 of 2005 saying that there must be finality to litigation. He argued that general principles of *res judicata* should apply in a proceeding before the Tribunal and the Union of India cannot be permitted to raise the issues which had been finally decided by the order dated 07.07.2006 of the Tribunal.

22. Mr. Jain next submitted that M/s Bharti Broadband has filed Civil Appeal No.2065 of 2008 against the impugned order because it is aggrieved by the conclusion of the Tribunal in the impugned order that the reliefs granted in the impugned order to the licensee will be effective from the date the licensee approached the Tribunal. He relied on *P.V. George* v. *State of Kerala* [(2007) 3 SCC 557] to contend that the Tribunal does not have the power to give prospective effect to its judgment. He argued that Bharti Broadband should, therefore, be entitled to the reliefs with effect from the date of demand i.e. 05.08.2005.

23. Mr. Vikas Singh, learned counsel appearing for M/s Bharti Airtel, submitted that the order dated 07.07.2006 of the Tribunal had merged with the order dated 19.01.2007 of this Court in Civil Appeal No.84 of 2007 by which the Civil Appeal was dismissed and therefore that in these appeals this Court cannot re-open the issues which had been closed by the order dated 19.01.2007 passed in Civil Appeal No.84 of 2007. In support of the submission, he relied on the decisions of this Court in *Kunhay Ahmed & Ors.* v. *State of Kerala & Anr.* [(2000) 6 SCC 359], *Supreme Court Employees' Welfare Association* v. *Union of India & Anr.* [(1989) 4 SCC 187] and *State of Manipur* v. *Thingujam Brojen Meetei* [(1996) 9 SCC

29]. He also relied on the decision of this Court in *Medley Pharmaceuticals Limited* v. *Commissioner of Central Excise and Customs* [(2011) 2 SCC 601] for the proposition that dismissal of an appeal under Article 136 of the Constitution after grant of leave by a non-speaking order attracted the doctrine of merger.

24. We have considered the submissions of learned counsel for the parties and we find that in *Cellular Operators Association of India & Ors.* v. *Union of India & Ors.* (supra) this Court considered the scope of the appeal under Section 18 of the TRAI Act and held that an appeal under Section 18 of the TRAI Act before this Court has to be confined to only substantial questions of law which arise out of the order of the Tribunal. We have therefore formulated the following substantial questions of law which arise for decision in these appeals:

(i) Whether after dismissal of Civil Appeal No.84 of 2007 of the Union of India against the order dated 07.07.2006 of the Tribunal, by this Court by order dated 19.01.2007, the Union of India can re-agitate the question decided in the order dated 07.07.2006 that the Adjusted Gross Revenue will include only revenue arising from licensed activities and not revenue from activities outside the license of the licensee.

(ii) Whether the TRAI and the Tribunal have jurisdiction to decide whether the terms and conditions of license which had been finalised by the Central Government and incorporated in the license agreement including the definition of Adjusted Gross Revenue.

(iii) Whether as a result of the Union of India not filing an appeal against the order dated 07.07.2006 of the Tribunal passed in favour of some of the licensees, the said order dated 07.07.2006 had not become binding on the Union of India with regard to the issue that revenue realised from activities beyond the licensed activities cannot be included

in the Adjusted Gross Revenue.

(iv) Whether the licensee can challenge the computation of Adjusted Gross Revenue, and if so, at what stage and on what grounds.

25. The first substantial question of law which we have to decide is whether after dismissal of Civil Appeal No.84 of 2007 of the Union of India by this Court on 19.01.2007 against the order dated 07.07.2006 of the Tribunal, the Union of India can re-agitate the question decided in the order dated 07.07.2006 that the Adjusted Gross Revenue will include only revenue arising from licensed activities and not revenue from activities outside the license of the licensee. For deciding this question, we must first look at the language of the order dated 19.01.2007 of this Court in Civil Appeal No.84 of 2007. The order dated 19.01.2007 is quoted hereinbelow:

"Heard the parties.

Pursuant to the direction of the TDSAT in the impugned order, a fresh recommendation has been made by the TRAI. In view thereof, we see no reasons to interfere. The appeal is dismissed. *The appellant is, however, given liberty to urge the contentions raised in this petition before the TDSAT."* (Emphasis Supplied)

It will be clear from the language of the order dated 19.01.2007 that while dismissing the appeal, the Court has given liberty to the appellant, namely, Union of India, to urge the contentions raised in Civil Appeal No.84 of 2007.

26. In Civil Appeal No.84 of 2007, the Union of India has urged 22 Grounds and Ground Nos.1 to 6 of the Memorandum of Appeal are extracted hereibelow :

1. Because the judgment and order dated 7.7.2006 passed by the Hon'ble TDSAT is wrong, erroneous, contrary to law and deserves to be set aside.

2. Because the Hon'ble TDSAT failed to appreciate that the migration package accepted and acted upon by the respondents herein itself provided for definition of Gross Revenue and Adjusted Gross Revenue.

3. Because the Hon'ble TDSAT failed to appreciate that the license unconditionally accepted the migration package, exploited the licenses on the terms and conditions mentioned therein and thereafter challenged the definition of Adjusted Gross Revenue.

4. Because the Hon'ble TDSAT failed to appreciate that it had no jurisdiction or power to examine the correctness of terms of the license which had been unconditionally accepted and acted upon by the licensee.

5. Because the Hon'ble TDSAT failed to appreciate that in fact some licensee obtained new license which contains the definition of 'Gross Revenue' and 'Adjusted Gross Revenue' which has been unconditionally accepted by the appellants.

6. Because the Hon'ble TDSAT failed to appreciate that under Section 4 of the Indian Telegraph Act, 1885 it is the exclusive privilege of the Central Government to establish, maintain and work telegraph/telecom and this privilege can be given to the private parties by granting licenses on such terms and conditions as the Central Government thinks fit and appropriate."

Thus, as per the express language of the order dated 19.01.2007 of this Court in Civil Appeal No.84 of 2007, Union of India could raise each of the grounds extracted above before the Tribunal. Hence, even if we hold that the order dated

07.07.2006 of the Tribunal got merged with the order dated 19.01.2007 of this Court passed in Civil Appeal No.84 of 2007, by the express liberty granted by this Court in the order dated 19.01.2007, Union of India could urge before the Tribunal all the contentions covered under Ground Nos.1 to 6 extracted above including the contention that the definition of Adjusted Gross Revenue as given in the license could not be challenged by the licensee before the Tribunal and will include all items of revenue mentioned in the definition of Adjusted Gross Revenue in the license.

27. The second substantial question of law which we have to decide is whether the TRAI and the Tribunal had jurisdiction to decide on the validity of the terms and conditions of license including the definition of Adjusted Gross Revenue finalised by the Central Government and incorporated in the license. For deciding this question, we must look at the provisions of Section 4(1) of the Telegraph Act and the proviso thereto and the relevant provisions of the TRAI Act which are quoted hereinbelow:

Section 4 (1) of the Telegraph Act:

"4. Exclusive privilege in respect of telegraphs, and power to grant licenses.—(1) Within India, the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs:

Provided that the Central Government may grant a license, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of India."

Relevant Provisions of the TRAI Act:

Section 2(e) "licensee" means any person licensed under sub-Section (1) of Section 4 of the Indian Telegraph Act, 1885 (13 of 1885) for providing specified public

telecommunication services;

2 (ea) "licensor" means the Central Government or the telegraph authority who grants a license under Section 4 of the Indian Telegraph Act, 1885 (13 of 1885);

2 (k) "telecommunication service" means service of any description (including electronic mail, voice mail, data services, audio tax services, video tax services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing images and sounds or intelligence of any nature, by wire, radio, visual or other electromagnetic means but shall not include broadcasting services:

[provided that the Central Government may notify other service to be telecommunication service including broadcasting services.]

"11(1). *Functions of Authority*.—(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to—

(a) make recommendations, either *suo motu* or on a request from the licensor, on the following matters, namely:-

(i) need and timing for introduction of new service provider;

(ii) terms and conditions of license to a service provider;

(iii) revocation of license for non-compliance of terms and conditions of license;

(iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;

(v) technological improvements in the services provided by the service providers;

(vi) type of equipment to be used by the service providers after inspection of equipment used in the network;

(vii) measures for the development of telecommunication technology and any other matter relatable to telecommunication industry in general;

(viii) efficient management of available spectrum;

(b) discharge the following functions, namely, :-

(i) ensure compliance of terms and conditions of licence;

(ii) notwithstanding anything contained in the terms and conditions of the license granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers;

(iii) ensure technical compatibility and effective inter-connection between different service providers;

(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

(v) lay down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;

(vi) lay down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;

(vii) maintain register of interconnect agreements and of all such other matters as may be provided in the regulations;

(viii) keep register maintained under clause (vii) open for inspection to any member of public on payment of such fee and compliance of such other requirements as may be provided in the regulations;

(ix) ensure effective compliance of universal service obligations;

(c) levy fees and other charges at such rates and in respect of such services as may be determined by regulations;

(d) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act.

Provided that the recommendations of the Authority specified in clause (a) of this sub-section shall not be binding upon the Central Government.

Provided further that the Central Government shall seek the recommendations of the Authority in respect of matters specified in sub-clauses (i) and (ii) of clause (a) of this sub-section in respect of new license to be issued to a service provider and the Authority shall forward its recommendations within a period of sixty days from the date on which that Government sought the recommendations:

Provided also that the Authority may request the Central Government to furnish such information or documents as may be necessary for the purpose of making recommendations under sub-clauses (i) and (ii) of clause (a) of this sub-section and that Government shall supply such information within a period of seven days from receipt of such request:

Provided also that the Central Government may issue a license to a service provider if no recommendations are

received from the Authority within the period specified in the second proviso or within such period as may be mutually agreed upon between the Central Government and the Authority:

Provided also that if the Central Government having considered that recommendation of the Authority, comes to a *prima facie* conclusion that such recommendation cannot be accepted or needs modification, it shall refer the recommendation back to the Authority for its reconsideration, and the Authority may, within fifteen days from the date of receipt of such reference, forward to the Central Government its recommendation after considering the reference made by that Government. After receipt of further recommendation, if any, the Central Government shall take a final decision."

"14(a)(i). *Establishment of Appellate Tribunal.*— The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to—

(a) adjudicate any dispute—

(i) between a licensor and a licensee."

28. A bare perusal of sub-section (1) of Section 4 of the Telegraph Act shows that the Central Government has the exclusive privilege of establishing, maintaining and working telegraphs. This would mean that only the Central Government, and no other person, has the right to carry on telecommunication activities. Interpreting the expression "exclusive privilege" of State Government under the State Excise Act to sell liquor, this Court has held in *State of Orissa and Others v. Harinarayan Jaiswal and Others* [(1972) 2 SCC 36]:

"the fact that the Government was the seller does not change the legal position once its exclusive right to deal with those privileges is conceded. If the Government is the exclusive owner of those privileges, reliance on Article 19(1)(g) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government – nor can there be any infringement of Article 14, if the Government tries to get the best available price for its valuable rights."

This position of law has been reiterated by this Court in *Har Shankar & Ors. v. The Deputy Excise & Taxation Commissioner & Others* (supra) and in subsequent decisions of this Court.

29. The proviso to sub-section (1) of Section 4 of the Telegraph Act, however, enables the Central Government to part with this exclusive privilege in favour of any other person by granting a license in his favour on such conditions and in consideration of such payments as it thinks fit. As the Central Government owns the exclusive privilege of carrying on telecommunication activities and as the Central Government alone has the right to part with this privilege in favour of any person by granting a license in his favour on such conditions and in consideration of such terms as it thinks fit, a license granted under proviso to sub-section (1) of Section 4 of the Telegraph Act is in the nature of a contract between the Central Government and the licensee. A Constitution Bench of this Court in *State of Punjab & Anr. v. Devans Modern Breweries Ltd. & Ors.* (supra), relying on *Har Shankar's* case and *Panna Lal v. State of Rajasthan* [(1975) 2 SCC 633], has held in para 121 at page 106 that issuance of liquor license constitutes a contract between the parties. Thus, once a license is issued under proviso to sub-section (1) of Section 4 of the Telegraph Act, the license becomes a contract between the licensor and the licensee. Consequently, the terms and conditions of the license including the definition of Adjusted Gross Revenue in the license agreement are part of a contract between the licensor and the licensee.

30. We have to, however, consider whether the enactment of the TRAI Act in 1997 has in any way affected the exclusive privilege of the Central Government in respect of the telecommunication activities and altered the contractual nature of the license granted to the licensee under the proviso to sub-section (1) of Section 4 of the Telegraph Act. Section 2(e) of the TRAI Act quoted above defines "licensee" to mean any person licensed under sub-Section (1) of Section 4 of the Telegraph Act for providing specified public telecommunication services and Section 2(ea) defines "licensor" to mean the Central Government or the telegraph authority who grants a license under Section 4 of the Telegraph Act. Sub-section 2(k) defines "telecommunication services" very widely so as to include all kinds of telecommunication activities. These provisions under the TRAI Act do not affect the exclusive privilege of the Central Government to carry on telecommunication activities nor do they alter the contractual nature of the license granted under the proviso to sub-section (1) of Section 4 of the Telegraph Act.

31. Section 11(1)(a)(ii) of the TRAI Act states that notwithstanding anything contained in the Telegraph Act, the TRAI shall have the function to make recommendations, either *suo motu* or on a request from a licensor on terms and conditions of license to a service provider. The first proviso, however, states that the recommendations of the TRAI shall not be binding upon the Central Government. The second, third, fourth and fifth provisos deal with the procedure that has to be followed by the TRAI and the Central Government with regard to recommendations of the TRAI. At the end of fifth proviso, it is stated that after receipt of further recommendation, if any, the Central Government shall take the final decision. These provisions in the TRAI Act show that notwithstanding sub-section (1) of Section 4 of the Telegraph Act vesting exclusive privilege on the Central Government in respect of telecommunication activities and notwithstanding the proviso to sub-section (1) of Section 4 of the Telegraph Act vesting in the

Central Government the power to decide on the conditions of license including the payment to be paid by the licensee for the license, the TRAI has been conferred with the statutory power to make recommendations on the terms and conditions of the license to a service provider and the Central Government was bound to seek the recommendations of the TRAI on such terms and conditions at different stages, but the recommendations of the TRAI are not binding on the Central Government and the final decision on the terms and conditions of a license to a service provider rested with the Central Government. The legal consequence is that if there is a difference between the TRAI and the Central Government with regard to a particular term or condition of a license, as in the present case, the recommendations of the TRAI will not prevail and instead the decision of the Central Government will be final and binding.

32. In contrast to this recommendatory nature of the functions of the TRAI under clause (a) of sub-section (1) of Section 11 of the TRAI Act, the functions of the TRAI under clause (b) of sub-section (1) of Section 11 of the TRAI Act are not recommendatory. This will be clear from the very language of clause (b) of sub-section (1) of Section 11 of the TRAI Act which states that the TRAI shall discharge the functions enumerated under sub-clauses (i), (ii) and (ix) under clause (b) of sub-section (1) of Section 11 of the TRAI Act. Under clause (c) of sub-section (1) of Section 11 of the TRAI Act, the TRAI performs the function of levying fees and other charges in respect of different services and under clause (d) of sub-section (1) of Section 11, the Central Government can entrust to the TRAI other functions. These functions of the TRAI under clauses (c) and (d) of sub-section (1) of Section 11 of the TRAI Act are also not recommendatory in nature. That the functions of the TRAI under clause (a) are recommendatory while the functions of the TRAI under clauses (b), (c) and (d) are not recommendatory will also be clear from the provisos 1st to 5th which refer to the recommendations of the TRAI under clause (a) of sub-section (1) of Section 11 of the TRAI Act and not to

clauses (b), (c) and (d) of sub-section (1) of Section 11 of the TRAI Act. The scheme of TRAI Act therefore is that the TRAI being an expert body discharges recommendatory functions under clause (a) of sub-section (1) of Section 11 of the TRAI Act and discharges regulatory and other functions under clauses (b), (c) and (d) of sub-section (1) of Section 11 of the TRAI Act. TRAI being an expert body, the recommendations of the TRAI under clause (a) of sub-section (1) of Section 11 of the TRAI Act have to be given due weightage by the Central Government but the recommendations of the TRAI are not binding on the Central Government. On the other hand, the regulatory and other functions under clauses (b), (c) and (d) of sub-section (1) of Section 11 of the TRAI Act have to be performed independent of the Central Government and are binding on the licensee subject to only appeal in accordance with the provisions of the TRAI Act.

33. A reading of Section 14 (a)(i) of the TRAI Act would show that the Tribunal has the power to adjudicate any dispute between a licensor and a licensee. A licensor, as we have seen, has been defined under Section 2(ea) of TRAI Act to mean the Central Government or the Telegraph Authority who grants a license under Section 4 of the Telegraph Act and a licensee has been defined in Section 2(e) of the TRAI Act to mean any person licensed under sub-section (1) of Section 4 of the Telegraph Act providing specified telecommunication services. The word 'means' in Sections 2(e) and 2(ea) of the TRAI Act indicates that the definitions of licensee and licensor in Sections 2(e) and 2(ea) of the TRAI Act are exhaustive and therefore would not have any other meaning. As Justice G.P. Singh puts it in his book '*Principles of Statutory Interpretation*' 12th Edition at pages 179-180:

> "when a word is defined to 'mean' such and such, the definition is prima facie restrictive and exhaustive ....".

A dispute between a licensor and a licensee referred to in

Section 14(a)(i) of the TRAI Act, therefore, is a dispute after a person has been granted a license by the Central Government or the Telegraph Authority under sub-section (1) of Section 4 of the Telegraph Act and has become a licensee and not a dispute before a person becomes a licensee under the proviso to sub-section (1) of Section 4 of the Telegraph Act. In other words, the Tribunal can adjudicate the dispute between a licensor and a licensee only after a person had entered into a license agreement and become a licensee and the word "any" in Section 14(a) of the TRAI Act cannot widen the jurisdiction of the Tribunal to decide a dispute between a licensor and a person who had not become a licensee. The result is that the Tribunal has no jurisdiction to decide upon the validity of the terms and conditions incorporated in the license of a service provider, but it will have jurisdiction to decide "any" dispute between the licensor and the licensee on the interpretation of the terms and conditions of the license.

34. Coming now to the facts of the cases before us, clause (iii) of the letter dated 22.07.1999 of the Government of India, Ministry of Communications, Department of Telecommunications, to the licensees quoted above made it clear that the license fee was payable with effect from 01.08.1999 as a percentage of gross revenue under the license and the gross revenue for this purpose would be total revenue of the licensee company excluding the PSTN related call charges paid to DOT/MTNL and service tax calculated by the licensee on behalf of the Government from the subscribers. It was also made clear in the aforesaid clause (iii) that the Government was to take a final decision after receipt of the TRAI's recommendation on not only the percentage of revenue share but also the definition of revenue. In accordance with this clause (iii) the Government took the final decision on the definition of Adjusted Gross Revenue and incorporated the same in the license agreement. Once the licensee had accepted clause (iii) of the letter dated 22.07.1999 that the license fee would be a percentage of gross revenue which

would be the total revenue of the licensee company and had also accepted that the Government would take a final decision not only with regard to the percentage of revenue share but also the definition of revenue for this purpose, the licensee could not have approached the Tribunal questioning the validity of the definition of Adjusted Gross Revenue in license agreement on the ground that Adjusted Gross Revenue cannot include revenue from activities beyond the license. If the wide definition of Adjusted Gross Revenue so as to include revenue beyond the license was in any way going to affect the licensee, it was open for the licensees not to undertake activities for which they do not require license under clause (4) of the Telegraph Act and transfer these activities to any other person or firm or company. The incorporation of the definition of Adjusted Gross Revenue in the license agreement was part of the terms regarding payment which had been decided upon by the Central Government as a consideration for parting with its rights of exclusive privilege in respect of telecommunication activities and having accepted the license and availed the exclusive privilege of the Central Government to carry on telecommunication activities, the licensees could not have approached the Tribunal for an alteration of the definition of Adjusted Gross Revenue in the license agreement.

35. Regarding the recommendations of the TRAI under Section 11(1)(a)(i) of the TRAI Act, we find that the Tribunal in its order dated 07.07.2006 has held that the opinion of the renowned expert in the accountancy that any other definition of Adjusted Gross Revenue would lead to reduction of license fee liability by way of accounting jugglery was not placed before the TRAI and as a result there was no proper and effective consultation with the TRAI and the weightage that was due to the recommendations of the TRAI was not given effect to. In our considered opinion, if the Tribunal found that there was no effective consultation with the TRAI on the opinion of the expert on accountancy, the Tribunal could have at best, if it had the jurisdiction to decide the dispute, directed the TRAI to consider

the opinion of the expert on accountancy and send its recommendations to the Central Government and directed the Central Government to consider such fresh recommendations of the TRAI as provided in the provisos to section 11(1) of the TRAI Act. Instead the Tribunal has considered the recommendations of the TRAI and passed the fresh impugned order dated 30.08.2007 contrary to the very provisions of Section 11(1)(a) of the TRAI Act and the provisos thereto. At any rate, as the Central Government has already considered the fresh recommendations of the TRAI and has not accepted the same and is not agreeable to alter the definition of Adjusted Gross Revenue, the decision of the Central Government on the point was final under the first proviso and the fifth proviso to Section 11(1) of the TRAI Act, 1997.

36. We may now deal with the authorities relied upon by the Tribunal and learned counsel for the parties. In *Cellular Operators Association of India & Ors.* v. *Union of India & Ors.* (supra), the Cellular Operators Association of India approached the Tribunal under Section 14 of the TRAI Act challenging the decisions of the Government permitting the fixed service providers to offer WLL with limited mobility and the recommendations of the TRAI in this regard. The Tribunal dismissed the application and the Cellular Operators filed an appeal under Section 18 of the TRAI Act before this Court. This Court held that WLL with limited mobility as recommended by the TRAI could be permitted if the question of level playing field of the Cellular Operators was duly considered and they were duly compensated but the Tribunal had not considered the relevant materials on this issue and had only arrived at a bald conclusion that the Cellular Operators have already been compensated in various ways. With these findings, this Court set aside the decision of the Tribunal and remitted the matter to the Tribunal for reconsideration with special emphasis on the question of level playing field on the basis of the materials already on record. In this decision, this Court was not called upon to consider whether a licensee having accepted the terms

of the license could challenge before the Tribunal the validity of a clause in the terms of license and whether the Tribunal would have jurisdiction to decide such a challenge.

37. In *Delhi Science Forum and Others v. Union of India* (supra) after the National Telecom Policy, 1994 was announced for inducting the private sector into basic telephone services and notice was published inviting tenders from private parties and tenders were submitted for different circles, but before licenses could be granted by the Central Government, writ petitions were filed in different High Courts as well as in this Court and all the writ petitions filed before different High Courts were transferred to this Court and heard together. The Writ Petitioners questioned the validity and propriety of the new telecom policy saying that it shall endanger the national security of the country and shall not serve the economic interest of the nation. This Court while upholding the new Telecom Policy held that the proviso to sub-section (1) of Section 4 of the Telegraph Act enables the Central Government to grant license to private bodies, but such power should be exercised on well-settled principles and norms which can satisfy the test of Article 14 of the Constitution. Thus, this is not a case like the present one, in which the licensees having accepted the terms of the license have challenged the definition of Adjusted Gross Revenue incorporated in the terms of the license.

38. In *State of U.P.* v. *Devi Dayal Singh* (supra), a truck owner, Devi Dayal Singh, challenged the right of the State Government to recover by way of toll under Section 2 of the Tolls Act, 1851, an amount for the actual construction of the bridge. This Court held that Section 2 of the Tolls Act, 1851 which enables the State Government to levy toll at such rates 'as it thinks fit' and the only restriction is latent in the word "toll" itself. This was therefore not a case of dispute between the Government and the contractor where the contractor had challenged a stipulation of the contract. In the present case, on the other hand, the licensees had accepted the terms of the

license and after having taken the benefits of the license is now trying to wriggle out from the terms of the license and in particular the definition of the Adjusted Gross Revenue.

39. In *Union of India* v. *Tata Teleservices (Mahrashtra) Ltd*. (supra) cited by Mr. Srinivasan, a letter of intent was issued to Tata Teleservices and this was accepted by Tata Teleservices but ultimately the contract did not come into being and the license was not actually granted. The Union of India suffered a considerable loss because Tata Teleservices had walked out of the obligation undertaken by the acceptance of the letter of intent. The Additional Solicitor General appearing for the Union of India submitted that such a dispute would also come within the purview of Section 14 of the TRAI Act, going by the definition of licensee and the meaning given to it in the notice inviting tenders. The Tribunal held that expression "licensor" or "licensee" occurring in Section 14 (a)(i) of the TRAI Act would not exclude a person who had been given a letter of intent and who had accepted the letter of intent but was trying to negotiate some further terms of common interest before a formal contract was entered into and the work was to be started. This was thus a case where this Court treated a person who had accepted the letter of intent of the licensor as a licensee, although a formal contract had not entered into. In this case this Court has not held that a licensee could dispute the validity of a term or condition which was incorporated in the license agreement.

40. On the other hand, we find from the long line of decisions in *Har Shankar & Ors.* vs. *The Deputy Excise & Taxation Commissioner & Others* (supra), *Government of A.P.* vs. *M/s Anabeshahi Wine & Distilleries Pvt. Ltd* (supra), *Assistant Excise Commissioner & Anr.* vs. *Issac Peter & Ors.* (supra), *State of Orissa & Ors.* vs. *Narain Prasad & Ors.* (supra), *State of M.P. & Ors.* vs. *KCT Drinks Ltd.* (supra), *State of Punjab & Anr.* vs. *Devans Modern Breweries Ltd. & Ors.* (supra), *Shyam Telelink Limited* vs. *Union of India* (supra) and

in *Bharti Cellular Limited* vs. *Union of India & Ors.* (supra), that this Court has consistently taken a view that once a licensee has accepted the terms and conditions of a license, he cannot question the validity of the terms and conditions of the license before the Court. We, therefore, hold that the TRAI and the Tribunal had no jurisdiction to decide on the validity of the definition of Adjusted Gross Revenue in the license agreement and to exclude certain items of revenue which were included in the definition of Adjusted Gross Revenue in the license agreement between the licensor and the licensee.

41. The next substantial question of law which we have to decide is whether as a result of Union of India not filing an appeal against the order dated 07.07.2006 in favour of some of licensees, the order dated 07.07.2006 had not become binding on the Union of India with regard to issues which had been decided by the Tribunal in the said order dated 07.07.2006. According to the learned counsel for the licensees in whose favour order dated 07.07.2006 has been passed and against whom no appeal was filed by the Union of India challenging the order dated 07.07.2006, the order dated 07.07.2006 of the Tribunal could not be re-opened because of the principle of *res judicata*. In the opening paragraph of the order dated 07.07.2006, the Tribunal has stated:

> "By this batch of petitions the Association of Unified Telecom Service Providers of India, Cellular Operators Association of India and some individual Telecommunication Service Providers are questioning the validity of the definition of Adjusted Gross Revenue (AGR) in the licenses given to various telecom service providers."

Finally, in the operative part of the order dated 07.07.2006, the Tribunal has directed as follows:

> "Apart from the principal question whether the State Government can include the gross income of the licensee from non-licensed activity in the AGR; the petitioners have

> also challenged individually the various components of AGR as enumerated in the licence.
>
> In view of the fact we have come to the conclusion that there has not been an effective consultation with the TRAI which is mandatory under the TRAI Act, we think we should not further delve into the exercise of finding out which component of the AGR, as defined by the Government in the conditions of licence, deserves to be retained and which component which the petitioners contend is not derived from the licensed revenue of the licensee should be excluded at this stage. We think it more appropriate that the matter should be remanded to the TRAI which is the 3rd Respondent herein, before whom the Government should produce the material relied by it while rejecting TRAI's recommendation so that TRAI can consider the same and send its conclusions to this Tribunal and thereafter, this Tribunal will have the benefit of a comprehensive recommendation of the TRAI after considering the materials relied upon by the Government. While forming its conclusions the TRAI shall hear the Government as well as the licensees and consider the materials that may be placed before it by either side. In this process it is not necessary for the TRAI to hold fresh consultative proceeding unless it thinks necessary. During this proceeding before the TRAI the petitioners shall place before it their contentions in regard to the various components of AGR which they have challenged before this Tribunal and the TRAI after hearing the Government on this issue also, send its recommendations to this Tribunal preferably within three months of the receipt of this order.
>
> Further, while considering the issue now remitted to the TRAI, the TRAI will bear in mind our finding in regard to the inclusion in gross revenue of the licensee revenue derived from non-licensed activities….."

Thus, the Tribunal in its order dated 07.07.2006 has not just decided a dispute on the interpretation of Adjusted Gross Revenue in the license, but has decided on the validity of the definition of Adjusted Gross Revenue in the license. As we have already held, the Tribunal had no jurisdiction to decide on the validity of the terms and conditions of the license including the definition of Adjusted Gross Revenue incorporated in the license agreement. Hence, the order dated 07.07.2006 of the Tribunal in so far as it decides that revenue realized by the licensee from activities beyond the license will be excluded from Adjusted Gross Revenue *dehors* the definition of Adjusted Gross Revenue in the license agreement is without jurisdiction and is a nullity and the principle of *res judicata* will not apply. In *Chandrabhai K. Bhoir and Others* vs. *Krishna Arjun Bhoir and Others* (supra) this Court relying on *Chief Justice of A.P.* vs. *L.V.A. Dixitulu* [(1979) 2 SCC 34, *Union of India* vs. *Pramod Gupta* [(2005) 12 SCC 1] and *National Institute of Technology* vs. *Niraj Kumar Singh* [(2007) 2 SCC 481] has held:

> "an order passed without jurisdiction would be a nullity. It will be a *coram non judice* and *non est* in the eye of the law. Principle of *res judicata* would not apply to such cases".

We accordingly hold that the order dated 07.07.2006 of the Tribunal was not binding on the Union of India even in those cases in which the Union of India did not file any appeal against the order dated 07.07.2006 before this Court.

42. The last substantial question of law which we have to decide is whether the licensee can challenge the computation of Adjusted Gross Revenue and if so at what stage and on what grounds. Section 14 (a)(i) of the TRAI Act, as we have seen, provides that the Tribunal can adjudicate any dispute between the licensor and the licensee. One such dispute can be that the computation of Adjusted Gross Revenue made by the licensor and the demand raised on the basis of such computation is not in accordance with the license agreement. This dispute

however can be raised by the licensee, after the license agreement has been entered into and the appropriate stage when the dispute can be raised is when a particular demand is raised on the licensee by the licensor. When such a dispute is raised against a particular demand, the Tribunal will have to go into the facts and materials on the basis of which the demand is raised and decide whether the demand is in accordance with the license agreement and in particular the definition of Adjusted Gross Revenue in the license agreement and can also interpret the terms and conditions of the license agreement. We, however, find from the order dated 07.07.2006 that instead of challenging any demands made on them, the licensees have questioned the validity of the definition of Adjusted Gross Revenue in the licenses given to them and the Tribunal has finally decided in its order dated 30.08.2007 as to what items of revenue would be part of Adjusted Gross Revenue and what items of revenue would not be part of Adjusted Gross Revenue without going into the facts and materials relating to the demand on a particular licensee.

43. In the result, we allow these appeals and set aside the impugned order dated 30.08.2007 of the Tribunal. There shall be no order as to costs.

CIVIL APPEAL Nos. 2479 of 2008, 1552 of 2009, 7049 of 2010, 7062 of 2010, 7063-7064 of 2010, 7443 of 2010, 7446 of 2010, 7126 of 2010, 7444 of 2010, 7445 of 2010, 9646-9661 of 2010, 2030 of 2011, 2031 of 2011, 2270 of 2011, 3245 of 2011, 5450-5451 of 2011, CIVIL APPEALS ARISING OUT OF SLP (C) Nos. 1786-1787 OF 2009 AND CIVIL APPEALS ARISING OUT OF SLP (C) Nos. 6641-6642 OF 2010:

Leave granted in Special Leave Petitions.

2. In these appeals, different orders of the Tribunal have been impugned. The orders of the Tribunal, which have been impugned, are based on the order dated 30.08.2007 of the

A

Tribunal which we have set aside. The orders impugned in these appeals are, therefore, set aside and the matters are remitted to the Tribunal to pass fresh orders in accordance with law.

B

3. The appeals stand disposed of accordingly with no order as to costs.

SUPPLEMENTARY ORDER

C

We have delivered today the judgment in these cases and while answering the last substantial question of law, we have held that when a particular demand is raised on a licencee, the licensee can challenge the demand before the Tribunal and the Tribunal will have to go into the facts and materials on the basis of which the demand is raised and decide whether the demand is in accordance with the license agreement and in particular the definition of Adjusted Gross Revenue in the license agreement and can also interpret the terms and conditions of the license agreement.

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2. It is stated by Mr. C.S. Vaidyanathan, learned senior counsel for some of the licencees that demands have already been raised on them. He submitted that two months' time be granted to the licencees to raise their disputes before the Tribunal and in the meanwhile the demands should not be enforced.

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3. If the demands have been raised, we grant two months' time to the licencees to raise the dispute before the Tribunal against the demands and during this period of two months, the demands will not be enforced.

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D.G. Appeals disposed of.

A

R. VIJAYAN
v.
BABY AND ANR.
(Criminal Appeal No. 1902 of 2011)

B

OCTOBER 11, 2011

[R.V. RAVEENDRAN AND R.M. LODHA, JJ.]

Negotiable instruments Act, 1881:

C

s.138 – Sentencing under – Respondent found guilty u/s.138 – Magistrate sentenced her to pay a fine of Rs.2000 and in default to undergo imprisonment and also directed her to pay Rs.20,000 as compensation to the complainant and in default to undergo simple imprisonment for three months – Held: Magistrate having levied fine of Rs.2,000/-, it was impermissible to levy any compensation having regard to s.357(3), Cr.P.C. – Code of Criminal Procedure, 1973 – s.357(3).

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s.138 – Methods to improve the disposal of cases u/s.138 of the Act – Suggested.

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s.138 – Purpose of enactment – Held: Cases arising u/s.138 are really civil cases masquerading as criminal cases – The avowed object of Chapter XVII of the Act is to "encourage the culture of use of cheques and enhance the credibility of the instrument" – It provides a single forum and single proceeding, for enforcement of criminal liability (for dishonouring the cheque) and for enforcement of the civil liability (for realization of the cheque amount) thereby obviating the need for the creditor to move two different fora for relief –The apparent intention is to ensure that not only the offender is punished, but also ensure that the complainant invariably receives the amount of the cheque by way of compensation u/s.357(1)(b), Cr.P.C. – Uniformity and

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consistency in deciding similar cases by different courts, not only increase the credibility of cheque as a negotiable instrument, but also the credibility of courts of justice.

s.143(1) – Imposition of fine – Held: s.143(1) provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, all offences under Chapter XVII of the Act should be tried by a Judicial Magistrate of the First Class or by a Metropolitan Magistrate and the provisions of ss.262 to 265 of the Code (relating to summary trials) shall, as far as may be, apply to such trials – The proviso thereto provides that it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term extending one year and an amount of fine exceeding Rs.5,000/-, in case of conviction in a summary trial under that section – In view of conferment of such special power and jurisdiction upon the First Class Magistrate, the ceiling as to the amount of fine stipulated in s.29(2) of the Code is removed – Consequently, in regard to any prosecution for offences punishable u/s.138 of the Act, a First Class Magistrate may impose a fine exceeding Rs.5000/-, the ceiling being twice the amount of the cheque.

Code of Criminal Procedure, 1973:

s.357(3) – Award of compensation – Held: Sub-section (3) of s.357 is categorical that compensation can be awarded only where fine does not form part of the sentence – Where the sentence imposed does not include a fine, that is, where the sentence relates to only imprisonment, the court, when passing judgment, can direct the accused to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced – Sub-section (1) of s.357 provides that where the court imposes a sentence of fine or a sentence of which fine forms a part, the Court may direct the fine amount to be applied in the payment to any person of compensation for any loss or injury caused by the offence, when compensation

is, in the opinion of the court, recoverable by such person in a Civil Court – Thus, if compensation could be paid from out of the fine, there is no need to award separate compensation – Only where the sentence does not include fine but only imprisonment and the court finds that the person who has suffered any loss or injury by reason of the act of the accused person, requires to be compensated, it is permitted to award compensation u/s.357(3) – Negotiable instruments Act, 1881 – Compensation.

The accused-first respondent issued a cheque for Rs.20,000 in favour of the complainant-appellant towards repayment of a loan. The cheque got dishonoured when presented for payment. The appellant sent notice to the first respondent but no payment was made. The appellant filed complaint under Section 138 of the Negotiable Instruments Act before the Magistrate. The Magistrate found the respondent guilty under Section 138 of the Act and sentenced her to pay a fine of Rs.2000 and in default to undergo imprisonment for one month. He also directed the respondent to pay Rs.20,000/- as compensation to the appellant and in default to undergo simple imprisonment for three months. The Session Judge set aside the conviction and sentence imposed on the first respondent. The High Court allowed the appeal in part. It held that the appellant had not discharged the burden to prove that the notice was duly served on the first respondent. As a consequence it restored the order of conviction passed by the Magistrate. However the High Court held that it could only restore the fine of Rs.2000/- imposed by the Magistrate with the default sentence but not the direction for payment of compensation under section 357(3), Cr.P.C. as it could not co-exist with the imposition of fine.

In the instant appeal, it was contended for the appellant that sections 29 and 357, Cr.P.C. and section 138 of the Negotiable Instruments Act should be read harmoniously and complementary to each other; and if

so done, compensation could be awarded in cases under section 138 of the Act to meet the loss sustained by the dishonour and that if compensation could not be awarded for any reason, fine could be levied upto twice the cheque amount; and, therefore, the High Court ought to have restored the direction for payment of Rs.20,000/- to the appellant either by way of compensation under section 357(3), Cr.P.C. or from the fine under section 357(1)(b), Cr.P.C. of the Code, by increasing the fine.

Dismissing the appeal, the Court

HELD: 1. Section 138 of the Negotiable Instruments Act provided that where a cheque is dishonoured, the person drawing the cheque shall be deemed to have committed an offence and shall, without prejudice to any other provision of the Act, be punished with imprisonment for a term which may extend to one year or with fine which may extend to twice the amount of the cheque or with both. Subsequent to the judgment of the Magistrate, the said Section 138 was amended (with effect from 6.2.2003) increasing and the period of imprisonment imposable to two years. Sub-section (3) of section 357, Cr.P.C. is categorical that the compensation can be awarded only where fine does not form part of the sentence. It is evident from Sub-Section (3) of section 357, Cr.P.C., that where the sentence imposed does not include a fine, that is, where the sentence relates to only imprisonment, the court, when passing judgment, can direct the accused to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced. The reason for this is obvious. Sub-section (1) of section 357 provides that where the court imposes a sentence of fine or a sentence of which fine forms a part, the Court may direct the fine amount to be applied in the payment

to any person as compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the court, recoverable by such person in a Civil Court. Thus, if compensation could be paid from out of the fine, there is no need to award separate compensation. Only where the sentence does not include fine but only imprisonment and the court finds that the person who has suffered any loss or injury by reason of the act of the accused person, requires to be compensated, it is permitted to award compensation under section 357(3),Cr.P.C. [Para 7, 9]

State of Punjab vs. Gurmej Singh **2002 (6) SCC 663: 2002 (1) Suppl.SCR 427;** *Sivasuriyan vs. Thangavelu* **2004 (13) SCC 795 – relied on.**

2. The difficulty arose in this case because of two circumstances. The fine levied was only Rs.2000/-. The compensation required to cover the loss/injury on account of the dishonour of the cheque was Rs.20,000/-. The Magistrate having levied fine of Rs.2,000/-, it was impermissible to levy any compensation having regard to section 357(3), Cr.P.C. The question is whether the fine can be increased to cover the sum of Rs. 20,000/- which was the loss suffered by the complainant, so that the said amount could be paid as compensation under section 357(1)(b), Cr.P.C. Section 138 of the Act authorizes the Magistrate to impose by way of fine, an amount which may extend to twice the amount of the cheque, with or without imprisonment. Section 29, Cr.P.C. deals with the sentences which Magistrates may pass. The Chief Judicial Magistrate is empowered to pass any sentence authorized by law (except sentence of death or imprisonment for life or imprisonment for a term exceeding seven years). On the other hand, sub-section (2) of Section 29 empowers a court of a Magistrate of First Class to pass a sentence of imprisonment for a term not

exceeding three years or fine not exceeding Rs.5,000/- or of both. By Act No.25 of 2005, sub-section (2) of Section 29 was amended with effect from 23.6.2006 and the maximum fine that could be levied by the Magistrate of First Class, was increased to Rs.10,000/-. At the relevant point of time, the maximum fine that the First Class Magistrate could impose was Rs.5,000/-. Therefore, it was also not possible to increase the fine to Rs.22,000/- so that Rs.20,000/- could be awarded as compensation, from the amount recovered as fine. [Para 10]

3. The first respondent-accused was a widow and police woman. On the facts and circumstances, the Magistrate thought fit to impose only a fine and not imprisonment. When the conviction was set aside, the appellant filed a revision, challenging the non-grant of compensation of Rs.20,000/-. He did not, however, challenge the non-imposition of sentence of imprisonment. The High Court was, therefore, justified in holding that once the sentence consists of only fine, the power under Section 357(3) could not be invoked for directing payment of compensation. The High Court was also justified in not converting the sentence from fine to imprisonment, so as to enable itself to award compensation, as the facts and circumstances of the case did not warrant imprisonment. Therefore, the order of High Court does not call for interference. [Para 11]

4. The difficulty caused by the ceiling imposed by section 29(2), Cr.P.C. has been subsequently solved by insertion of section 143 in the Act (by Amendment Act No.55 of 2002) with effect from 6.2.2003. Section 143(1) provides that notwithstanding anything contained in the Code, all offences under Chapter XVII of the Act should be tried by a Judicial Magistrate of the First Class or by a Metropolitan Magistrate and the provisions of sections 262 to 265 of the Code (relating to summary trials) shall,

as far as may be, apply to such trials. The proviso thereto provides that it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term extending one year and an amount of fine exceeding Rs.5,000/-, in case of conviction in a summary trial under that section. In view of conferment of such special power and jurisdiction upon the First Class Magistrate, the ceiling as to the amount of fine stipulated in section 29(2),Cr.P.C. is removed. Consequently, in regard to any prosecution for offences punishable under section 138 of the Act, a First Class Magistrate may impose a fine exceeding Rs.5000/-, the ceiling being twice the amount of the cheque. [Para 12]

Damodar S.Prabhu vs. Sayed Babalal H. **2010 (5) SCC 663: 2010 (5) SCR 678 – relied on.**

5.1. Suggestions of methods to improve the disposal of cases under Section 138 of the Negotiable Instruments Act, 1881. It is sometimes said that cases arising under section 138 of the Act are really civil cases masquerading as criminal cases. The avowed object of Chapter XVII of the Act is to "encourage the culture of use of cheques and enhance the credibility of the instrument". In effect, its object appears to be both punitive as also compensatory and restitutive, in regard to cheque dishonour cases. Chapter XVII of the Act is an unique exercise which blurs the dividing line between civil and criminal jurisdictions. It provides a single forum and single proceeding, for enforcement of criminal liability (for dishonouring the cheque) and for enforcement of the civil liability (for realization of the cheque amount) thereby obviating the need for the creditor to move two different fora for relief. This is evident from the following provisions of Chapter XVII of the Act. (i)The provision for levy of fine which is linked to the cheque amount and may extend to twice the amount of the cheque (section 138) thereby rendering

section 357(3) virtually infructuous in so far as cheque dishonour cases. (ii)The provision enabling a First Class Magistrate to levy fine exceeding Rs.5,000/- (Section 143) notwithstanding the ceiling to the fine, as Rs.5,000/- imposed by section 29(2) of the Code; (iii) The provision relating to mode of service of summons (section 144) as contrasted from the mode prescribed for criminal cases in section 62 of the Code; (iv) The provision for taking evidence of the complainant by affidavit (section 145) which is more prevalent in civil proceedings, as contrasted from the procedure for recording evidence in the Code; (v) The provision making all offences punishable under section 138 of the Act compoundable. [Para 14]

5.2. The apparent intention is to ensure that not only the offender is punished, but also ensure that the complainant invariably receives the amount of the cheque by way of compensation under section 357(1)(b), Cr.P.C. Though a complaint under section 138 of the Act is in regard to criminal liability for the offence of dishonouring the cheque and not for the recovery of the cheque amount, (which strictly speaking, has to be enforced by a civil suit), in practice once the criminal complaint is lodged under section 138 of the Act, a civil suit is seldom filed to recover the amount of the cheque. This is because of the provision enabling the court to levy a fine linked to the cheque amount and the usual direction in such cases is for payment as compensation, the cheque amount, as loss incurred by the complainant on account of dishonour of cheque, under section 357 (1)(b), Cr.P.C. and the provision for compounding the offences under section 138 of the Act. Most of the cases (except those where liability is denied) get compounded at one stage or the other by payment of the cheque amount with or without interest. Even where the offence is not compounded, the courts tend to direct payment of

compensation equal to the cheque amount (or even something more towards interest) by levying a fine commensurate with the cheque amount. A stage has reached when most of the complainants, in particular the financing institutions (particularly private financiers) view the proceedings under section 138 of the Act, as a proceeding for the recovery of the cheque amount, the punishment of the drawer of the cheque for the offence of dishonour, becoming secondary. Having reached that stage, if some Magistrates go by the traditional view that the criminal proceedings are for imposing punishment on the accused, either imprisonment or fine or both, and there is no need to compensate the complainant, particularly if the complainant is not a 'victim' in the real sense, but is a well-to-do financier or financing institution, difficulties and complications arise. In those cases where the discretion to direct payment of compensation is not exercised, it causes considerable difficulty to the complainant, as invariably, by the time the criminal case is decided, the limitation for filing civil cases would have expired. As the provisions of Chapter XVII of the Act strongly lean towards grant of reimbursement of the loss by way of compensation, the courts should, unless there are special circumstances, in all cases of conviction, uniformly exercise the power to levy fine upto twice the cheque amount (keeping in view the cheque amount and the simple interest thereon at 9% per annum as the reasonable quantum of loss) and direct payment of such amount as compensation. Direction to pay compensation by way of restitution in regard to the loss on account of dishonour of the cheque should be practical and realistic, which would mean not only the payment of the cheque amount but interest thereon at a reasonable rate. Uniformity and consistency in deciding similar cases by different courts, not only increase the credibility of cheque as a negotiable instrument, but also the credibility of courts of justice. [Paras 15,16]

6. Proceedings under section 138 of the Act cannot be treated as civil suits for recovery of the cheque amount with interest. Also, compensation awarded under section 357(1)(b) is not intended to be an elaborate exercise taking note of interest etc. There is need to have uniformity and consistency in decision making. In same type of cheque dishonour cases, after convicting the accused, if some courts grant compensation and if some other courts do not grant compensation, the inconsistency, though perfectly acceptable in the eye of law, will give rise to certain amount of uncertainty in the minds of litigants about the functioning of courts. Citizens will not be able to arrange or regulate their affairs in a proper manner as they will not know whether they should simultaneously file a civil suit or not. The problem is aggravated having regard to the fact that in spite of section 143(3) of the Act requiring the complaints in regard to cheque dishonour cases under section 138 of the Act to be concluded within six months from the date of the filing of the complaint, such cases seldom reach finality before three or four years let alone six months. These cases give rise to complications where civil suits have not been filed within three years on account of the pendency of the criminal cases. While it is not the duty of criminal courts to ensure that successful complainants get the cheque amount also, it is their duty to have uniformity and consistency, with other courts dealing with similar cases. [Para 17]

7. One other solution is a further amendment to the provision of Chapter XVII so that in all cases where there is a conviction, there should be a consequential levy of fine of an amount sufficient to cover the cheque amount and interest thereon at a fixed rate of 9% per annum interest, followed by award of such sum as compensation from the fine amount. This would lead to uniformity in decisions, avoid multiplicity of proceedings (one for enforcing civil liability and another for enforcing criminal liability) and achieve the object of Chapter XVII of the Act, which is to increase the credibility of the instrument. This is however a matter for the Law Commission of India to consider. [Para 18]

Case Law Reference:

2002 (1) Suppl. SCR 427	**relied on**	**Para 7**
2004 (13) SCC 795	**relied on**	**Para 8**
2010 (5) SCR 678	**relied on**	**Para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1902 of 2011.

From the Judgment & Order dated 8.11.2006 of the High Court of Kerala at Ernakulam in Criminal Appeal No. 1071 of 2002.

Rajeev Dhawan, C.K. Sasi for the Appellant.

G. Prakash and K. Sarada Devi for the Respondent.

The Judgment of the Court was delivered by

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

2. The complainant in a complaint under section 138 of the Negotiable Instruments Act, 1881 ('Act' for short) is the appellant in this appeal by special leave. A cheque dated 31.3.1995 for Rs.20,000/- issued by the first respondent drawn in favour of the complainant, towards alleged repayment of a loan was dishonoured when presented for payment. The appellant sent a notice dated 20.4.1995 demanding payment. According to the complainant, the notice was served on the first respondent but the payment was not made. Therefore on 25.5.1995 the appellant lodged a complaint against the first

respondent, under section 138 of the Act before the First Class Magistrate -IV, (Mobile), Thiruvananthapuram. After trial, the learned Magistrate by judgment dated 30.11.1996 found the accused guilty under section 138 of the Act and sentenced her to pay a fine of Rs.2000/- and in default to undergo imprisonment for one month. He also directed the accused to pay Rs.20,000/- as compensation to the complainant and in default to undergo simple imprisonment for three months.

3. The first respondent challenged the said judgment and the criminal appeal filed by her was allowed by the First Additional Sessions Judge, Thiruvananthapuram by judgment dated 26.11.2001. The conviction and sentence imposed on the first respondent was set aside and the appellant was acquitted. The first appellate court held that the accused having denied her signature in the postal acknowledgement relating to the notice dated 20.4.1995, the appellant ought to have examined the postman who served the notice; and as the appellant did not do so, the court held that the complainant had not discharged the burden to prove that the notice was duly served on the first respondent. The appellant filed criminal appeal before the High Court. The High Court allowed the appeal in part. It held that the service of notice was duly proved. As a consequence it restored the conviction entered by the learned Magistrate in reversal of the judgment of the first appellate court. However the High Court held that it could only restore the fine of Rs.2000/- imposed by the Magistrate with the default sentence but not the direction for payment of compensation under section 357(3) of the Code, as it could not co-exist with the imposition of fine. Therefore, the direction for payment of compensation was not restored. The said judgment is challenged in this appeal by special leave.

4. The appellant contends that sections 29 and 357 of the Code and section 138 of the Act should be read harmoniously and complementary to each other; and if so done, compensation could be awarded in cases under section 138

of the Act to meet the loss sustained by the dishonour and that if compensation could not be awarded for any reason, fine could be levied upto twice the cheque amount; and therefore the High Court ought to have restored the direction for payment of Rs.20,000/- to the appellant either by way of compensation under section 357(3) or from the fine under section 357(1)(b) of the Code, by increasing the fine.

5. Section 138 of the Act provided that where a cheque is dishonoured, the person drawing the cheque shall be deemed to have committed an offence and shall, without prejudice to any other provision of the Act, be punished with imprisonment for a term which may extend to one year or with fine which may extend to twice the amount of the cheque or with both. It may be mentioned that subsequent to the judgment of the learned Magistrate, the said Section 138 was amended (with effect from 6.2.2003) increasing and the period of imprisonment imposable to two years.

6. Section 357 relates to Order to pay compensation.

> ***"357. Order to pay compensation.***—(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment order the whole or any part of the fine recovered to be applied —-
>
> (a) in defraying the expenses properly incurred in the prosecution;
>
> (b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;
>
> (c) & (d) x x x x (not relevant)
>
> (2) x x x x x (not relevant)

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment order the accused person to pay, by way of compensation such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced."

(4) An order under this section may also be made by an Appellate Court or by the High Court or Court of sessions when exercising its power of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the court shall take into account any sum paid or recovered as compensation under this section.

7. Sub-section (3) of section 357, is categorical that the compensation can be awarded only where fine does not form part of the sentence. Section 357(3) has been the subject-matter of judicial interpretation by this Court in several decisions. In *State of Punjab vs. Gurmej Singh* [2002 (6) SCC 663], this Court held :

"A reading of sub-section (3) of Section 357 would show that the question of award of compensation would arise where the court imposes a sentence of which fine does not form a part."

This Court also held that section 357(3) will not apply where a sentence of fine has been imposed.

8. In *Sivasuriyan vs. Thangavelu* [2004 (13) SCC 795], this Court held :

"In view of the submissions made, the only question that arises for consideration is whether the court can direct payment of compensation in exercise of power under sub-section (3) of Section 357 in a case where fine already

forms a part of the sentence. Apart from sub-section (3) of Section 357 there is no other provision under the Code whereunder the court can exercise such power:"

After extracting section 357(3) of the Code, the Court proceeded to hold thus:

"On a plain reading of the aforesaid provision, it is crystal clear that the power can be exercised only when the court imposes sentence by which fine does not form a part. In the case in hand, a court having sentenced to imprisonment, as also fine, the power under sub-section (3) of Section 357 could not have been exercised. In that view of the matter, the impugned direction of the High Court directing payment of compensation to the tune of Rs. one lakh by the appellant is set aside."

9. It is evident from Sub-Section (3) of section 357 of the Code, that where the sentence imposed does not include a fine, that is, where the sentence relates to only imprisonment, the court, when passing judgment, can direct the accused to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced. The reason for this is obvious. Sub-section (1) of section 357 provides that where the court imposes a sentence of fine or a sentence of which fine forms a part, the Court may direct the fine amount to be applied in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the court, recoverable by such person in a Civil Court. Thus, if compensation could be paid from out of the fine, there is no need to award separate compensation. Only where the sentence does not include fine but only imprisonment and the court finds that the person who has suffered any loss or injury by reason of the act of the accused person, requires to be compensated, it is permitted to award compensation under compensation under section 357(3).

10. The difficulty arises in this case because of two circumstances. The fine levied is only Rs.2000/-. The compensation required to cover the loss/injury on account of the dishonour of the cheque is Rs.20,000/-. The learned Magistrate having levied fine of Rs.2,000/-, it is impermissible to levy any compensation having regard to section 357(3) of the Code. The question is whether the fine can be increased to cover the sum of Rs. 20,000/- which was the loss suffered by the complainant, so that the said amount could be paid as compensation under section 357(1)(b) of the Code. As noticed above, section 138 of the Act authorizes the learned Magistrate to impose by way of fine, an amount which may extend to twice the amount of the cheque, with or without imprisonment. Section 29 of the Code deals with the sentences which Magistrates may pass. The Chief Judicial Magistrate is empowered to pass any sentence authorized by law (except sentence of death or imprisonment for life or imprisonment for a term exceeding seven years). On the other hand, sub-section (2) of Section 29 empowers a court of a Magistrate of First Class to pass a sentence of imprisonment for a term not exceeding three years or fine not exceeding Rs.5,000/- or of both. (Note : By Act No.25 of 2005, sub-section (2) of Section 29 was amended with effect from 23.6.2006 and the maximum fine that could be levied by the Magistrate of First Class, was increased to Rs.10,000/-). At the relevant point of time, the maximum fine that the First Class Magistrate could impose was Rs.5,000/-. Therefore, it is also not possible to increase the fine to Rs.22,000/- so that Rs.20,000/- could be awarded as compensation, from the amount recovered as fine.

11. The first respondent was a widow and police woman. On the facts and circumstances the learned Magistrate thought fit to impose only a fine and not imprisonment. When the conviction was set aside, the appellant filed a revision, challenging the non-grant of compensation of Rs.20,000/-. He did not however challenge the non-imposition of sentence of imprisonment. The High Court was, therefore, justified in holding

that once the sentence consists of only fine, the power under Section 357(3) could not be invoked for directing payment of compensation. The High Court was also justified in not converting the sentence from fine to imprisonment, so enable itself to award compensation, as the facts and circumstances of the case did not warrant imprisonment. Therefore, we are of the view that the order of High Court does not call for interference.

12. It is of some interest to note, though may not be of any assistance in this case, that the difficulty caused by the ceiling imposed by section 29(2) of the Code has been subsequently solved by insertion of section 143 in the Act (by Amendment Act No.55 of 2002) with effect from 6.2.2003. Section 143(1) provides that notwithstanding anything contained in the Code, all offences under Chapter XVII of the Act should be tried by a Judicial Magistrate of the First Class or by a Metropolitan Magistrate and the provisions of sections 262 to 265 of the Code (relating to summary trials) shall, as far as may be, apply to such trials. The proviso thereto provides that it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term extending one year and an amount of fine exceeding Rs.5,000/-, in case of conviction in a summary trial under that section. In view of conferment of such special power and jurisdiction upon the First Class Magistrate, the ceiling as to the amount of fine stipulated in section 29(2) of the Code is removed. Consequently, in regard to any prosecution for offences punishable under section 138 of the Act, a First Class Magistrate may impose a fine exceeding Rs.5000/-, the ceiling being twice the amount of the cheque.

13. This case relates to dishonour of cheque in the year 1995. Though the complainant-appellant has succeeded in obtaining a conviction, he has virtually lost in the sense he did not get compensation to recover the amount of the dishonoured cheque. As the limitation for filing a civil suit expired during the pendency of the appeal before the sessions court, the appellant

has also lost the opportunity of recovering the amount by way of civil suit. In view of this peculiar position, we requested Dr. Rajiv Dhavan, senior counsel, to assist us as an Amicus Curiae to suggest methods to improve the disposal of cases under section 138 of the Act and also improve the relief that could be granted in such cases. In the meantime a three Judge Bench of this Court in *Damodar S.Prabhu vs. Sayed Babalal H.* [2010 (5) SCC 663], addressed the question of reluctance of offenders to compound the cases at earlier stages of the case prosecution leading to a huge pendency of cheque dishonour cases, and issued the following guidelines proposing levy of 'a graded scale of fine' to encourage compounding at earlier stages of the case :

> "(a) That directions can be given that the Writ of Summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any costs on the accused.
>
> (b) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the Court deems fit.
>
> (c) Similarly, if the application for compounding is made before the Sessions Court or a High Court in revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of costs.
>
> (d) Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount.
>
> x x x x x
>
> The graded scheme for imposing costs is a means to encourage compounding at an early stage of litigation. In the status quo, valuable time of the Court is spent on the trial of these cases and the parties are not liable to pay any Court fee since the proceedings are governed by the Code of Criminal Procedure, even though the impact of the offence is largely confined to the private parties. Even though the imposition of costs by the competent court is a matter of discretion, the scale of costs has been suggested in the interest of uniformity. The competent Court can of course reduce the costs with regard to the specific facts and circumstances of a case, while recording reasons in writing for such variance. Bona fide litigants should of course contest the proceedings to their logical end."

14. We propose to address an aspect of the cases under section 138 of the Act, which is not dealt with in *Damodar S. Prabhu*. It is sometimes said that cases arising under section 138 of the Act are really civil cases masquerading as criminal cases. The avowed object of Chapter XVII of the Act is to "encourage the culture of use of cheques and enhance the credibility of the instrument". In effect, its object appears to be both punitive as also compensatory and restitutive, in regard to cheque dishonour cases. Chapter XVII of the Act is an unique exercise which blurs the dividing line between civil and criminal jurisdictions. It provides a single forum and single proceeding, for enforcement of criminal liability (for dishonouring the cheque) and for enforcement of the civil liability (for realization of the cheque amount) thereby obviating the need for the creditor to move two different fora for relief. This is evident from the following provisions of Chapter XVII of the Act.

(i) The provision for levy of fine which is linked to the

cheque amount and may extend to twice the amount of the cheque (section 138) thereby rendering section 357(3) virtually infructuous in so far as cheque dishonour cases.

(ii) The provision enabling a First Class Magistrate to levy fine exceeding Rs.5,000/- (Section 143) notwithstanding the ceiling to the fine, as Rs.5,000/- imposed by section 29(2) of the Code;

(iii) The provision relating to mode of service of summons (section 144) as contrasted from the mode prescribed for criminal cases in section 62 of the Code;

(iv) The provision for taking evidence of the complainant by affidavit (section 145) which is more prevalent in civil proceedings, as contrasted from the procedure for recording evidence in the Code;

(v) The provision making all offences punishable under section 138 of the Act compoundable.

15. The apparent intention is to ensure that not only the offender is punished, but also ensure that the complainant invariably receives the amount of the cheque by way of compensation under section 357(1)(b) of the Code. Though a complaint under section 138 of the Act is in regard to criminal liability for the offence of dishonouring the cheque and not for the recovery of the cheque amount, (which strictly speaking, has to be enforced by a civil suit), in practice once the criminal complaint is lodged under section 138 of the Act, a civil suit is seldom filed to recover the amount of the cheque. This is because of the provision enabling the court to levy a fine linked to the cheque amount and the usual direction in such cases is for payment as compensation, the cheque amount, as loss incurred by the complainant on account of dishonour of cheque, under section 357 (1)(b) of the Code and the provision for compounding the offences under section 138 of the Act. Most of the cases (except those where liability is denied) get

compounded at one stage or the other by payment of the cheque amount with or without interest. Even where the offence is not compounded, the courts tend to direct payment of compensation equal to the cheque amount (or even something more towards interest) by levying a fine commensurate with the cheque amount. A stage has reached when most of the complainants, in particular the financing institutions (particularly private financiers) view the proceedings under section 138 of the Act, as a proceeding for the recovery of the cheque amount, the punishment of the drawer of the cheque for the offence of dishonour, becoming secondary.

16. Having reached that stage, if some Magistrates go by the traditional view that the criminal proceedings are for imposing punishment on the accused, either imprisonment or fine or both, and there is no need to compensate the complainant, particularly if the complainant is not a 'victim' in the real sense, but is a well-to-do financier or financing institution, difficulties and complications arise. In those cases where the discretion to direct payment of compensation is not exercised, it causes considerable difficulty to the complainant, as invariably, by the time the criminal case is decided, the limitation for filing civil cases would have expired. As the provisions of Chapter XVII of the Act strongly lean towards grant of reimbursement of the loss by way of compensation, the courts should, unless there are special circumstances, in all cases of conviction, uniformly exercise the power to levy fine upto twice the cheque amount (keeping in view the cheque amount and the simple interest thereon at 9% per annum as the reasonable quantum of loss) and direct payment of such amount as compensation. Direction to pay compensation by way of restitution in regard to the loss on account of dishonour of the cheque should be practical and realistic, which would mean not only the payment of the cheque amount but interest thereon at a reasonable rate. Uniformity and consistency in deciding similar cases by different courts, not only increase the credibility

of cheque as a negotiable instrument, but also the credibility of courts of justice.

17. We are conscious of the fact that proceedings under section 138 of the Act cannot be treated as civil suits for recovery of the cheque amount with interest. We are also conscious of the fact that compensation awarded under section 357(1)(b) is not intended to be an elaborate exercise taking note of interest etc. Our observations are necessitated due to the need to have uniformity and consistency in decision making. In same type of cheque dishonour cases, after convicting the accused, if some courts grant compensation and if some other courts do not grant compensation, the inconsistency, though perfectly acceptable in the eye of law, will give rise to certain amount of uncertainty in the minds of litigants about the functioning of courts. Citizens will not be able to arrange or regulate their affairs in a proper manner as they will not know whether they should simultaneously file a civil suit or not. The problem is aggravated having regard to the fact that in spite of section 143(3) of the Act requiring the complaints in regard to cheque dishonour cases under section 138 of the Act to be concluded within six months from the date of the filing of the complaint, such cases seldom reach finality before three or four years let alone six months. These cases give rise to complications where civil suits have not been filed within three years on account of the pendency of the criminal cases. While it is not the duty of criminal courts to ensure that successful complainants get the cheque amount also, it is their duty to have uniformity and consistency, with other courts dealing with similar cases.

18. One other solution is a further amendment to the provision of Chapter XVII so that in all cases where there is a conviction, there should be a consequential levy of fine of an amount sufficient to cover the cheque amount and interest thereon at a fixed rate of 9% per annum interest, followed by award of such sum as compensation from the fine amount. This

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would lead to uniformity in decisions, avoid multiplicity of proceedings (one for enforcing civil liability and another for enforcing criminal liability) and achieve the object of Chapter XVII of the Act, which is to increase the credibility of the instrument. This is however a matter for the Law Commission of India to consider.

19. The appeal is dismissed. We place on record our appreciation for the assistance rendered by Dr. Rajiv Dhavan as Amicus Curiae.

D.G. Appeal dismissed.

A B C

GOA HOUSING BOARD
v.
RAMESHCHANDRA GOVIND PAWASKAR & ANR.
(Civil Appeal No. 8540 of 2011)

OCTOBER 11, 2011

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

Goa Land Use (Regulation) Act, 1991:

Object of its enactment – Discussed.

ss.2, 13 – Compensation – Determination of – Acquisition of 358730 sq.m. of land – LAO determined compensation @ Rs.18 per sq.m. which was affirmed by reference court – High Court awarded Rs.100 per sq.m. as compensation – On appeal, held: The acquired land vested in the respondent who was the tenant under the provisions of the Tenancy Act, therefore, the respondent could not have used the land for any purpose other than agriculture or even allow anyone else to use the same for any purpose other than agriculture – In view of permanent restriction regarding user and the bar in regard to any non-agricultural use, the acquired land would have to be valued only as an agricultural land and could not be valued with reference to sales statistics of other nearby lands which had the potential of being used for urban development – Merely by notifying the regional plan showing certain agricultural lands as earmarked for industrial purpose, those lands would not cease to be agricultural lands – At least 50% would have to be deducted from market value of freehold land with development potential to arrive at market value of such land which could be used only for agricultural purposes – Market value of neighbouring land being Rs.110/- per sq.m., appropriate compensation for acquired land would be 50%

thereof, that is Rs.55 per sq.m. – Goa, Daman and Diu Agricultural Tenancy Act, 1964.

Land acquisition – Compensation – Determination of, in respect of similarly situated land in the same area – Held: Similarly situated land in the same area, having the same advantages and acquired under the same notification should be awarded the same compensation – But if an acquired land is subject to a statutory covenant that it can be used only for agriculture and cannot be used for any other purpose necessarily it will have to be sold as agricultural land as the land owner cannot sell it for any purpose other than agriculture and the purchaser cannot sell it for any purpose other than agriculture.

Land acquisition – Vacant land vis-à-vis land in possession of long term lessee – Compensation – Determination of.

The Respondent was declared as the tenant of land measuring 374,000 sq. mts. under the Goa, Daman and Diu Agricultural Tenancy Act, 1964. On payment of the purchase price of Rs.59,980 determined under sections 18C and 18D of the Tenancy Act, a purchase certificate was issued to him under section 18H of the Tenancy Act confirming that he was deemed to be the purchaser of the said land under the provisions of the Tenancy Act, subject to the condition that the said land shall not be transferred without the previous sanction of the Mamlatdar under section 18K of the Tenancy Act. An extent of 358730 sq.m. of land belonging to the respondent was acquired in pursuance of the preliminary notification.

The LAO made an award determining the compensation payable as Rs.18 per sq.m. The reference court declared the compensation awarded at Rs.18 per

sq.m. to be reasonable and affirmed the award of the LAO. Aggrieved, the respondent filed an appeal before the High Court seeking increase in compensation. The High Court found that in regard to the adjoining land acquired under the same notification, compensation was awarded @ Rs.136.50 per sq.m. and as the land in Survey No.102/1 belonging to the landholder was much larger, the High Court deducted Rs.36.50 per sq.m. and awarded Rs.100 per sq.m. as the compensation. Both the Board and the landowners filed the appeals challenging the order of the High Court.

Disposing of the appeals, the Court

HELD: 1.1. Having regard to section 2 of the Goa, Daman and Diu Agricultural Tenancy Act, 1964, it is clear that notwithstanding anything contained in the Town and Country Planning Act or any scheme thereunder or the Land Revenue Code, no land which is vested in a tenant under the provisions of the Tenancy Act shall be used or allowed to be used for any purpose other than agriculture. In the instant case, the acquired land vested in the respondent-land owner who was the tenant under the provisions of the Tenancy Act. Therefore, the respondent could not have used the land for any purpose other than agriculture or even allow anyone else to use the same for any purpose other than agriculture. The only manner in which the land use could be changed was by an acquisition for a public purpose. Thus, the prohibition in regard to any use other than agriculture is not with reference to any person or holder with reference to the land itself. Any land which vested in a tenant under the provisions of the Tenancy Act attracted the bar contained in section 2 of the Land Use Act and there was a permanent bar against the use of such land for purposes other than agriculture either by the tenant in whom the

land is vested or any of his transferees or successors-in-interest. [Para 11]

1.2. There can be no doubt that similarly situated land in the same area, having the same advantages and acquired under the same notification should be awarded the same compensation. But if an acquired land is subject to a statutory covenant that it can be used only for agriculture and cannot be used for any other purpose necessarily it will have to be sold as agricultural land as the land owner cannot sell it for any purpose other than agriculture and the purchaser cannot sell it for any purpose other than agriculture. As a consequence, the price fetched for such land will be low even if it is situated near any urban area. But if the same land is not subject to any prohibition or restrictive covenant regarding use and has the potential of being developed either as a residential layout or put to commercial or industrial use, the land will fetch a much higher price; and the market value of such other land with development potential can be determined with reference to the sale price of nearby residential plots by making appropriate deduction for development. On the other hand if the land is to be used only for agricultural purposes, it may not be possible to arrive at the market value thereof with reference to the market value of nearby residential plots. Therefore, in regard to the land in question, in view of the permanent restriction regarding user, that is it should only be used for agricultural purposes, and the bar in regard to any non-agricultural use, it will have to be valued only as an agricultural land and cannot be valued with reference to sales statistics of other nearby lands which have the potential of being used for urban development. [Paras 11, 12, 17]

Administrator General of West Bengal v. Collector, Varanasi **1988 (2) SCC 150: 1988 (2) SCR 1025;** *Chimanlal*

Hargovinddas v. Special Land Acquisition Officer, Poona **1988 (3) SCC 751: 1988 (1) Suppl. SCR 531;** *Subh Ram v. State of Haryana* **2010 (1) SCC 444 : 2009 (15) SCR 287 – relied on.**

K. Periasami v. Sub-Tehsildar (Land Acquisition) **1994 (4) SCC 180;** *Delhi Development Authority v. Bali Ram Sharma* **2004 (6) SCC 533 – referred to.**

2. The matter can be seen from a slightly different perspective. A vacant land has a particular value. If such land is in the occupation of a long term lessee, and the owner wants to sell it without possession, he will only get a far lesser price that what he would get as price for the same land if vacant possession can be given to the purchaser. If such land in the occupation of a long term lessee is acquired, as the lessee's rights are also taken over, the compensation awarded for the land will be the full value as awarded for any neighbouring property which is not subject to any tenancy. But the entire compensation will not be received by the land owner/ landlord. The landlord will have to share the compensation with the long term lessee. In other words, the landlord will not get the entire value as compensation but will only get a part of the market value and the tenant will get the balance. In that sense even if the market value of the land without any restrictive covenants is considered to be Rs.110 per sq.m., having regard to the fact that the land is incapable of being used for purposes other than agriculture and the price of Rs.110 is arrived at with reference to a land which can be used for all purposes, an appropriate percentage will have to be deducted from the value of Rs.110 per sq.m. to arrive at the land subject to the statutory restriction regarding use. On the facts and circumstances, having regard to the prohibition regarding use of land for any purpose other than agriculture, the land will have to be treated and valued as agriculture land without any development

potential for being used as residential/commercial/ industrial plots. At least 50% will have to be deducted from the market value of freehold land with development potential to arrive at the market value of such land which can be used only for agricultural purposes. The market value of neighbouring land (which is not subject to the prohibition under Land Use Act) is determined as Rs.110/ - per sq.m. An appropriate compensation for the acquired land should be 50% thereof, that is Rs.55 per sq.m. [Paras 18, 19]

Prohibition under Section 2 of Goa Land Use (Regulation) Act, 1991 – Inapplicability to the acquired land.

3.1. The object of the Goa Land Use (Regulation) Act, 1991 is to ensure that agricultural land which vested in a tenant as a deemed purchaser on account of special provisions of the Tenancy Act subject to payment of a nominal price, (thereby denying the ownership and the market value to the original owner) is not sold or used for any non-agricultural purpose. If the land was non-agricultural land, the tenant would not have got the title to the land as a deemed purchaser and the land would have continued under the ownership of the landlord. Therefore the object of the Act is that no tenant in whom a land had vested under the provisions of the Tenancy Act shall use the land for any purpose other than agriculture. To see that he does not easily defeat the said bar by transferring the property, a prohibition was attached to the land itself by providing that no land which vested in a tenant under the Tenancy Act shall be used or allowed to be used for any purpose other than agriculture. But for the exemption contained in section 3, when such a property is acquired under the Land Acquisition Act for public purpose, the prohibition under section 2 in regard to use of the land for any purpose other than agriculture would have continued to apply.

Therefore it was necessary to make an exemption in regard to the lands acquired for public purpose. That is, even though a land which vested in a tenant under the Tenancy Act was subject to a covenant that it could not be used for any agricultural purpose in future, once it was acquired under the Land Acquisition Act for a public purpose and vested in the government, the prohibition contained under section 2 would cease to operate, and the state government or the beneficiary of acquisition could use it for any purpose. Section 3 is therefore a provision which entitles the State Government or beneficiary of acquisition to use it for any purpose other than agriculture. The said section will not enable the landowner to get the market value of the land as one with non-agricultural potential. In so far as the landowner is concerned, the compensation to which he is entitled would be what he would have got if he had sold it in open market to a willing purchaser who could have used it only for agricultural purpose. [Para 22]

3.2. The contention was raised on behalf of the respondent that by notification issued under section 13 of the Goa, Daman and Diu Town & Country Planning Act, 1974, the said land (Sy. No.102/1) along with other lands in Colvale village were notified for proposed change of use from cultivable land to industrial land; and that by a notification issued under section 15 read with section 17 of the Town Planning Act, the Chief Town Planner notified the amended regional plan for Goa as approved by the government which showed that the said land was earmarked for industrial use. The said contention based on section 15 of Town Planning Act has no merit. Merely by notifying the regional plan showing certain agricultural lands as earmarked for industrial purpose, those lands will not cease to be agricultural lands. Publication of a regional plan under section 15, therefore, only means that on and from the date of

publication of the regional plan, any development programme or development work undertaken should conform to the provisions of the Regional plan and nothing more. As the land was not converted to non-agricultural industrial use under Sections 30 and 32 of the Goa, Daman and Diu Land Revenue Code, 1968, the land did not become industrial land. Once the Land Use Act came into force, notwithstanding anything contained in the Town Planning Act or in any plan or scheme made thereunder, a land vested in a tenant under the Tenancy Act could not be used or allowed to be used for any purpose other than agriculture. [Paras 23, 24]

4. Section 18A of the Tenancy Act provides that on the Tiller's Day (that is, 8.10.1976, the date of introduction of Goa, Daman and Diu Agricultural Tenancy (Fifth Amendment) Act, 1976 in the Legislative Assembly), every tenant shall subject to the other provisions of the Act, be deemed to have purchased from his landlord the land held by him as a tenant and such land shall vest in him free from such encumbrances on that day. Section 18E provides that on determination of the purchase price by the Mamlatdar under section 18C, the tenant shall deposit the purchase price with the Mamlatdar as provided in section 18E. Section 18H provides that on deposit of the purchase price the Mamlatdar shall issue a certificate of purchase to the tenant-purchaser in respect of the land; and the purchase will be in effective on tenant-purchaser's failure to pay the purchase price. Section 18J provides that where purchase of any land by the tenant under section 18A becomes ineffective under section 18C or 18H or where the tenant fails to exercise the right to purchase the land held by him within the specified period under section 18B, the Mamlatdar may direct the land or part thereof, shall be disposed of in the manner provided therein. In this case, in terms of section 18E, the Mamlatdar required the respondent to deposit the

purchase price of Rs.59,840/- and on such deposit, a certificate of purchase was issued to the respondent under section 18H only on 6.5.1993. Until such a certificate was issued, there was a possibility of resumption and disposal under section 18J. By the time, the certificate of purchase in regard to the land was issued on 6.5.1993, Goa Land Use (Regulations) Act, 1991 had came into force on 2.11.1990. Further, under section 30 of the Land Revenue Code, no land used for agriculture shall be used for any non-agricultural purpose except with the permission of the Collector under section 32 of the Code. Section 32 provides for the procedure for conversion of use of land from agricultural to non-agricultural use. It requires an application to be made by the land holder to the Collector and a permission being granted by Collector for conversion, subject to payment of the fees prescribed therein. It is not the case of the respondent that the land has been converted to non-agricultural use under sections 30 and 32 of the Land Revenue Code. In fact, before the issue of a purchase certificate on 6.5.1993, it may not be possible for a tenant-purchaser to apply for conversion to non-agricultural use. It is, thus, clear that the land in question was agricultural land as on the date when the Land Use Act came into force and when the land was acquired under the Land Acquisition Act. Therefore, the contention that it was not agricultural land, is rejected. Consequently the appeal filed by the Board is accepted and the compensation awarded for land from Rs.100/- per sq.m. is reduced to Rs.55 per sq.m. The respondent would be entitled to all statutory benefits as awarded by the High Court. As a consequence the appeal filed by the landowner for increase of compensation stands rejected. [Paras 25, 26]

6. CA No.8542 of 2011 is related to acquisition of 9,153 sq.m. of land in the said Sy. No.102/1 of Colvale village under preliminary notification dated 26.9.1991

belonging to the respondent. This appeal related to an acquisition initiated under preliminary notification dated 26.9.1991. In this case, the relevant date for purpose of determination of market value is 26.9.1991, about one and half years after 23.3.1990 (the date of the relied upon sale transaction). By applying the same principle, the market value of the land as on 26.9.1991 will be Rs.90 per sq.m. The said value is with reference to land with potential for development. As the land acquired was subject to a prohibition under the Land Use Act, a deduction of 50% is made for to arrive at the value of the land with agricultural potential only. Consequently, the market value of the acquired land is determined as Rs.45/- per sq.m. [Para 27]

Case Law Reference:

1994 (4) SCC 180	**referred to**	**Para 12**
2004 (6) SCC 533	**referred to**	**Para 12**
1988 (2) SCR 1025	**relied on**	**Para 13**
1988 (1) Suppl. SCR 531	**relied on**	**Para 14**
2009 (15) SCR 287	**relied on**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8540 of 2011.

From the Judgment & Order dated 26.9.2008 of the High Court of Bombayin FA No. 216 of 2003.

WITH

C.A. Nos. 8541 and 8542 of 2011.

S. Ganesh, L.N. Rao, Dhruv Mehta, Pratap Venugopal, Surekha Raman, Dileep P., P.K. Jain, Varun Singh, Namrata Sood, K.J. John & Co., Shriniwas R. Khalap, Wajeeh Shafiq, Anupam Lal Das, A. Raghunath, Yashraj Singh Deora, Sriram

Krishna, Sarv Mitter, Mitter & Mitter Co. Siddharth Bhatnagar, Pawan Kumar Bansal and T. Mahipal for the appearing parties.

The Judgment of the Court was delivered by

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

CA Nos. 8540 and 8541 of 2011 [@ SLP(c) Nos.149 and 9591 of 2009]

2. These two appeals arise out of the judgment dated 26.9.2008 in FA No.216/2003, the first by the Goa Housing Board and the second by the land owner. As the ranks of the parties differ, the Goa Housing Board (appellant in the first matter and second respondent in the second matter) for whose benefit the acquisition was made will be referred to as the 'Board' or the appellant. Rameshchandra Govind Pawaskar (first respondent in the first matter and appellant in the second matter) whose land was acquired will be referred to as the 'respondent'. The Land Acquisition Officer (second respondent in the first matter and first respondent in the second matter) will be referred to as 'the LAO'.

3. By an order dated 31.1.1977 passed by the Mamlatdar, Bardez, the respondent was declared as the tenant of Survey No.102/1, Colvale village, Bardez, Goa measuring 374,000 sq. mts. under the Goa, Daman and Diu Agricultural Tenancy Act, 1964 ('Tenancy Act' for short). On payment of the purchase price of Rs.59,980 determined under sections 18C and 18D of the Tenancy Act, a purchase certificate dated 6.5.1993 was issued to him under section 18H of the Tenancy Act confirming that he was deemed to be the purchaser of the said land under the provisions of the Tenancy Act, subject to the condition that the said land shall not be transferred without the previous sanction of the Mamlatdar under section 18K of the Tenancy Act. An extent of 358730 sq.m. of land in the said Survey No.102/1 belonging to the respondent was acquired in pursuance of the preliminary notification dated 9.6.1994

(gazetted on 16.6.1994) corrected by corrigendum dated 26.9.1994 (gazetted on 27.9.1994).

4. The LAO made an award dated 28.2.2003 determining the compensation payable as Rs.18 per sq.m. The respondent sought reference to the civil court for claiming a higher compensation. The Reference court by its judgment and award dated 28.2.2003 declared the compensation awarded at Rs.18 per sq.m. to be proper and reasonable and affirmed the award of the LAO. Feeling aggrieved, the respondent filed an appeal before the High Court seeking increase in compensation.

5. Before the High Court, the Board contended that having regard to the provisions of the Goa Land Use (Regulation) Act, 1991 ('Land Use Act' for short), a tenant in whom the land had vested under the Tenancy Act could not use it or allow it to be used for any purpose other than agriculture; and therefore the valuation of such land could not be with reference to its potential for use for non-agricultural building purposes, but should be only as agricultural land. In support of its contention, the Board relied upon a decision of a division bench of the High Court in *Janaki N. Morajkar vs. Special Land Acquisition Officer* (First Appeal No.221/2003 decided on 9.2.2005). It was therefore submitted that the market value of agricultural land determined by the reference court at Rs.18/- per sq.m. affirming the determination by the LAO was correct and there was no need to increase the compensation.

6. The High Court found that in regard to the adjoining land (Survey No.102/1A of Colvale) acquired under the same notification, compensation was awarded at the rate of Rs.136.50 per sq.m. As the land in Survey No.102/1 belonging to the landholder was much larger, the High Court deducted Rs.36.50 per sq.m. and awarded Rs.100 per sq.m. as the compensation. Though the High Court noticed the contention of the Board with reference to the prohibition under the Land Use Act, and the decision in *Janaki N. Morajkar*, it did not choose to follow the said decision. Nor did it hold that the

decision in *Janaki N. Morajkar* was wrongly decided or inapplicable. The High Court avoided the issue by observing that it was not necessary to go into the larger controversy as to whether *Janaki N.Morajkar* was rightly decided. The High Court held that the Board cannot pick and choose only some of the acquired lands for applying the provisions of the Land Use Act; that the contention based on the Land Use Act was not taken in regard to other lands acquired under the same notification, was evident from the decision in *Goa Housing Board vs. Pandurang V.Sawant* – (FA NO.204/2003 dated 16.4.2008); that compensation should be on the same lines in regard to all lands acquired under the same notification and therefore it was not necessary to examine the contention based on Land Use Act, that the valuation should be only as the agricultural land.

7. Feeling aggrieved the Board has filed an appeal contending as follows:

(a) In view of the bar contained in the Land Use Act in regard to use of land vested in a tenant under the provisions of the Tenancy Act for any purpose other than agriculture, compensation could not be determined with reference to the sales statistics relating to residential plots on the assumption that the agricultural land in question had development potential for residential use.

(b) Having regard to clause 8 of section 24 of the Land Acquisition Act which provides that "the court shall not take into consideration any increase to the value of the land on account of it being put to any use which is forbidden by any law or opposed to public policy" and the bar contained in the Land Use Act in regard to any use other than agriculture, the High Court could not have taken note of the development and building potential of the acquired land for the purpose of determining compensation.

(c) The High Court ought to have followed the decision of another division bench of the High Court in *Janaki N. Morajkar,* on an identical issue. If the High Court was not in agreement with the view in *Janaki N. Morajkar,* it ought to have either referred it to a larger bench, or distinguished it or held that it was inapplicable. It could not have ignored the decision.

8. The respondent has also filed an appeal contending that compensation at Rs.110 per sq.m. was very low and claiming higher compensation. On the contentions urged, the following questions arise :

(i) Having regard to section 2 of the Land Use Act, whether the acquired land should be valued only as agricultural land or whether it could be valued as land with development potential for being used as building sites?

(ii) Whether the compensation awarded by the High Court is excessive as contended by the Board or inadequate as contended by the respondent and what should be the compensation?

9. At the outset we may notice two subsequent events. The first is that the special leave petition against the decision in *Janaki N. Morajkar* was dismissed by this Court (*Janaki N. Morajkar v. Spl. LAO* - SLP(C) No.13195/2003 decided on 19.7.2005). The second is that the appeal against the decision in *Pandurang V.Sawant* was allowed by this Court. The market value of the acquired land, if it was not subject to any prohibition regarding use under the Land Use Act, is now settled by the decision of this court in regard to the neighbouring land, in *Goa Housing Board v. Pandurang V.Sawant* [CA Nos.1992-93/ 2010 decided on 19.2.2010). The said decision relates to the adjoining land (Sy. No.102/1A) which was the subject matter of First Appeal No.204/2003 before the High Court. In that case also the Land Acquisition Officer had awarded Rs.18 per sq.m. The reference court had increased the compensation to Rs.150

per sq.m. and on appeal the High Court by judgment dated 16.4.2008 had reduced it to Rs.136.50. But subsequently by order dated 29.1.2009 the judgment dated 16.4.2008 reducing the compensation to Rs.136.50 was corrected and the compensation was determined as Rs.147 per sq.m. This court reduced the compensation to Rs.110 per sq.m. instead of Rs.147 per sq.m. Thus the market value of freehold land which is not subject to any restriction regarding use or otherwise as on 16.6.1994 was Rs.110/- per sq.m. This would mean that if the contention of the respondent is accepted and the Land Use Act is found to be inapplicable the compensation will have to be increased from Rs.100 to Rs.110 per sq.m. However if the contention of the Board that the prohibition in regard to the land use applied to the land in question having regard to the provisions of the Land Use Act is accepted, then the market value will have to be determined taking note of such provision.

10. We may at this juncture refer to the provisions of the Goa Land Use Regulation Act, 1991. As it is a short Act and every provision thereof is relevant, we extract below the said Act in entirety :

"An Act to provide for regulation of use of agricultural land for non-agricultural purposes.

Be it enacted by the Legislative Assembly of Goa in the Forty-second Year of the Republic of India as follows :-

1. Short title, extent and commencement. – (1) This Act may be called the Goa Land Use (Regulation) Act, 1991.

(2) It extends to the whole of the State of Goa.

(3) It shall be deemed to have come into force with effect from the 2nd day of November, 1990.

2. Regulation of use of land. – Notwithstanding anything contained in the Goa, Daman and Diu Town and Country Planning Act, 1974 (Act 21 of 1975), or in any plan or scheme made thereunder, or in the Goa Land Revenue Code, 1968 (Act 9 of 1969), no land which is vested in a tenant under the provisions of the Goa, Daman and Diu Agricultural Tenancy Act, 1964 (Act 7 of 1964) shall be used or allowed to be used for any purpose other than agriculture.

Explanation:- The expression "agriculture", "land" and "tenant" shall have the same meaning assigned to them under the Goa, Daman and Diu Agricultural Tenancy Act, 1964 (Act 7 of 1964).

3. Exemption. – The provisions of this Act shall not apply to acquisition of any land vested in a tenant under the Goa, Daman and Diu Agricultural Tenancy Act, 1964 (Act 7 of 1964) by the State for a public purpose under the provision of the Land Acquisition Act, 1894 (Central Act 1 of 1894)."

11. Having regard to section 2 of the said Act, it is clear that notwithstanding anything contained in the Town & Country Planning Act or any scheme thereunder or the Land Revenue Code, no land which is vested in a tenant under the provisions of the Tenancy Act shall be used or allowed to be used for any purpose other than agriculture. In this case it is not in dispute that the acquired land in question vested in the land owner who was the tenant under the provisions of the Tenancy Act. Therefore it cannot be disputed that the respondent could not have used the land for any purpose other than agriculture or even allow anyone else to use the same for any purpose other than agriculture. The only manner in which the land use could be changed was by an acquisition for a public purpose. Thus the prohibition in regard to any use other than agriculture is not with reference to any person or holder with reference to the land itself. Any land which vested in a tenant under the provisions of the Tenancy Act attracted the bar contained in section 2 of the Land Use Act and there was a permanent bar against the use of such land for purposes other than agriculture either by

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the tenant in whom the land is vested or any of his transferees or successors-in-interest.

12. The question is whether such prohibition will affect the market value of the land. The respondent submitted that this court had repeatedly held that all lands situated in the same area and acquired by the same notification, should be awarded the same compensation. He relied upon the judgment in *K. Periasami v. Sub-Tehsildar (Land Acquisition)* [1994 (4) SCC 180] and *Delhi Development Authority v. Bali Ram Sharma* [2004 (6) SCC 533]. There can be no doubt that similarly situated land in the same area, having the same advantages and acquired under the same notification should be awarded the same compensation. But the question is when one land is a freehold land not subject to any restrictions in regard to user and the adjoining land though similarly situated is subject to a permanent restriction regarding user requiring it to be used only for agricultural purposes, the question is whether the two lands can be termed as comparable lands which should be subjected to the same compensation. We may give a few examples to illustrate the position:

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(i) A person constructs two identical houses adjoining each other. He lets out one of them and keeps the other vacant. After some years he sells both the properties. The house sold with vacant possession will fetch a better price than the adjoining premises which is in occupation of a tenant and therefore sold without possession. The fact that both properties are situated adjoining each other and have the same area of construction and face the same road will not mean that the price they will fetch will be the same.

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(ii) There are two adjoining properties belonging to the same owner. One falls under area earmarked as commercial and the other falls under area earmarked as residential. Though they are similarly situated, the land which is capable of commercial use is likely to fetch a

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higher price than a land earmarked for residential use.

(iii) An agricultural land with no development potential sold to another agriculturalist for agricultural purposes will fetch a price which will be lower than the price fetched by an agricultural land with potential of development into residential or commercial plots sold for development into a layout of plots.

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(iv) A small plot measures 10' x 20' and is suitable for construction of a shop. If it is to be sold, it will fetch a good price at par with prevailing market value. But if the said plot is subject to an easementary right of passage in favour of the owner of the property to the rear of the said plot and also subject to easementary rights of light and air in favour of the owners of plots on either side, the plot cannot be used for construction at all and will have to be kept as a vacant plot. Necessarily its market value will be far less than the value of such a plot which is not subject to such easements.

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13. In *Administrator General of West Bengal vs. Collector, Varanasi* [1988 (2) SCC 150], this court observed thus in regard to determination of market value :

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"The market-value of a piece of property, for purposes of Section 23 of the Act, is stated to be the price at which the property changes hands from a willing seller to a willing, but not too anxious a buyer, dealing at arms length. The determination of market-value, as one author put it, is the prediction of an economic event, viz, the price-outcome of a hypothetical sale, expressed in terms of probabilities. Prices fetched for similar lands with similar advantages and potentialities under bonafide transactions of sale at or about the time of the preliminary notification are the usual; and indeed the best, evidences of market-value. Other methods of valuation are resorted to if the evidence of sale of similar lands is not available."

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14. In *Chimanlal Hargovinddas vs. Special Land Acquisition Officer, Poona* [1988 (3) SCC 751] this court set out the principle regarding determination of market value. One of the principles mentioned is as under :

> "The determination has to be made standing on the date line of valuation (date of publication of notification under Section 4) as if the valuer is a hypothetical purchaser willing to purchase land from the open market and is prepared to pay a reasonable price as on that day. It has also to be assumed that the vendor is willing to sell the land at a reasonable price."

Thereafter, this court stated that the exercise of determining the market value has to be taken in a commonsense manner as a prudent man in a business world would do and gave some illustrative facts which have a bearing on the value :

" **Plus factors**	**Minus factors**
1. Smallness of size.	1. Largeness of area.
2. Proximity to a road.	2. Situation in the interior at a distance from the road.
3. Frontage on a road.	3. Narrow strip of land with very small frontage compared to depth
4. Nearness to developed area.	4. Lower level requiring the depressed portion to be filled up.
5. Regular shape.	5. Remoteness from developed locality.
6. Level vis-a-vis land under acquisition	6. **Some special disadvantageous factor which would deter a purchaser**.
7. Special value for an owner of an adjoining property to whom it may have some very special advantage."	

(emphasis supplied)

15. In *Subh Ram vs. State of Haryana* [2010 (1) SCC 444], this court observed :

> "It is in this context, in some cases, to avoid the need to differentiate the lands acquired under a common notification for a common purpose, and to extend the benefit of a uniform compensation, courts have observed that the purpose of acquisition is also a relevant factor. The said observation may not apply in all cases and all circumstances as the general rule is that the land owner is being compensated for what he has lost and not with reference to the purpose of acquisition.
>
> The purpose of acquisition can never be a factor to increase the market value of the acquired land. We may give two examples. Where irrigated land belonging to 'A' and dry land of 'B' and waste land of 'C' are acquired for purpose of submergence in a dam project, neither 'B' nor 'C' can contend that they are entitled to the same higher compensation which was awarded for the irrigated land, on the ground that all the lands were acquired for the same purpose. Nor can the Land Acquisition Collector hold that in case of acquisition for submergence in a dam project, irrigated land should be awarded lesser compensation equal to the value of waste land, on the ground that purpose of acquisition is the same in regard to both. The principle is that the quality (class) of land, the situation of the land, the access to the land are all relevant factors for determination of the market value."

16. While section 23 of the Land Acquisition Act enumerates the matters to be considered in determining

compensation, section 24 enumerates the matters to be neglected in determining compensation. It provides :

> "But the court shall not take into consideration— x x x x x
>
> *fifthly*, any increase to the value of the land acquired likely to accrue from the use to which it till be put when acquired;
>
> x x x x
>
> *eighthly*, any increase to the value of the land on account of its being put to any use which is forbidden by law or opposed to public policy."

It is thus clear that if there is a prohibition regarding use of the land for purposes other than agriculture, the value of such land on account of the same being put to commercial, residential or industrial use cannot form the basis of determining the market value.

17. Where an acquired land is subject to a statutory covenant that it can be used only for agriculture and cannot be used for any other purpose necessarily it will have to be sold as agricultural land as the land owner cannot sell it for any purpose other than agriculture and the purchaser cannot sell it for any purpose other than agriculture. As a consequence, the price fetched for such land will be low even if it is situated near any urban area. But if the same land is not subject to any prohibition or restrictive covenant regarding use and has the potential of being developed either as a residential layout or put to commercial or industrial use, the land will fetch a much higher price; and the market value of such other land with development potential can be determined with reference to the sale price of nearby residential plots by making appropriate deduction for development. On the other hand if the land is to be used only for agricultural purposes, it may not be possible to arrive at the market value thereof with reference to the market value of nearby residential plots. Therefore we are of the considered view that in regard to the land in question, in

view of the permanent restriction regarding user, that is it should only be used for agricultural purposes, and the bar in regard to any non-agricultural use, it will have to be valued only as an agricultural land and cannot be valued with reference to sales statistics of other nearby lands which have the potential of being used for urban development.

18. We may also look at the matter from a slightly different perspective. A vacant land has a particular value. If such land is in the occupation of a long term lessee, and the owner wants to sell it without possession, he will only get a far lesser price that what he would get as price for the same land if vacant possession can be given to the purchaser. If such land in the occupation of a long term lessee is acquired, as the lessee's rights are also taken over, the compensation awarded for the land will be the full value as awarded for any neighbouring property which is not subject to any tenancy. But the entire compensation will not be received by the land owner/landlord. The landlord will have to share the compensation with the long term lessee. In other words, the landlord will not get the entire value as compensation but will only get a part of the market value and the tenant will get the balance. In that sense even if the market value of the land without any restrictive covenants is considered to be Rs.110 per sq.m., having regard to the fact that the land is incapable of being used for purposes other than agriculture and the price of Rs.110 is arrived at with reference to a land which can be used for all purposes, an appropriate percentage will have to be deducted from the value of Rs.110 per sq.m. to arrive at the land subject to the statutory restriction regarding use.

19. On the facts and circumstances, having regard to the prohibition regarding use of land for any purpose other than agriculture, the land will have to be treated and valued as agriculture land without any development potential for being used as residential/commercial/industrial plots. We are of the view that at least 50% will have to be deducted from the market

value of freehold land with development potential to arrive at the market value of such land which can be used only for agricultural purposes. As we have already determined the market value of neighbouring land (which is not subject to the prohibition under Land Use Act) as Rs.110/- per sq.m. We are of the view that an appropriate compensation for the acquired land should be 50% thereof, that is Rs.55 per sq.m.

20. We may now deal with contentions of the respondent that the prohibition under section 2 of the Land Use Act is inapplicable to the acquired land.

21. The respondent relied on section 3 of the Land Use Act relating to exemption and provides that the provisions of the Land Use Act shall not apply to acquisition of any land vested in a tenant under the Tenancy Act, by the State for a public purpose under the provisions of the Land Acquisition Act, 1894. He contended that once a notification is issued proposing to acquire the land under the Land Acquisition Act, the provisions of the Land Use Act, in particular, the prohibition contained in section 2 will not apply and the acquired land will have to be valued as a freehold land without any restrictions.

22. Though the said argument appears to be attractive at first blush, on a careful reading of the section, we find it to be without merit. The object of the Land Use Act is to ensure that agricultural land which vested in a tenant as a deemed purchaser on account of special provisions of the Tenancy Act subject to payment of a nominal price, (thereby denying the ownership and the market value to the original owner) is not sold or used for any non-agricultural purpose. If the land was non-agricultural land, the tenant would not have got the title to the land as a deemed purchaser and the land would have continued under the ownership of the landlord. The tenant got the land under the statute, because it was agricultural land and he was the tenant thereof, that too at a very nominal price, by virtue of the special provisions of the Tenancy Act. Therefore the object of the Act is that no tenant in whom a land had vested

under the provisions of the Tenancy Act shall use the land for any purpose other than agriculture. To see that he does not easily defeat the said bar by transferring the property, a prohibition was attached to the land itself by providing that no land which vested in a tenant under the Tenancy Act shall be used or allowed to be used for any purpose other than agriculture. But for the exemption contained in section 3, when such a property is acquired under the Land Acquisition Act for public purpose, the prohibition under section 2 in regard to use of the land for any purpose other than agriculture would have continued to apply. Therefore it was necessary to make an exemption in regard to the lands acquired for public purpose. That is, even though a land which vested in a tenant under the Tenancy Act was subject to a covenant that it could not be used for any agricultural purpose in future, once it was acquired under the Land Acquisition Act for a public purpose and vested in the government, the prohibition contained under section 2 would cease to operate, and the state government or the beneficiary of acquisition could use it for any purpose. Section 3 is therefore a provision which entitles the State Government or beneficiary of acquisition to use it for any purpose other than agriculture. The said section will not enable the landowner to get the market value of the land as one with non-agricultural potential. In so far as the landowner is concerned, the compensation to which he is entitled would be what he would have got if he had sold it in open market to a willing purchaser who could have used it only for agricultural purpose.

23. The respondent referred to and relied upon the Preamble of the Act which provides that the object of the Act is to provide for regulation and use of agricultural land for non-agricultural purposes. He contended that if on the date when the Land Use Act came into force, the land in question had ceased to be agricultural land then the Land Use Act would be inapplicable. He submitted that by notification dated 9.11.1988 (gazetted on 24.11.1988) issued under section 13 of the Goa, Daman and Diu Town & Country Planning Act, 1974 (for short

'Town Planning Act'), the said land (Sy. No.102/1) along with other lands in Colvale village were notified for proposed change of use from cultivable land to industrial land; and that by a notification dated 12.3.1990 (gazetted on 5.4.1990) issued under section 15 read with section 17 of the Town Planning Act, the Chief Town Planner notified the amended regional plan for Goa as approved by the government which showed that the said land was earmarked for industrial use. The respondent contended that on 5.4.1990, the land became an industrial land and consequently ceased to be agricultural land before the Land Use Act came into force with retrospective effect from 2.11.1990; and therefore the Land Use Act did not apply to the land in question (Sy. No.102/1).

24. Merely by notifying the regional plan showing certain agricultural lands as earmarked for industrial purpose, those lands will not cease to be agricultural lands. Section 15 notification is only an initial step in a long process under the Town Planning Act. Section 18 provided for declaration of planning area. Section 29 relates to preparation of an outline development plan. Section 31 provides for preparation of comprehensive development plan. Section 37 provides when the development plan will come into operation. Section 41 empowers the state to acquire any land reserved, required, or designated in a development plan as a land needed for a public purpose. Section 42 provides that on and from the date on which a public notice of the preparation of a development plan is published under section 35(1), every land use covered by the development plan shall conform to the provisions of the Act. Publication of a regional plan under section 15 therefore only means that on and from the date of publication of the regional plan, any development programme or development work undertaken should conform to the provisions of the Regional plan and nothing more. As the land was not converted to non-agricultural industrial use under Sections 30 and 32 of the Goa, Daman and Diu Land Revenue Code, 1968 ('Land Revenue Code' for short) the land did not become industrial

land. Therefore the said contention based on section 15 of Town Planning Act has no merit. Once the Land Use Act came into force, notwithstanding anything contained in the Town Planning Act or in any plan or scheme made thereunder, a land vested in a tenant under the Tenancy Act could not be used or allowed to be used for any purpose other than agriculture.

25. Section 18A of the Tenancy Act provides that on the Tiller's Day (that is, 8.10.1976, the date of introduction of Goa, Daman and Diu Agricultural Tenancy (Fifth Amendment) Act, 1976 in the Legislative Assembly), every tenant shall subject to the other provisions of the Act, be deemed to have purchased from his landlord the land held by him as a tenant and such land shall vest in him free from such encumbrances on that day. Section 18E provides that on determination of the purchase price by the Mamlatdar under section 18C, the tenant shall deposit the purchase price with the Mamlatdar as provided in section 18E. Section 18H provides that on deposit of the purchase price the Mamlatdar shall issue a certificate of purchase to the tenant-purchaser in respect of the land; and the purchase will be in effective on tenant-purchaser's failure to pay the purchase price. Section 18J provides that where purchase of any land by the tenant under section 18A becomes ineffective under section 18C or 18H or where the tenant fails to exercise the right to purchase the land held by him within the specified period under section 18B, the Mamlatdar may direct the land or part thereof, shall be disposed of in the manner provided therein. Section 18K of the Tenancy Act provides that no land purchased by a tenant under Chapter IIA of the Tenancy Act shall be transferred by sale, gift, mortgage, lease or assignment, without the previous sanction of the Mamlatdar. In this case, in terms of section 18E, the Mamlatdar required the respondent to deposit the purchase price of Rs.59,840/- and on such deposit, a certificate of purchase was issued to the respondent under section 18H only on 6.5.1993. It should be noted that until such a certificate was issued, there was a possibility of resumption and disposal under section 18J. By the time, the

certificate of purchase in regard to the land was issued on 6.5.1993, Goa Land Use (Regulations) Act, 1991 had came into force on 2.11.1990. Further, under section 30 of the Land Revenue Code, no land used for agriculture shall be used for any non-agricultural purpose except with the permission of the Collector under section 32 of the Code. Section 32 provides for the procedure for conversion of use of land from agricultural to non-agricultural use. It requires an application to be made by the land holder to the Collector and a permission being granted by Collector for conversion, subject to payment of the fees prescribed therein. It is not the case of the respondent that the land has been converted to non-agricultural use under sections 30 and 32 of the Land Revenue Code. In fact, before the issue of a purchase certificate on 6.5.1993, it may not be possible for a tenant-purchaser to apply for conversion to non-agricultural use. It is, thus, clear that the land in question was agricultural land as on the date when the Land Use Act came into force and when the land was acquired under the Land Acquisition Act. Therefore, the contention that it was not agricultural land, is rejected.

26. Consequently we allow the appeal filed by the Board and reduce the compensation awarded for land from Rs.100/- per sq.m. to Rs.55 per sq.m. The respondent will be entitled to all statutory benefits as awarded by the High Court. As a consequence the appeal filed by the landowner for increase of compensation stands rejected.

CA No. 8542 2011 [@ SLP (C) No.3723/2009]

27. This appeal relates to acquisition of 9,153 sq.m. of land in the said Sy. No.102/1 of Colvale village under preliminary notification dated 26.9.1991 belonging to the respondent. The facts are the same as in the first two appeals as this appeal relates to acquisition of the another portion of the same land belonging to the same respondent, the only difference being that this appeal relates to an acquisition initiated under preliminary notification dated 26.9.1991. In the other two

appeals, we had relied upon the decision of this Court in *Goa Housing Board vs. Panduranga V Samant* [CA Nos.1992-93 of 2010 decided on 19.2.2010], wherein this Court had determined compensation as Rs.110 per sq.m. in regard to acquisition of neighbouring land under preliminary notification gazetted on 16.6.1994. Determination of market value in *Pandurang V.. Samant* was with reference to a sale transaction dated 23.3.1990. This Court had determined the market value as Rs.75 per sq.m. as on 23.3.1990 and increased it by Rs.35 to arrive at the value as Rs.110/- after four years, as on 16.6.1994. In this case, as the relevant date for purpose of determination of market value is 26.9.1991, about one and half years after 23.3.1990 (the date of the relied upon sale transaction). By applying the same principle, the market value of the land as on 26.9.1991 will be Rs.90 per sq.m. The said value is with reference to land with potential for development. As the land acquired was subject to a prohibition under the Land Use Act, for reasons stated in the first two appeals, a deduction of 50% is made for to arrive at the value of the land with agricultural potential only. Consequently, the market value of the acquired land is determined as Rs.45/- per sq.m.

28. We accordingly allow this appeal in part and reduce the compensation from Rs.140 per sq.m. to Rs.45 per sq.m. The respondent will be entitled to said compensation with all statutory benefits under section 23(1A), section 23(2) and section 28 of the Land Acquisition Act 1894.

D.G. Appeals disposed of.

UNITED INSURANCE CO. LTD.
v.
SHILA DATTA & ORS.
(Civil Appeal No. 6026-6027 OF 2007)

OCTOBER 13, 2011

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

Motor Vehicles Act, 1988:

Claim petition under – For compensation in regard to a motor accident – Nature of – Held: An award by the tribunal cannot be seen as an adversarial adjudication between the litigating parties to a dispute but a statutory determination of compensation on the occurrence of an accident, after due enquiry, in accordance with the statute.

ss. 149(2) and 170 – Claim petition – Position in cases where the claimants implead the insurer as a respondent – Held: Where the insurer is a party-respondent, either on account of being impleaded as a party by the tribunal u/s. 170 or being impleaded as a party-respondent by the claimants in the claim petition voluntarily, it would be entitled to contest the matter by raising all grounds, without being restricted to the grounds available u/s. 149(2) of the Act.

ss. 173, 168 and 149 – Joint appeal by the owner of the vehicle (insured) and insured – Maintainability of – Held: An appeal which is maintainable when the owner of the vehicle files it, does not become not maintainable merely on account of the insurer being a co-appellant with the owner – When the insurer becomes a co-appellant, the owner of the vehicle does not cease to be a person aggrieved – So long as the owner is an appellant and he is a 'person aggrieved' in law, the question whether he is independently filing the appeal, or

whether he is filing it at the instance of the insurer becomes irrelevant – When a counsel holds vakalatnama for an insurer and the owner of the vehicle in a joint appeal, the court cannot say his arguments and submissions are only on behalf of the insurer and not on behalf of the owner.

s. 149(2) – Claim petition – Position in cases where the insurer is only a noticee u/s. 149(2) and has not been impleaded as a party to the claim proceedings – Held: It is accepted that where a notice is issued u/s. 149(2), the insurer as 'noticee' (as contrasted from a 'party') cannot 'deny' its liability as an insurer on grounds other than those mentioned in Section 149(2)(a) and (b) of the Act, but nothing prevents it as a person liable to pay the compensation, from assisting the Tribunal in arriving at the 'just' compensation - Therefore, an insurer, without seeking to avoid or exclude its liability under the policy, on grounds other than those mentioned in Section 149(2)(a) and (b), can contest the claim, in regard to the quantum – All that Section 149(2) said that insurer cannot raise all kinds of contentions based on the terms of policy to avoid the contract of indemnity – But it does not require the insurer to concede wrong claims or false claims or not challenge erroneous determination of compensation – It is only the insurer, who is required to pay the compensation amount, is interested in filing the appeal – It can file an appeal by itself or it can file an appeal jointly with the owner – If it is denied that opportunity, there is a likelihood of huge compensation being awarded without any correction - Act nowhere says that the insurer is not a 'person aggrieved' with reference to the amount of compensation awarded which he is required to pay – Interests of justice would not be served by allowing obvious errors to remain uncorrected – If the owner of the vehicle(insured) fails to file an appeal when an erroneous award is made, he fails to contest the same and consequently, the insurer should be able to file an appeal, by applying the principle underlying s. 170 – Interests of justice would not be served by allowing obvious errors to remain

uncorrected – Matter placed before the Chief Justice for constituting a larger bench to consider the said issues.

On reference by the two Judge Bench of this Court the questions which arose for consideration before the present three Judge Bench were whether the insurer could contest a motor accident claim on merits, in particular, in regard to the quantum, in addition to the grounds mentioned in section 149(2) of the Act for avoiding liability under the policy of insurance; and whether an insurer could prefer an appeal under Section 173 of the Motor Vehicles Act, 1988, against an award of the Motor Accident Claims Tribunal, questioning the quantum of compensation awarded?

The insurance companies contended that they were not barred from questioning the quantum of compensation either before the Motor Accidents Claims Tribunal or in appeals arising from the awards of the Tribunal on the following grounds:

(i) Where an insurer is impleaded by the claimants as a party, it can contest the claim on all grounds, as there were no restrictions or limitations in regard to contest but where an insurer is only issued a statutory notice under Section 149(2) of the Act by the Tribunal requiring it to meet the liability, it is entitled to be made a party to deny the liability on the grounds mentioned in Section 149(2).

(ii) When the owner of the vehicle (insured) and the insurer are aggrieved by the award of the Tribunal, and jointly file an appeal challenging the quantum, the mere presence of the insurer as a co-appellant will not render the appeal, as not maintainable.

(iii) When an insurer is aggrieved by the quantum of compensation, it is not seeking to *avoid or exclude* its liability, but merely wants determination of the extent of its liability, the restrictions imposed upon the insurers to defend the action by the claimant or file an appeal against the judgment and award of the Tribunal would apply, only if it wants to file an appeal to avoid liability and not when it admits its liability to pay the amount awarded, but only seeks proper determination of the quantum of compensation to be paid.

(iv) If and when an award is made by the Tribunal which is excessive, arbitrary or erroneous, the owner of the vehicle has to challenge the same by filing an appeal before the High Court. If the insured (owner of the vehicle) fails to challenge an award even when it is erroneous or arbitrary or fanciful, it can be considered that the insured has failed to contest the same and consequently under section 170, the High Court or the tribunal may permit the insurer to file an appeal and contest the award on merits.

(v) The insurer has a right, if it has reserved such a right in the policy, to defend the action in the name of the insured. If it opts to step into the shoes of the insured, it can defend the action in the name of the insured and all defences open to the insured will be available to it and can be urged by it. Its position contesting a claim under section 149(2) of the Act is distinct and different, when it is contesting the claim in the name of or on behalf of the insured owner of the vehicle. In cases, where it is authorized by the policy to defend any claim in the name of the insured, and the insurer does so, it can not be restricted to the grounds mentioned in section 149(2) of the Act, as the defence is on behalf of the owner of the vehicle.

HELD: 1. The issues as regards the position in cases where the claimants implead the insurer as a respondent in the claim petition; and maintainability of a joint appeal by the owner of the vehicle (Insured) and Insurer, are held in favour of the Insurers. The matters covered by the said issues are placed before the respective benches for consideration. Further, in view of the decision in ****Nicolletta Rohtagi' s* **case, the issue where the insurer is only a notice under Section 149(2) and has not been impleaded as a party to the claim proceedings, cannot be decided in favour of Insurers. For the aforesaid reasons, in so far as the said issues are concerned, ****Nicolletta Rohtagi*** **requires reconsideration by a larger bench. It is directed that these matters where the insurer alone was the appellant before the High Court and where the insurer was only a noticee under Section 149(2) and not an impleaded respondent in the claim petition, to be placed before the Hon'ble Chief Justice for constituting a larger bench to consider the issues raised by the insurers. [Para 21, 22]**

Nature of a claim petition under the Motor Vehicles Act, 1988

2. A claim petition for compensation in regard to a motor accident (filed by the injured or in case of death, by the dependant family members) before the Motor Accident Claims Tribunal constituted under Section 165 of the Act is neither a suit nor an adversarial lis in the traditional sense. It is a proceedings in terms of and regulated by the provisions of Chapter XII of the Act which is a complete Code in itself. There are significant aspects in regard to the Tribunals and determination of compensation by Tribunals. An award by the tribunal cannot be seen as an adversarial adjudication between the litigating parties to a dispute, but a statutory determination of compensation on the occurrence of an accident, after due enquiry, in accordance with the statute. [Para 5]

The position in cases where the claimants implead the insurer as a respondent in the claim petition:

3.1. An insurer need not be impleaded as a party to the claim proceedings and it should only be issued a statutory notice under Section 149(2) of the Act so that it can be made liable to pay the compensation awarded by the tribunal and also resist the claim on any one of the grounds mentioned in clauses (a) and (b) of sub-section (2) of Section 149. Sub-sections (1), (2) and (7) of Section 149 clearly refer to the insurer being merely a noticee and not a party. Similarly, Sections 158(6), 166(4), 168(1) and 170 clearly provide for and contemplate insurer being merely a noticee for the purposes mentioned in the Act and not being a party-respondent. Section 170 specifically refers to impleading of insurer as a party to the claim proceedings. [Para 7]

3.2. When an insurer is impleaded as a party-respondent to the claim petition, as contrasted from merely being a noticee under Section 149(2) of the Act, its rights are significantly different. If the insurer is only a noticee, it can only raise such of those grounds as are permissible in law under section 149(2). But if he is a party-respondent, it can raise, not only those grounds which are available under section 149(2), but also all other grounds that are available to a person against whom a claim is made. It therefore, follows that if a claimant impleads the insurer as a party-respondent, for whatever reason, then as such respondent, the insurer will be entitled to urge all contentions and grounds which may be available to it. [Para 8]

3.3. If the insurer is already a respondent (having been impleaded as a party respondent), it need not seek

the permission of the Tribunal under Section 170 of the Act to raise grounds other than those mentioned in Section 149(2) of the Act. The entire scheme and structure of Chapters XI and XII is that the claimant files a claim petition only against the owner and driver and the tribunal issues notice to the insurer under Section 149(2) so that it can be made liable to pay the amount awarded against the insurer and if necessary, deny liability under the policy of insurance, on any of the grounds mentioned in Section 149(2). If an insurer is only a noticee and not a party-respondent, having regard to the decision in ****Nicolletta Rohtagi***, it can defend the claim only on the grounds mentioned in Section 149(2) and not any of the other grounds relating to merits available to the insured-respondent. This is the position even where the claim proceedings are initiated** ***suo moto*** **under Sections 149(7) and 158(6) of the Act, without any formal application by the claimants, as the insurer is only a noticee under Section 149(2) of the Act. [Para 9]**

3.4. Section 170 of the Act does not contemplate an insurer making an application for impleadment. Nor does it contemplate the insurer, if he is already impleaded as a party respondent by the claimants, making any application seeking permission to contest the matter on merits. Section 170 proceeds on the assumption that a claim petition is filed by the claimants, or is registered ***suo moto*** **by the tribunal, with only the owner and driver of the vehicle as the respondents. It also proceeds on the basis that in such a proceeding, a statutory notice would have been issued by the tribunal to the insurer so that the insurer may know about its future liability in the claim petition and also resist the claim, on any of the grounds mentioned in section 149(2). Section 170 of the Act also assumes that the tribunal will hold an inquiry into the claim, where only the claimants and the owner and driver will be the parties. Section 170 provides that if during the**

course of such inquiry, the tribunal finds and satisfies itself that there is any collusion between the claimant and the owner/driver or where the owner/driver has failed to contest the claim, the tribunal may ***suo moto*****, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of the claim, who was till then only a notice, shall be treated as a party to the proceedings. The insurer so impleaded, without prejudice to the provisions of Section 149(2), would have the right to contest the claim on all or any of the grounds that are available to the driver/owner. [Para 10]**

3.5. Where the insurer is a party-respondent, either on account of being impleaded as a party by the tribunal under Section 170 or being impleaded as a party-respondent by the claimants in the claim petition voluntarily, it would be entitled to contest the matter by raising all grounds, without being restricted to the grounds available under Section 149(2) of the Act. The claim petition is maintainable against the owner and driver without impleading the insurer as a party. When a statutory notice is issued under Section 149(2) by the tribunal, it is clear that such notice is issued not to implead the insurer as a party-respondent but merely to put it on notice that a claim has been made in regard to a policy issued by it and that it will have to bear the liability as and when an award is made in regard to such claim. Therefore, it cannot, as of right, require that it should be impleaded as a party-respondent. But it can however be made a party-respondent either by the claimants voluntarily in the claim petition or by the direction of the Tribunal under Section 170 of the Act. Whatever be the reason or ground for the insurer being impleaded as a party, once it is a party-respondent, it can raise all contentions that are available to resist the claim. [Para 11]

Maintainability of a joint appeal by the owner of the vehicle (insured) and insured:

4.1. When an award is made by the Tribunal, the owner of the vehicle (insured), being a person aggrieved, can file an appeal challenging his liability on any ground, or challenge the quantum of compensation. An appeal which is "maintainable" when the owner of the vehicle files it, does not become "not maintainable" merely on account of the insurer being a co-appellant with the owner. When the insurer becomes a co-appellant, the owner of the vehicle does not cease to be a person aggrieved. [Para 12]

4.2. When a joint appeal is filed, to say that insurer is not an aggrieved person and the owner of the vehicle is also not an aggrieved person, would lead to anomalous situation and would border on an absurdity. On account of the insurer being a co-appellant, will not affect the maintainability of the appeal. So long as the owner is an appellant and he is a 'person aggrieved' in law, the question whether he is independently filing the appeal, or whether he is filing it at the instance of the insurer becomes irrelevant. When a counsel holds vakalatnama for an insurer and the owner of the vehicle in a joint appeal, the court cannot say his arguments and submissions are only on behalf of the insurer and not on behalf of the owner. There is also no need to examine at the threshold in a joint appeal, whether the insurer should be deleted from the array of appellants. [Para 16]

Chinnama George & Ors. vs. N. K. Raju & Anr. **2000 (4) SCC 130 – Partly overruled.**

Narendra Kumar vs. Yarenissa **1998 (9) SCC 202 – referred to.**

The position in cases where the insurer is only a noticee under Section 149(2) and has not been impleaded as a party to the claim proceedings:

5.1. There is considerable force in the contention that where a notice is issued under Section 149(2) of the Motor Vehicles Act, the insurer as 'noticee' (as contrasted from a 'party') cannot 'deny' its liability as an insurer on grounds other than those mentioned in Section 149(2)(a) and (b) of the Act, but nothing prevents it as a person liable to pay the compensation, from assisting the Tribunal in arriving at the 'just' compensation. The assumption that as a noticee under Section 149(2), the insurer cannot raise any contention other than those mentioned in clauses (a) and (b) of section 149(2) is correct in so far as denial of liability under the policy is concerned. This is because sub-section (1) of section 149 of the Act clearly provides that '*notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall subject to the provisions of this section, pay to the person entitled to the benefit*.........". Therefore, an insurer, without seeking to avoid or exclude its liability under the policy, on grounds other than those mentioned in Section 149(2)(a) and (b), can contest the claim, in regard to the quantum. All that Section 149(2) said that insurer cannot raise all kinds of contentions based on the terms of policy to avoid the contract of indemnity. But it does not require the insurer to concede wrong claims or false claims or not challenge erroneous determination of compensation. [Paras 17 and 18]

National Insurance Co. Ltd. v. Jugal Kishore **1988 (1) SCC 626 – referred to**

5.2. It is only the insurer, who is required to pay the compensation amount, is interested in filing the appeal. It can file an appeal by itself or it can file an appeal jointly with the owner. If it is denied that opportunity, there is a likelihood of huge compensation being awarded without any correction. The fact that the compensation is not

likely to be interfered, may also encourage the Motor Accident Claims Tribunal to make awards which may not be fanciful reasonable. This Court fails to see as to why the insurance company cannot challenge the judgment of the tribunal, if it is erroneous. The Act nowhere says that the insurer is not a 'person aggrieved' with reference to the amount of compensation awarded which he is required to pay. Interests of justice would not be served by allowing obvious errors to remain uncorrected. [Para 18]

United India Insurance Co. Ltd. vs. Bhushan Sachdeva **2002 (2) SCC 265: 2002 (1) SCR 352;** *British India General Insurance Co.Ltd. v. Captain Itbar Singh & Ors.* **AIR 1959 SC 1331: 1960 SCR 426 – referred to**

5.3 ****Nicolletta Rohtagi* did not consider the issue with reference to the situation where the insurer is enabled by a specific term in the insurance policy to take over and conduct the defence of the case in the name of the insured, presumably as the insurance policy did not have such an enabling provision. In fact if such a contention had been raised, the court would have noticed that the issue was covered by a binding three-Judge Bench judgment in** ***British India General Insurance*****. [Para 20]**

National Insurance Co. Ltd. vs. Nicolletta Rohtagi* **2002 (7) SCC 456: 2002 (2) Suppl. SCR 456; *Shankarrayya vs. United Insurance Co. Ltd.* **1998 (3) SCC 140;** *Ritu Devi vs. New Delhi Insurance Co. Ltd.* **2000 (5) SCC 113: 2000 (3) SCR 741 – referred to**

Case Law Reference:

2002 (2) Suppl. SCR 456	**Referred to**	**Para 1**
1998 (3) SCC 140	**Referred to**	**Para 6**
1998 (9) SCC 202	**Referred to**	**Para 6**
2000 (4) SCC 130	**Referred to**	**Para 5**
2000 (3) SCR 741	**Referred to**	**Para 5**
1988 (1) SCC 626	**Referred to**	**Para 17**
2002 (1) SCR 352	**Referred to**	**Para 18**
1960 SCR 426	**Referred to**	**Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6026-6027 of 2007.

From the Judgment & Order dated 19.9.2006 of the High Court at Calcutta in F.M.A. 363 of 2002.

WITH

SLP (C) No. 10164 of 2006, 14962 of 2007, 10128, 10130, 10131, 10132, 10133, 10211, 10217, 10269, 10315, 10390, 10511, 10797, 12121, 13966, 12747, 18540 of 2006, 9302-9305 of 2005, 7905 of 2007, 8789, 16460 of 2006, C.A. Nos. 798-800 of 2006, SLP (C) No. 3556, 5073, 1891, 1889, 7108, 16066, 4917, 13916 of 2008, 6359 of 2007, 5531-5532 of 2009, 19472 of 2008, 29055 of 2009, 26470 of 2008, 9983 of 2009, 14134 of 2008, 14152, 14131, 14148, 14129, 14144, 14121, 14125 of 2008, 20966 of 2006, 121 of 2009, 16018 of 2008, 6380 of 2007, 17258 of 2006, 6717 of 2004, 19275-19285 of 2008, 25491, 2022, 5383 of 2008, 22535 of 2009, 21888-21889 of 2008, 19701 of 2009, 2854-2855 of 2009, 17965 of 2009, 5364 of 2006.

Atul Nanda, Rameeza, Sugandha, (for Law Associates & Co.), Subhro Sanyal, Kiran Suri, S.J. Amith, Aparna Mattoo, A.K. De, Udit Kumar, Rajesh Kumar, Debasis Misra, Shivam Sharma, Akanksha Sharma, Rishi Kesh, Dinesh Verma, Rajat Sharma, Vishnu Mehra, Sakshi Gupta, S.N. Bhat, Abhijit P. Medh, Shakeel Ahmed, Parmanand Gaur, Nikhilesh Ramachandra, Manish Mani, Alok Pandey, Shantanu Singh, R. Bhaskar, Kishore Rawat, M.K. Dua, Azim H. Laskar, Sachin Das, Abhijit Sengupta, Ramesh Chandra Mishra, Dr. Meera

Agarwal, Naveen R. Nath, Lalit Mohini Bhat, Gaurav Talukdar, Amrita Sharma, S.L. Gupta, Goodwill Indeevar, Ram Ashray, Biswanath Agrawalla, Arvind Kumar Sharma, Saurabh Mishra, Hiren Dasan, Dhirendra Kr. Sharma, Shreejata, Sarla Chandra, F.I. Choudhury, R.P. Goyal, Anilendra Pandey, Priya Kashyap, Laxmi Arvind, Pramod Dayal, Avijit Bhattacharjee, P.V. Yogeswaran, K. Rajeev, A.K. Raina, Anil Kumar Jha, Dr. Kailash Chand, P.K. Jain, Anil Kumar Jain, Ajay Aggarwal, R.P.S. Bhaduria, Rajiv Mehta, N. Ganpathy, Shiv Mangal Sharma, M.K. Dua, S. Janani, Jai Prakash Pandey, H.K. Puri, Jatin Zaveri, Abhijit Sengupta, Dr. Meera Agarwal, S. Chandra Shekhar, P.N. Puri, Sharmila Upadhyay, I.B. Gaur, Yash Pal Dhingra, B.K. Satija, Manjusha Wadhwa, Sureshta Bagga, Himanshu Shekhar, D. Mahesh Babu, Santosh Singh, Naresh Kumar for the appearing parties.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J. 1. A Two Judge Bench of this Court made the following order of reference in this case on 3.12.2007:

"One of the contentions raised in these appeals is the correctness of a three-Judge Bench decision of this Court in *National Insurance Co. Ltd., Chandigarh vs. Nicolletta Rohtagi and Ors.,* - 2002 (7) SCC 456, which is said to be pending consideration in a large number of cases before this Court. Assailing the correctness of the aforesaid decision Mr. Atul Nanda submits that therein the liability of the insurer to reimburse the insured on two premises, namely, (1) just compensation; and (2) whose liability would be to pay, as envisaged under sub-section (1) of section 149 vis-à-vis the right of the aggrieved persons (Which would include the insured) to prefer an appeal in terms of section 173 of the Motor Vehicles Act, had not been considered in the backdrop of the history in which sub-section (1) of section 149 was enacted.

Apart from the question raised by Mr. Nanda, we are of the opinion that the matter may be considered from other angles, namely, whether the insurer shall be wholly without any remedy even if the amount of compensation is determined in violation of the standard formula envisaged under the second schedule of the Act or in clear violation of the ratio (s) laid down by this Court.

We, therefore, are of the opinion that it is a fit case where the matter should be referred to larger Bench. We direct accordingly. Let the records of the case be placed before Hon'ble the Chief Justice of India for appropriate orders."

2. On the said reference made, the following questions arise for our consideration, in regard to the position of an Insurer, under the Motor Vehicles Act, 1988 ('Act' for short) :

(i) Whether the insurer can contest a motor accident claim on merits, in particular, in regard to the quantum, in addition to the grounds mentioned in section 149(2) of the Act for avoiding liability under the policy of insurance?

(ii) Whether an insurer can prefer an appeal under section 173 of the Motor Vehicles Act, 1988, against an award of the Motor Accident Claims Tribunal, questioning the quantum of compensation awarded?

3. The insurance companies have urged the following five points for our consideration, which are independent grounds in support of their contention that insurance companies are not barred from questioning the quantum of compensation either before the Motor Accidents Claims Tribunal or in appeals arising from the awards of the Tribunal :

(i) There is a significant difference between insurer as a 'noticee' (a person to whom a notice is served as required by

section 149(2) of the Act) in a claim proceedings and an insurer as a party-respondent in a claim proceedings. Where an insurer is impleaded by the claimants as a party, it can contest the claim on all grounds, as there are no restrictions or limitations in regard to contest. But where an insurer is not impleaded by the claimant as a party, but is only issued a statutory notice under section 149 (2) of the Act by the Tribunal requiring it to meet the liability, it is entitled to be made a party to deny the liability on the grounds mentioned in section 149(2).

(ii) When the owner of the vehicle (insured) and the insurer are aggrieved by the award of the Tribunal, and jointly file an appeal challenging the quantum, the mere presence of the insurer as a co-appellant will not render the appeal, as not maintainable. When insurer is the person to pay the compensation, any interpretation to say that it is not a 'person aggrieved' by the quantum of compensation determined, would be absurd and anomalous.

(iii) When an insurer is aggrieved by the quantum of compensation, it is not seeking to *avoid or exclude* its liability, but merely wants determination of the extent of its liability. The restrictions imposed upon the insurers to defend the action by the claimant or file an appeal against the judgment and award of the Tribunal will apply, only if it wants to file an appeal to avoid liability and not when it admits its liability to pay the amount awarded, but only seeks proper determination of the quantum of compensation to be paid.

(iv) Appeal is a continuation of the original claim proceedings. Section 170 provides that if the person against whom the claim is made, fails to contest the claim, the insurer may be permitted to resist the claim on merits. If and when an award is made by the Tribunal which is excessive, arbitrary or erroneous, the owner of the vehicle has to challenge the same by filing an appeal before the High Court. If the insured (owner of the vehicle) fails to challenge an award even when it is erroneous or arbitrary or fanciful, it can be considered that the

insured has failed to contest the same and consequently under section 170, the High Court or the tribunal may permit the insurer to file an appeal and contest the award on merits.

(v) The Motor Vehicles Act, 1988 ('Act' for short) creates a liability upon the insurer to satisfy the judgments and awards against the insured. The Act expressly restricts the right of the insurer to avoid the liability as insurer, only to the grounds specified in section 149(2) of the Act. Though it is impermissible to add to the grounds mentioned in the statute, the insurer has a right, if it has reserved such a right in the policy, to defend the action in the name of the insured. If it opts to step into the shoes of the insured, it can defend the action in the name of the insured and all defences open to the insured will be available to it and can be urged by it. Its position contesting a claim under section 149(2) of the Act is distinct and different, when it is contesting the claim in the name of or on behalf of the insured owner of the vehicle. In cases, where it is authorized by the policy to defend any claim in the name of the insured, and the insurer does so, it can not be restricted to the grounds mentioned in section 149(2) of the Act, as the defence is on behalf of the owner of the vehicle.

Relevant Legal Provisions

4. We may refer to the position of an insurer and insured in the scheme contained in Chapters XI and XII of the Act.

(4.1) Section 149 deals with the duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks. Sub-sections (1), (2) and (7) are extracted below :

"149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks :

(1) If, after a certificate of insurance has been issued under sub-section (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in

respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of section 147 (being a liability covered by the terms of the policy) [or under the provisions of section 163A] is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid o cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:—

(i) a condition excluding the use of the vehicle—

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organized racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

x x x x

(7) No insurer to whom the notice referred to in sub-section (2) or sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in sub-section (1) or in such judgment as is referred to in sub-section (3) otherwise than in the manner provided for in sub-section (2) or in the corresponding law of the reciprocating country, as the case may be."

(4.2.) Section 147 prescribes the requirements of policies and limits of liability. The relevant portion of the said section is extracted below:

"147. *Requirements of policies and limits of liability.*— (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which –

(a) is issued by a person who is an authorized insurer; and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)—

(i) against any liability which may be incurred by him in respect of the death of or bodily [injury to any person, including owner of the goods or his authorized representative carried in the vehicle] or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:

Provided that a policy shall not be required—"

xxx xxx xxx

(4.3) Section 163A makes special provisions as to payment of compensation on structured formula basis and is extracted below :

"*163A. Special provisions as to payment of compensation on structured formula basis.*—(1) Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law, the owner of the motor vehicle or *the authorized insurer shall be liable to pay in the case of death or permanent disablement due to accident* arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be."

xxx xxx xxx

(4.4) Section 168 relates to award of the Claims Tribunal and the relevant portion thereof is extracted below :-

"168. *Award of the Claims Tribunal.*—On receipt of an

application for compensation made under section 166, the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an inquiry into the claim or, as the case may be, each of the claims and, subject to the provisions of section 162 may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the *Claims Tribunal shall specify the amount which shall be paid by the insurer* or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be:"

(4.5) Section 170 deals with impleading insurer in certain cases and is extracted below :-

"170. *Impleading insurer in certain cases.*—Where in the course of any inquiry, the Claims Tribunal is satisfied that –

(a) there is collusion between the person making the claim and the person against whom the claim is made, or

(b) the person against whom the claim is made has failed to contest the claim,

it may, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in sub-section (2) of section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made."

Section 173 deals with appeals and relevant part thereof is extracted below :-

"173. **Appeals**.—(1) Subject to the provisions of sub-section (2) any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court:

Provided that no appeal by the person who is required to pay any amount in terms of such award shall be entertained by the High Court unless he has deposited with it twenty-five thousand rupees or fifty per cent of the amount so awarded, whichever is less, in the manner directed by the High Court:"

Nature of a claim petition under the Motor Vehicles Act, 1988

5. A claim petition for compensation in regard to a motor accident (filed by the injured or in case of death, by the dependant family members) before the Motor Accident Claims Tribunal constituted under section 165 of the Act is neither a suit nor an adversarial lis in the traditional sense. It is a proceedings in terms of and regulated by the provisions of Chapter XII of the Act which is a complete Code in itself. We may in this context refer to the following significant aspects in regard to the Tribunals and determination of compensation by Tribunals:

(i) A proceedings for award of compensation in regard to a motor accident before the Tribunal can be initiated either on an application for compensation made by the persons aggrieved (claimants) under section 166(1) or section 163A of the Act or *suo moto* by the Tribunal, by treating any report of accident (forwarded to the tribunal under section 158(6) of the Act as an application for compensation under section 166 (4) of the Act.

(ii) The rules of pleadings do not strictly apply as the claimant is required to make an application in a form prescribed under the Act. In fact, there is no pleading where the

proceedings are *suo moto* initiated by the Tribunal.

(iii) In a proceedings initiated *suo moto* by the tribunal, the owner and driver are the respondents. The insurer is not a respondent, but a noticee under section 149(2) of the Act. Where a claim petition is filed by the injured or by the legal representatives of a person dying in a motor accident, the driver and owner have to be impleaded as respondents. The claimants need not inplead the insurer as a party. But they have the choice of impleading the insurer also as a party respondent. When it is not impleaded as a party, the Tribunal is required to issue a notice under section 149(2) of the Act. If the insurer is impleaded as a party, it is issued as a regular notice of the proceedings.

(iv) The words 'receipt of an application for compensation' in section 168 refer not only to an application filed by the claimants claiming compensation but also to a suo motu registration of an application for compensation under section 166(4) of the Act on the basis of a report of an accident under section 158(6) of the Act.

(v) Though the tribunal adjudicates on a claim and determines the compensation, it does not do so as in an adversarial litigation. On receipt of an application (either from the applicant or *suo motu* registration), the Tribunal gives notice to the insurer under section 149(2) of the Act, gives an opportunity of being heard to the parties to the claim petition as also the insurer, holds an inquiry into the claim and makes an award determining the amount of compensation which appears to it to be just. (Vide Section 168 of the Act).

(vi) The Tribunal is required to follow such summary procedure as it thinks fit. It may choose one or more persons possessing special knowledge of and matters relevant to inquiry, to the assist it in holding the enquiry (vide section 169 of the Act).

(vii) The award of the Tribunal should specify the person/s to whom compensation should be paid. It should also specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them. (Vide section 168 of the Act).

(viii) The Tribunal should deliver copies of the award to the parties concerned within 15 days from the date of the award. (Vide section 168 (2) of the Act).

We have referred to the aforesaid provisions to show that an award by the tribunal cannot be seen as an adversarial adjudication between the litigating parties to a dispute, but a statutory determination of compensation on the occurrence of an accident, after due enquiry, in accordance with the statute.

The decision in NICOLLETTA ROHTAGI

6. In *National Insurance Co. Ltd. vs. Nicolletta Rohtagi* – 2002 (7) SCC 456, a three Judge Bench of this Court considered the following two questions :

(i) Non-filing of an appeal by the insured amounted to failure to contest the claim and that the right to contest included the right to file an appeal against the award of the Tribunal.

(ii) Where despite the existence of the facts postulated in section 170 of the MV Act, 1988, the Tribunal does not implead the insurance company to contest the claim on grounds available to the insured or the persons against whom claim has been made, or in such a situation rejects the insurer's application for permission to contest the claim on merit or where the claimant has obtained an award by playing fraud, in such cases the insurer has a right of appeal to contest the award on merits.

The three Judge Bench, after referring to the decisions in *Shankarrayya vs. United Insurance Co. Ltd.* – 1998 (3) SCC 140, *Narendra Kumar vs. Yarenissa* – 1998 (9) SCC 202, *Chinnamma George vs. N. K. Raju* – 2000 (4) SCC 130, ad *Ritu Devi vs. New Delhi Insurance Co. Ltd.* – 2000 (5) SCC 113, held as under :

"It was urged by learned counsel appearing for the insurance company that if an insured has not filed any appeal, it means he has failed to contest the claim and that the right to contest include the right to contest by filing an appeal against the award of the Tribunal as well, and in such a situation an appeal by the insurer questioning the quantum of compensation would be maintainable.

We have earlier noticed that motor vehicle accident claim is a tortious claim directed against tort-feasors who are the insured and the driver of the vehicle and the insurer comes to the scene as a result of statutory liability created under the Motor Vehicles Act. The legislature has ensured by enacting Section 149 of the Act that the victims of motor vehicle are fully compensated and protected. It is for that reason the insurer cannot escape from its liability to pay compensation on any exclusionary clause in the insurance policy except those specified in Section 149(2) of the Act or where the condition precedent specified in Section 170 is satisfied.

For the aforesaid reasons, an insurer if aggrieved against an award, may file an appeal only on those grounds and no other. However, by virtue of Section 170 of the 1988 Act, where in course of an enquiry the Claims Tribunal is satisfied that (a) there is a collusion between the person making a claim and the person against whom the claim has been made or (b) the person against whom the claim has been made has failed to contest the claim, the tribunal may, for reasons to be recorded in writing, implead the insurer and in that case it is permissible for the insurer to contest the claim also on the grounds which are available to the insured or to the person against whom the claim has been made. Thus, unless an order is passed by the tribunal

permitting the insurer to avail the grounds available to an insured or any other person against whom a claim has been made on being satisfied of the two conditions specified in Section 170 of the Act, it is not permissible to the insurer to contest the claim on the grounds which are available to the insured or to a person against whom a claim has been made. Thus where conditions precedent embodied in Section 170 is satisfied and award is adverse to the interest of the insurer, the insurer has a right to file an appeal challenging the quantum of compensation or negligence or contributory negligence of the offending vehicle even if the insured has not filed any appeal against the quantum of compensation. Sections 149, 170 and 173 are part of one Scheme and if we give any different interpretation to Section 172 of the 1988 Act, the same would go contrary to the scheme and object of the Act."

A careful reading of the said decision shows that issues (i) and (ii) raised before us did not arise for consideration in *Nicolletta Rohtagi*, nor were they considered therein.

Re: Point No.(i) : The position in cases where the claimants implead the insurer as a respondent in the claim petition.

7. The scheme of the Motor Vehicles Act, 1988 as contained in Chapters XI (Insurance of Motor Vehicles against Third Party risks) and XII (Claim Tribunals) proceeds on the basis that an insurer need not be impleaded as a party to the claim proceedings and it should only be issued a statutory notice under section 149(2) of the Act so that it can be made liable to pay the compensation awarded by the tribunal and also resist the claim on any one of the grounds mentioned in clauses (a) and (b) of sub-section (2) of section 149. Sub-sections (1), (2) and (7) of section 149 clearly refer to the insurer being merely a noticee and not a party. Similarly, sections 158(6), 166(4), 168(1) and 170 clearly provide for and contemplate insurer being merely a noticee for the purposes mentioned in the Act and not being a party-respondent. Section 170 specifically refers to impleading of insurer as a party to the claim proceedings.

8. When an insurer is impleaded as a party – respondent to the claim petition, as contrasted from merely being a noticee under section 149(2) of the Act, its rights are significantly different. If the insurer is only a noticee, it can only raise such of those grounds as are permissible in law under section 149(2). But if he is a party-respondent, it can raise, not only those grounds which are available under section 149(2), but also all other grounds that are available to a person against whom a claim is made. It therefore follows that if a claimant impleads the insurer as a party-respondent, for whatever reason, then as such respondent, the insurer will be entitled to urge all contentions and grounds which may be available to it.

9. The Act does not require the claimants to implead the insurer as a party respondent. But if the claimants choose to implead the insurer as a party, not being a noticee under section 149(2), the insurer can urge all grounds and not necessarily the limited grounds mentioned in section 149(2) of the Act. If the insurer is already a respondent (having been impleaded as a party respondent), it need not seek the permission of the Tribunal under section 170 of the Act to raise grounds other than those mentioned in section 149(2) of the Act. The entire scheme and structure of Chapters XI and XII is that the claimant files a claim petition only against the owner and driver and the tribunal issues notice to the insurer under section 149(2) so that it can be made liable to pay the amount awarded against the insurer and if necessary, deny liability under the policy of insurance, on any of the grounds mentioned in section 149(2). If an insurer is only a noticee and not a party-respondent, having regard to the decision in *Nicolletta Rohtagi*, it can defend the claim only on the grounds mentioned in section 149(2) and not any of the other grounds relating to merits available to the insured-respondent. This is the position even where the claim proceedings are initiated *suo moto* under

sections 149(7) and 158(6) of the Act, without any formal application by the claimants, as the insurer is only a noticee under section 149(2) of the Act.

10. Section 170 of the Act does not contemplate an insurer making an application for impleadment. Nor does it contemplate the insurer, if he is already impleaded as a party respondent by the claimants, making any application seeking permission to contest the matter on merits. Section 170 proceeds on the assumption that a claim petition is filed by the claimants, or is registered *suo moto* by the tribunal, with only the owner and driver of the vehicle as the respondents. It also proceeds on the basis that in such a proceeding, a statutory notice would have been issued by the tribunal to the insurer so that the insurer may know about its future liability in the claim petition and also resist the claim, on any of the grounds mentioned in section 149(2). Section 170 of the Act also assumes that the tribunal will hold an inquiry into the claim, where only the claimants and the owner and driver will be the parties. Section 170 provides that if during the course of such inquiry, the tribunal finds and satisfies itself that there is any collusion between the claimant and the owner/driver or where the owner/driver has failed to contest the claim, the tribunal may *suo moto*, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of the claim, who was till then only a notice, shall be treated as a party to the proceedings. The insurer so impleaded, without prejudice to the provisions of section 149(2), will have the right to contest the claim on all or any of the grounds that are available to the driver/owner.

11. Therefore, where the insurer is a party- respondent, either on account of being impleaded as a party by the tribunal under section 170 or being impleaded as a party-respondent by the claimants in the claim petition voluntarily, it will be entitled to contest the matter by raising all grounds, without being restricted to the grounds available under section 149(2) of the Act. The claim petition is maintainable against the owner and

driver without impleading the insurer as a party. When a statutory notice is issued under section 149(2) by the tribunal, it is clear that such notice is issued not to implead the insurer as a party-respondent but merely to put it on notice that a claim has been made in regard to a policy issued by it and that it will have to bear the liability as and when an award is made in regard to such claim. Therefore, it cannot, as of right, require that it should be impleaded as a party-respondent. But it can however be made a party-respondent either by the claimants voluntarily in the claim petition or by the direction of the Tribunal under section 170 of the Act. Whatever be the reason or ground for the insurer being impleaded as a party, once it is a party-respondent, it can raise all contentions that are available to resist the claim.

Re : Point (ii) : Maintainability of a joint appeal by the owner of the vehicle (Insured) and Insurer

12. There is no dispute that when an award is made by the Tribunal, the owner of the vehicle (insured), being a person aggrieved, can file an appeal challenging his liability on any ground, or challenge the quantum of compensation. An appeal which is "maintainable" when the owner of the vehicle files it, does not become "not maintainable" merely on account of the insurer being a co-appellant with the owner. When the insurer becomes a co-appellant, the owner of the vehicle does not cease to be a person aggrieved.

13. This question came up for consideration of a Two Judge Bench of this Court with reference to the provisions of the Motor Vehicles Act, 1939 ('Old Act' for short) in *Narendra Kumar vs. Yarenissa* – 1998 (9) SCC 202. This Court held :

> "The question, however, is if such a joint appeal is preferred must it be dismissed in toto or can the tortfeasor, the owner of the offending vehicle, be permitted to pursue the appeal while rejecting or dismissing the appeal of the insurer. If the award has gone against the tortfeasors it is

difficult to accept the contention that the tortfeasor is not "an aggrieved person" as has been held by some of the High Courts vide *Kantilal & Bros. v. Ramarani Debi,* 1980 ACJ 501, *New India Assurance Co. Ltd. v. Shakuntla Bai,* 1987 ACJ 224, *Nahar Singh v. Manohar Kumar,* (1993) 1 ACJ 269, *Radha Kishan Sachdeva v. Fit, Lt. L.D. Sharma,* (1993) 27 DRJ 18 (Del) merely because under the scheme of Section 96 if a decree or award has been made against the tortfeasors the insurer is liable to answer judgment "as if a judgment-debtor". That does not snatch away the right of the tortfeasors who are jointly and severally liable to answer judgment from preferring an appeal under Section 110-D of the Act. If for some reason or the other the claimants desire to execute the award against the tortfeasors because they are not in a position to recover the money from the insurer the law does not preclude them from doing so and, therefore, so long as the award or decree makes them liable to pay the amount of compensation they are aggrieved persons within the meaning of Section 110-D and would be entitled to prefer an appeal. But merely because a joint appeal is preferred and it is found that one of the appellants, namely, the insurer was not competent to prefer an appeal, we fail to see why the appeal by the tortfeasor, the owner of the vehicle, cannot be proceeded with after dismissing or rejecting the appeal of the insurer. To take a view that the owner is not an aggrieved party because the Insurance Company is liable in law to answer judgment would lead to an anomalous situation in that no appeal would lie by the tortfeasors against any award because the same logic applies in the case of a driver of the vehicle. The question can be decided a little differently. Can a claim application be filed against the Insurance Company alone if the tortfeasors are not the aggrieved parties under Section 110-D of the Act? The answer would obviously be in the negative. If that is so, they are persons against whom the claim application must be preferred and an award sought

for otherwise the insurer would not be put to notice and would not be liable to answer judgment as if a judgment-debtor. Therefore, on first principle it would appear that the contention that the owner of a vehicle is not an aggrieved party is unsustainable.

For the reasons stated above, we are of the opinion that even in the case of a joint appeal by insurer and owner of offending vehicle if an award has been made against the tortfeasors as well as the insurer even though an appeal filed by the insurer is not competent, it may not be dismissed as such. The tortfeasor can proceed with the appeal after the cause-title is suitably amended by deleting the name of the insurer."

14. When the issue again came up for consideration before another Two Judge bench of this Court in *Chinnama George & Ors. vs. N. K. Raju & Anr.* – 2000 (4) SCC 130, with reference to the provisions of the Motor Vehicles Act, 1988, this Court agreed with *Narendra Kumar* that the owner of the vehicle is an aggrieved person, but held that a joint appeal would not be maintainable. This Court held :

"Admittedly, none of the grounds as given in Sub-section (2) of Section 149 exist for the insurer to defend the claims petition. That being so, no right existed in the insurer to file appeal against the award of the Claims Tribunal. However, by adding N.K. Raju, the owner as co-appellant, an appeal was filed in the High Court which led to the impugned judgment. None of the grounds on which insurer could defend the claims petition was the subject matter of the appeal as far as the insurer is concerned. We have already noticed above that we have not been able to figure out from the impugned judgment as to how the owner felt aggrieved by the award of the Claims Tribunal. The impugned judgment does not reflect any grievance of the owner or even that of the driver of the offending bus against the award of the Claims Tribunal. The insurer by

associating the owner or the driver in the appeal when the owner or the driver is not an aggrieved person cannot be allowed to mock at the law which prohibit the insurer from filing any appeal except on the limited grounds on which it could defend the claims petition. We cannot put our stamp of approval as to the validity of the appeal by the insurer merely by associating the insured. Provision of law cannot be undermined in this way. We have to give effect to the real purpose to the provision of law relating to the award of compensation in respect of the accident arising out of the use of the motor vehicles and cannot permit the insurer to give him right to defend or appeal on grounds not permitted by law by a backdoor method. Any other interpretation will produce unjust results and open gates for the insurer to challenge any award. We have to adopt purposive approach which would not defeat the broad purpose of the Act. Court has to give effect to true object of the Act by adopting purposive approach.

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There is no dispute with the proposition so laid by this Court. But the insurer cannot maintain a joint appeal along with the owner or the driver if defence on any ground under Section 149(2) is not available to it. In that situation joint appeal will be incompetent. It is not enough if the insurer is struck out from the array of the appellants. The appellate court must also be satisfied that a defence which is permitted to be taken by the insurer under the Act was taken in the pleadings and was pressed before the Tribunal. On the appellate court being so satisfied the appeal may be entertained for examination of the correctness or otherwise of the judgment of the Tribunal on the question arising from/relating to such defence taken by the insurer If the appellate court is not satisfied that any such question was raised by the insurer in the pleadings and/or was pressed before the Tribunal, the appeal filed

by the insurer has to be dismissed as not maintainable. The court should take care to ascertain this position on proper consideration so that the statutory bar against the insurer in a proceeding of claim of compensation is not rendered irrelevant by the subterfuge of the insurance company joining the insured as a co-appellant in the appeal filed by it. This position is clear on a harmonious reading of the statutory provisions in Sections 147, 149 and 173 of the Act. Any other interpretation will defeat the provision of Sub-section (2) of Section 149 of the Act and throw the legal representatives of the deceased or the injured in the accident to unnecessary prolonged litigation at the instance of the insurer."

This issue did not arise for consideration of the Three Judge Bench decision in *Nicolletta Rohtagi*, as the question therein was whether an insurer could file an appeal.

15. On a careful consideration, we are of the view that the decision in *Chinnamma George* to the extent it holds that a joint appeal is not maintainable, does not lay down the correct law. As observed in *Narendra Kumar*, the owner of the vehicle does not cease to be an aggrieved person, merely because the insurer is ultimately liable under the terms of the policy or under section 149 of the Act. If the owner by himself, can file an appeal as an aggrieved person and such appeal is maintainable, we fail to understand how the presence of the insurer as a co-appellant would make the appeal not maintainable. Whether the owner joins the insurer or the insurer joins the owner, makes no difference to the fact that owner continues to be a person aggrieved.

16. When a joint appeal is filed, to say that the insurer is not an aggrieved person and the owner of the vehicle is also not an aggrieved person, would lead to an anomalous situation and would border on an absurdity. Without entering upon the question whether an insurer is an aggrieved person (which requires to be considered separately), we make it clear that

on account of the insurer being a co-appellant, will not affect the maintainability of the appeal. So long as the owner is an appellant and he is a 'person aggrieved' in law, the question whether he is independently filing the appeal, or whether he is filing it at the instance of the insurer becomes irrelevant. When a counsel holds vakalatnama for an insurer and the owner of the vehicle in a joint appeal, the court cannot say his arguments and submissions are only on behalf of the insurer and not on behalf of the owner. There is also no need to examine at the threshold in a joint appeal, whether the insurer should be deleted from the array of appellants.

Re : Points (iii) to (v)

17. We may next consider the cases where the insurer is only a noticee under section 149(2) and has not been impleaded as a party to the claim proceedings. The basic premises in *Nicolletta Rohtagi* is that the insurer can contest a motor-accident claim for compensation only on the grounds mentioned in section 149(2) of the Act. The contention of Insurance Companies is that an Insurer can deny liability under the policy only on the grounds mentioned in section 149(2) of the Act (even though several other grounds may be available under the terms of the policy); and where it does not deny liability or avoid liability under policy of insurance, it can certainly assist the Tribunal in arriving at the just compensation, by contesting any unjust or illegal or erroneous claim by the claimants. We find considerable force in the contention that where a notice is issued under section 149(2) of the Act, the insurer as 'noticee' (as contrasted from a 'party') can not 'deny' its liability as an insurer on grounds other than those mentioned in section 149(2)(a) and (b) of the Act, but nothing prevents it as a person liable to pay the compensation, from assisting the Tribunal in arriving at the 'just' compensation. In this context, we may rely upon the observation of this Court in *National Insurance Co. Ltd. v. Jugal Kishore* - 1988 (1) SCC 626, referring to section 96(6) of the old Act (Motor Vehicles Act, 1939):

> "….Secondly, from the words "to avoid his liability" used in Sub-section (6) of Section 96 it is apparent that the restrictions placed with regard to defences available to the insurer specified in Sub-section (2) of Section 96 are applicable to a case where the insurer wants to avoid his liability. In the instant case the appellant is not seeking to avoid its liability but wants a determination of the extent of its liability which is to be determined, in the absence of any contract to the contrary, in accordance with the statutory provision contained in this behalf in Clause (b) of Sub-section (2) of Section 95 of the Act..."

The assumption that as a noticee under section 149(2), the insurer cannot raise any contention other than those mentioned in clauses (a) and (b) of section 149(2) is correct in so far as denial of liability under the policy is concerned. This is because sub-section (1) of section 149 of the Act clearly provides that '*notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall subject to the provisions of this section, pay to the person entitled to the benefit*………". Therefore, an insurer, without seeking to avoid or exclude its liability under the policy, on grounds other than those mentioned in section 149(2)(a) and (b), can contest the claim, in regard to the quantum. All that section 149(2) says is that insurer cannot raise all kinds of contentions based on the terms of policy to avoid the contract of indemnity. But it does not require the insurer to concede wrong claims or false claims or not challenge erroneous determination of compensation.

18. Let us take by way of example, a case where the deceased was aged 20 years and the annual loss of dependency was Rs.1,00,000/- to the dependants. The multiplier applicable would be 18 and the compensation would be Rs.18 lakhs. But if the tribunal holds that as the life expectancy of the deceased was 70 as per evidence and therefore, it would apply a multiplier of 50 (that is 70-20), instead

of 18 and as a consequence, awards Rs.50 lakhs as compensation, should the insurer be without remedy if the owner and driver do not care to file an appeal, as the liability under the Act is that of the insurer. It is only the insurer, who is required to pay the compensation amount, is interested in filing the appeal. It can file an appeal by itself or it can file an appeal jointly with the owner. If it is denied that opportunity, there is a likelihood of huge compensation being awarded without any correction. The fact that the compensation is not likely to be interfered, may also encourage the Motor Accident Claims Tribunal to make awards which may not be fanciful reasonable. We fail to see why the insurance company cannot challenge the judgment of the tribunal, if it is erroneous. The Act nowhere says that the insurer is not a 'person aggrieved' with reference to the amount of compensation awarded which he is required to pay. It is difficult to countenance the submission that a person who is required to a sum of money, from his pocket, has no right even to say : "Look here, the calculation of the amount claimed is wrong". Interests of justice will not be served by allowing obvious errors to remain uncorrected.

19. The Insurers submit that if the owner of the vehicle (Insured) fails to file an appeal when an erroneous award is made, he fails to contest the same and consequently, the insurer should be able to file an appeal, by applying the principle underlying section 170 of the Code. In this behalf, they relied upon the decision in *United India Insurance Co. Ltd. vs. Bhushan Sachdeva* – 2002 (2) SCC 265, (held to be not good law in *Nicolletta Rohtagi*) wherein a two Judge Bench of this Court held thus :

> "The person against whom the claim is made is normally the insured of the vehicle involved in the accident. When he failed to contest that claim made against him the insurer gets the opportunity to contest such claim on all or any of the grounds available to the insured. Such a provision was absent in the Motor Vehicles Act, 1939 initially and the Parliament inserted it therein only in March 1970. The right of the insured to contest a claim does not stop with the end of the proceedings before the Tribunal.
>
> What is meant by the words "failed to contest"? Those words must be interpreted in a realistic manner. Right to contest would include the right to contest by filing an appeal against the award of the Tribunal as well. Hence the insured can continue to context the claim by filing an appeal as provided under Section 173 of the Act. If the insured fails to prefer an appeal that also would amount to failure to contest that claim effectively. Quite often the insured would lose the desire to contest the claim once he is told that he would not be mulcted with the liability as the same is siphoned off to the insurer. It means that insured had dropped out from contesting a claim midway. In such an eventuality the Act enables the insured to contest it on all grounds available to the insured."

20. In *British India General Insurance Co.Ltd. v. Captain Itbar Singh & Ors.* — AIR 1959 SC 1331, a three Judge Bench of this Court held as under:

> "….The Statute has no doubt created a liability in the insurer to the injured person but the statute has also expressly confined the right to avoid that liability to certain grounds specified in it. It is not for us to add to those grounds and therefore to the statute for reasons of hardship. We are furthermore not convinced that the statute causes any hardship. *First, the insurer has the right, provided he has reserved it by the policy, to defend the action in the name of the assured and if he does so, all defences open to the assured can then be urged* by him and there is no other defence that he claims to be entitled to urge. He can thus avoid all hardship if any, by providing for a right to defend the action in the name of the assured and this he has full liberty to do…."
>
> (emphasis supplied)

Nicolletta Rohtagi did not consider the issue with reference to the situation where the insurer is enabled by a specific term in the insurance policy to take over and conduct the defence of the case in the name of the insured, presumably as the insurance policy did not have such an enabling provision. In fact if such a contention had been raised, the court would have noticed that the issue was covered by a binding three-Judge Bench judgment in *British India General Insurance*. Be that as it may.

21. However, in view of the decision in *Nicolletta Rohtagi*, we cannot decide points (iii) to (v) in favour of the Insurers. For the aforesaid reasons, in so far as issues (iii) to (v) are concerned, we are of the view that *Nicolletta Rohtagi* requires reconsideration by a larger bench.

Conclusion

22. We accordingly answer the points arising from the reference as under:

(i) Points (i) and (ii) are held in favour of the Insurers. The matters covered by points (i) and (ii) are to be placed before the respective benches for consideration accordingly.

(ii) Points (iii) to (v) which may come in conflict with *Nicolletta Rohtagi*, are referred to a larger Bench. We accordingly direct these matters (that is, cases where the insurer alone was the appellant before the High Court and where the insurer was only a noticee under section 149(2) and not an impleaded respondent in the claim petition), to be placed before the Hon'ble Chief Justice for constituting a larger bench to consider points (iii), (iv) and (v) raised by the insurers.

20. The parties to file memos indicating whether their cases are covered by points (i) and (ii) or under points (iii) to (iv) to enable the Registry to place the matters appropriately.

N.J. Reference answered.

ASHOK KUMAR LINGALA
v.
STATE OF KARNATAKA & ORS.
(Civil Appeal No. 8819 of 2011)

OCTOBER 18, 2011

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

Mines and minerals – Mining lease – Overlapping of the area covered by the two leases – Appellant granted mining lease in respect of a private land whereas respondent no. 3 granted mining lease in respect of government and forest land alone – Writ petition by the appellant seeking direction to the respondent to refrain from interfering with the mining activities of the appellant which the lease deed authorised him to carry out and writ petition by respondent No.3 challenging the very grant of the mining lease in favour of the appellant – High Court holding that area forming subject matter of the mining leases granted to the appellant on one hand and respondent on the other to be determined by the civil court in the suit pending before it on basis of the evidence led by the parties – On appeal, held: When large areas are granted for mining purposes, some confusion as to the boundaries of such areas especially if they are adjacent to each other is nothing abnormal - In such cases a fresh demarcation is to be conducted and boundaries is to be fixed so that the parties holding such areas stay within the limits of their respective areas instead of straying into the adjacent area – Order of restraining mining operation was meant to be a temporary and interim arrangement meant to remain in force only till such time the Director (Mines) examined the issue regarding the alleged overlapping of the area and passed a final order on the subject – Ownership of the areas claimed by both the lessees vests in different owners - So long as the areas leased to them are identifiable on spot by different survey numbers

and boundaries, there is no question of any overlapping – Thus, proper identification and demarcation of the areas to be carried out and directions issued for the same.

Certain land dedicated to a temple, was given to 'P' for services rendered to the temple. After the enactment of Karnataka (Sandur Area) Inam Abolition Act, 1976, 'P' was granted occupancy rights in respect of the said land (private patta land) and his name was entered in the record of rights. Thereafter, wife of 'P' allowed the appellant to obtain a mining lease over the said land. The Authorities found the property to be private patta land and gave no objection for the grant. The Central Government approved for the *grant of land*. **The State Government issued notification sanctioning a mining lease over the said area and the lease deed was executed.**

Respondent No. 3-'S' held a lease in respect of Government and forest land situate in 'S' Area. It is the appellant's case that when he started the mining activity, the Director of Mines and Geology restrained the appellant from conducting mining activities on the ground that the area for which the lease was granted to the appellant overlapped the area granted to 'S'. Aggrieved, the appellant filed an application to the Director of Mines and Geology as also to the State Government. He submitted that even when 3rd though respondent No. 3 had filed a suit for an injunction but no injunction was issued by the court, yet the Director of Mines issued an injunction. The appellant filed a writ petition challenging the said order/communication and prayed for a direction to the respondent to refrain from interfering with the mining activities of the appellant. Respondent No.3 filed a writ petition challenging the grant of the mining lease in favour of the appellant. The High Court disposed of the writ petitions holding that the identity of the area forming subject matter of mining leases granted to the appellant and to the respondent would be decided by the Civil Court on the basis of evidence adduced before it; and that if there is an overlapping of the area covered by two leases, the lessee who claims under the lease granted earlier in point of time would have a superior right to carry out the mining activities in preference to the one granted earlier. Therefore, the appellants filed the instant appeals.

Allowing the appeals, the Court

HELD: 1.1 The grant of occupancy rights in favour of 'P' by the Statutory Tribunal was not under challenge before the High Court nor was any challenge ever thrown to the orders passed by it or the implementation thereof in the relevant revenue record before any other forum. Even the State under whom respondent No.3 'S' claims the right to carry out mining operations, never found fault with the grant of land in favour of 'P'. It is, therefore, too late in the day for any one to question the legality of the order granting land situate in Survey No. 27 to 'P' or to assert that notwithstanding what has happened in the statutory proceedings, the area falling under Sy. No. 27 must be recognised as government land, thus, a part of area leased to 'S'. Secondly because in the record of rights Survey No.27 is shown to be privately held by 'P' and after his death by 'Y' his widow. The State Government and 'KD' Temple to whom the land was dedicated before its grant to 'P' accepted that position; and raised no dispute or question as to the correctness of the revenue record. The report submitted by the Deputy Commissioner, the spot inspection, and the very grant of a lease qua the area in question, all lend credence to the revenue record that recognises the land in question to be private land. [Para 16]

1.2 It is obvious that when large areas are granted for mining purposes, some confusion as to the boundaries of such areas especially if they are adjacent to each other is nothing abnormal. What in such cases needs to be done is to conduct a fresh demarcation and fix boundaries so that the parties holding such areas stay within the limits of their respective areas instead of straying into the adjacent area. [Para 17]

1.3 The mere pendency of a suit in a civil court could not be an impediment for the appellant to start or continue his mining activity, unless there was an injunction restraining him from doing so. No such injunction has been issued by the civil court. That does not, however, mean that the Government or the Director (Mines) for that matter could not in the event of any dispute between the appellant and 'S' regarding the identity and demarcation of the area leased to both of them direct the appellant to refrain from carrying on the mining activity as an interim measure till such time the issue was sorted out. But once such an interim direction was issued, the authority doing so had to take steps to resolve the dispute. It could not let the dispute fester and result in a stalemate. So also the restraint order could not be continued by the High Court till the dispute was adjudicated upon by the Civil Court. Doing so would amount to one authority making an interim order pending a final order to be made by another. The power to make an interim order is, except where it is specifically taken away by the statute, implicit in the power to make a final order. It is exercised by the authority who has to make the final order or an authority exercising appellate or revisional jurisdiction, against an order granting or refusing an interim order. The exercise of the power implies that the authority seized of the proceedings in which such an order is made will eventually pass a final order; the interim order serving

only as a step in aid of such final order. The law, does not permit the making of an interim order by one authority or Court pending adjudication of the dispute by another except in the situation mentioned above. The order of restraining mining operation was meant to be a temporary and interim arrangement meant to remain in force only till such time the Director (Mines) examined the issue regarding the alleged overlapping of the area and passed a final order on the subject. [Para 19]

1.4 The restraint order passed by the Director (Mines) in the absence of the report of the Drawing Section which was the sole basis for the order passed by the Director (Mines) could not be justified. If the Drawing Section had indeed undertaken an exercise the same ought to have been disclosed to the High Court and to this Court so that the validity of any such exercise could be examined. Absence of the report said to have been made by the Drawing Section and non-production of any material indicating the process by which the Drawing Section came to the conclusion that there was overlapping of the two areas, one privately owned and the other belonging to the State, lend support to the submission that the order of restraint passed by the Director was made in haste. However, there is no inclination to dwell any further on this aspect nor it is proposed to vacate the interim restraint order issued by the Director on the ground that it was based on material that was tenuous and remained un-substantiated. The real problem lies in the demarcation of the two areas leased to the appellant on the one hand and 'S' on the other. The ownership of the areas claimed by both the lessees vests in different owners. So long as the areas leased to them are identifiable on spot by different survey numbers and boundaries, there is no question of any overlapping. The confusion regarding boundaries in turn is a matter the

answer to which lies only in a proper demarcation of the areas. [Para 20]

1.5 It was submitted that dispute between the appellant and 'S' has considerably delayed the mining activity of the appellant, and that a direction ought to be issued to the authorities to expedite the process of demarcation; that keeping in view the bad blood generated between the parties it would be more appropriate to entrust the entire process of demarcation and identification of the leased areas to the Geological Survey of India. However, there is no reason to issue any such direction at this stage. While the appellant may have some apprehensions about the fairness of the officers of the concerned department, those are not considered sufficient to mistrust the State functionaries in the absence of any material to suggest that there is any real likelihood of bias. That does not mean that the process of identification and demarcation of the area leased to the appellant should not be undertaken by senior level officers of the State Government to ensure that there is no scope for any mischief or miscarriage of justice. [Para 21]

1.6 The impugned order passed by the High Court is set aside and the writ petition filed by the appellant is allowed partly and to the following extent:

(1) The Secretary, Department of Industries and Commerce, Government of Karnataka, shall constitute a Committee of officers for conduct of the demarcation and identification of the boundaries of the area leased to the appellant in terms of Mining Lease No.2622.

(2) The Secretary shall monitor the progress made by the Committee from time to time. A suitable order based on the report and other material, if any, placed before the

Secretary shall then be passed by him after affording to each party an opportunity of being heard in the matter. The order so passed shall supersede the order dated 5.3.2010 passed by the Director (Mines).

(3)The above directions shall be carried out by the Secretary expeditiously. [Para 22]

CIVIL APPELLATE JURISDICITION : Civil Appeal No. 8819 of 2011.

From the Judgment & Order dated 01.09.2010 of the High Court of Karnataka at Bangalore in W.P. No. 17281 of 2010.

WITH

C.A. No. 8820 of 2011.

Dushyant A. Dave, L.M. Chidanandayya, Prachi Bajpai, M.P. Shorawala for the Appellant.

T.R. Andhyarujina, Sunil Gogra, A. Venayaga, Balan for the Respondents.

The Judgment of the Court was delivered by

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

2. These appeals arise out of an order dated 1st September, 2010 passed by the High Court of Karnataka whereby Writ Petition No.17281 of 2010 filed by the appellant has been disposed of with the direction that the question of identity of the area forming the subject matter of the mining leases granted to the appellant on the one hand and respondent M/s Sandur Manganese & Iron Ore Company Ltd. ('SIMORE' for short) on the other, shall be determined by the Civil Court in the suit pending before it on the basis of the evidence that the parties may choose to lead. The High Court has further held that in case the Civil Court comes to the

conclusion that the area over which the mining leases have been granted to the rival parties does not overlap then both of them would be entitled to carry out their mining activities under their respective lease agreements. In case, however, the Civil Court is of the opinion that there is an overlapping of the area covered by the two leases, the lessee who claims under the lease granted earlier in point of time would have a superior right to carry out the mining activities in preference to the one granted later. The facts in brief are as under:

3. Land measuring 4.42 hectares situated at village Devagiri, Sandur Taluk, Bellary District falling under Surveys No. 56/P, 57/P, 58/P and 91/P was according to the appellant dedicated to Kumaraswamy Devaru Temple. The entire extent of land which now falls in new Survey No.27 was given to one-Pennaiah S/o Dodda Pennaiah for cultivation in lieu of the services which he was rendering to the temple. With the enactment of the Karnataka (Sandur Area) Inam Abolition Act, 1976 abolishing all rights in inam lands and permitting the cultivators and tenants of the land to make applications under Section 10 of the Act for re-grant and registration, the cultivator-Pennaiah also made an application to the Land Tribunal, Sandur Taluk, Bellary District seeking a re-grant. The said application eventually culminated in the Tribunal passing an order dated 22nd October, 1981 granting occupancy rights in favour of the tenant, pursuant whereto the Tehsildar issued a registration certificate registering his occupancy rights and entering his name in the record of rights.

4. The appellant's further case is that Pennaiah continued to cultivate the land personally especially when neither the order of re-grant was challenged before the Land Tribunal nor his cultivation objected to by anyone including the 3rd respondent who held a lease in respect of Government and forest land situate in Sandur Area. The appellant asserts that the land aforementioned is a piece of private patta land that was held by Pennaiah during his life time and by his widow Yellamma

after his death. Neither Pennaiah nor Yellamma had in their capacity as Pattadars in cultivating possession of the land ever offered the property to SIMORE or granted any right or any other interest in its favour. On the contrary Yellamma in her capacity as Pattadar had permitted the appellant to obtain a mining lease under the provisions of Minor Mineral (Development and Regulation) Act, read with Mineral Concessions Rules, 1960 which application was sent to the Deputy Commissioner, Bellary District, to verify the status of the land and also to the Deputy Director of Mining and Geology for conducting an actual spot inspection. Both the authorities had, according to the appellant, submitted their respective reports in which the said property was found to be private Patta land. They had, therefore, offered no objection to the grant of a mining lease qua the same.

5. It was on the basis of the reports aforementioned that the State Government had sought the approval of the Central Government for the grant of a mining lease in favour of the appellant which approval was upon due and proper consideration granted by the Central Government. The State Government had pursuant thereto issued a Notification dated 15.1.2010 sanctioning a mining lease over an area of 4.42 hectares situate in Devagiri Village Sandur Taluk Bellary Distt., as per the sketch furnished by the Director Department of Mines and Geology. Boundaries of the area in question were fixed for an extent of 3.36 hectares in terms of letter dated 2.2.2010 issued by the Deputy Director Mines and Geology, Hospet and a lease deed executed and registered with the Sub-Registrar under ML No.2622.

6. The appellant's case is that when he started the mining activities in exercise of his right under the lease aforementioned, the Director of Mines and Geology, Government of Karnataka issued a communication dated 5th March, 2010 by which the appellant was restrained from conducting any such activities on the ground that the area

covered by the lease granted to the appellant overlapped the area stated to have been granted to the SIMORE respondent no.3 herein. On receipt of the said letter the appellant filed an application to the Director of Mines and Geology objecting to the order and pointing out that the same had been passed without issuing to the appellant any notice or granting to him any opportunity of being heard in the matter. The appellant also represented to the State Government against the direction issued by the Director of Mines and Geology and asserted that even when 3rd respondent SIMORE had filed a Civil Suit in the Court of Civil Judge (Senior Division) Kudligi and prayed for an injunction no such injunction had been issued by the said Court. The Director of Mines was not, therefore, justified in issuing an injunction which the Civil Court had not issued; on the very same factual matrix. The restraint order issued by the Director of Mines and Geology continued to remain in force despite the objections raised by the appellant. As a matter of fact, the Director of Mines wrote a letter dated 25.5.2010 to the appellant saying that order dated 5.3.2010 stopping mining operations could not be vacated or modified. The appellant was in that backdrop forced to approach the High Court of Karnataka at Bangalore in Writ Petition No.17281 of 2010 challenging the said order/communication on several grounds and praying for a direction to the respondent to refrain from interfering with the mining activities of the appellant which the lease deed authorised him to carry out. Respondent no.3, SIMORE filed Writ Petition No.18043 of 2010 challenging the very grant of the mining lease in favour of the appellant. The said two writ petitions were finally disposed of by the High Court in terms of a common order dated 1st September, 2010 impugned in the present appeals.

7. Relying upon the orders passed by the Director, Department of Mines and Geology dated 5th March, 2010 and 25th May, 2010, the High Court concluded that there was overlapping of areas held by the appellant and SIMORE under their respective lease deeds. The High Court held that the

appellant had not been in a position to produce any evidence to show that the conclusion drawn by the Director of Mines regarding overlapping of the areas was erroneous. The High Court observed:

> "We permitted learned counsel for Ashok Kumar Lingala to examine the same. Even therefrom, learned counsel representing Ashok Kumar Lingala could not repudiate the finding of fact recorded in the two impugned orders.
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> 15. *From the two orders issued by the Director, Department of Mines & Geology dated 05.03.2010 and 25.05.2010, we have no other alternative or hesitation but to conclude, that 'M/s Simore' had been granted a mining lease, in respect of the same land, well before Ashok Kumar Lingala was awarded the mining lease. That being so, the claim of Ashok Kumar Lingala could not have been considered for grant of a mining lease over the area which comprised of part of the mining lease already granted to 'M/s Simore', as the application of Ashok Kumar Lingala was bound to be treated as a premature application.* This inference is inevitable from a collective reading of rules 59 and 60 of the Mineral Rules, and Section 24A of the Mines and Minerals Act."

(underlined)

8. Having held that there was an overlapping of the areas covered by the two leases, the High Court interpreted the rules to record a finding that even when the area leased to SIMORE may include private land owned by Smt. Yallamma and even when Yallamma has not granted any surface rights to it, SIMORE could undertake mining activity in the private area by paying compensation to Yallamma before undertaking such

activities. The High Court observed:

> "On the issue whether 'M/s Simore' could carry out mining activities over the land owned by the private owner Smt. Yallamma, the provisions relied upon by the learned counsel representing 'M/s Simore' leave no room for any doubt, that in case mining activity is carried out by 'M/s Simore' over private land, compensation will have to be paid by 'M/s Simore' to the private land owner under rule 72 of the Mineral Rules. But the submission of this learned counsel representing Ashok Kumar Lingala, also leave no room for any doubt, that 'M/s Simore', in spite of the grant of a mining lease covering private owned land, would not be in a position to unilaterally and arbitrarily conduct mining activities thereon without the consent/permission of the land owner Smt. Yallamma. The instant conclusion is based on the second proviso under rule 22(3) (i) (h) of the Mining Rules which mandates, that unless permission/ authorization is granted by the land owner, mining activity cannot be carried out. Even if it is assumed, that prior consent of the land owner was not obtained by 'M/s Simore' before obtaining the lease deed from the State Government, still the second proviso under rule 22(3) (i)(h) of the Mining Rules extracted above, mandates that, prior to entering into private owned land for mining activities, permission from the land owner is a necessary pre-requisite."

9. What followed the above two findings, one touching the question of overlapping of the lease areas and the other dealing with the effect of the overlapping qua privately owned land, is interesting. The High Court took a somersault and held that the question of overlapping could not be decided by it authoritatively and left the same must be decided by the Civil Court on the basis of evidence adduced before it. It observed:

> "Thus viewed, it is not possible for us to record any concrete finding on the factual aspect of the matter. We have noticed hereinabove, that a civil suit is pending between the parties. It will be open to the rival parties to lead evidence therein, if they are so advised, to determine the specific identity of the property over which mining leases have been granted to them. In case such evidence leads to the conclusion, that the land over which mining leases have been granted to the rival parties, do not overlap, then both of them would be entitled to carry out mining activities, under the lease agreements executed by the State Government in their favour. In case the factual finding is to the contrary, then on account of the conclusions drawn hereinabove, the earlier licensee will have to be granted the superior right to exclusively carry out mining activities. As such, 'M/s Simore' shall have a preferential right over Ashok Kumar Lingala. In such an eventuality, no interference will be called for with the impugned orders dated 05.03.2010 and 25.05.2010."

10. Appearing for the appellant Mr. Dushyant A. Dave, learned senior counsel strenuously argued that the High Court had totally misdirected itself both on facts and in law. He submitted that the High Court had failed to notice that the lease granted in favour of respondent no.3 SIMORE was in respect of government and forest land alone. No part of any private land covered the lease in its favour nor was any claim to that effect ever made by respondent no.3 SIMORE. In support of that submission learned counsel drew our attention to the application filed before the Government of Karnataka by respondent no.3 SIMORE seeking renewal of the lease in the year, 1992. In particular, he relied upon the answers given by SIMORE to the queries made in paras viii (a), x-A(a) and (b) of the renewal application to argue that respondent No.3 SIMORE had unequivocally stated that the lease sought to be renewed in its favour comprised government land and no part of it was owned or occupied by any private party. Paras viii (a), x-A(a) and (b) of the renewal application are as under:

viii a)	Particular of the mining lease of which renewal is desired	ML No. 1179 Area: 16.74 sq. miles In Sandur Taluk of Bellary District Karnataka
x-A a)	Does the applicant continue to have surface rights over the area of the land for which he requires renewal of the mining lease.	Yes (Government land).
b)	If not, has he obtained the consent of the owner and occupier for undertaking mining operations. If so, the consent of the owner and occupier of the land obtained in writing, be filed.	Not applicable

11. He also drew our attention to the report of inspection dated 22nd February, 1993 submitted by Government of Karnataka, a copy whereof has been placed on record which too clearly mentioned that the area covered by the lease sought to be renewed was forest and government land. He particularly drew our attention to the following passage in the said report:

"The present application for renewal is for third renewal. The whole area of 16.74 sq. miles is bounded on the North by Sandur State Forest on the South by Hospet Taluk on the East by Nauluti forest and on the West by Kudligi Taluk. *Area is Government and it is forest land also.*"

12. Mr. Dave next drew our attention to the plaint filed by respondent no.3 SIMORE in OS No.9/2010 to buttress his submission that respondent no.3 SIMORE had not claimed any private land to be a part of its mining lease area. Reference in

this regard was particularly made to para 11 of the plaint which is to the following effect:

"11. Further, the Plaintiff hereby submits that the Plaintiff is in physical possession and enjoyment of the Schedule land for more than five decades. The Schedule land is an un-surveyed land and accordingly the NOC issued by the Deputy Commissioner, Bellary on 31.03.1998 refers to the same as blocks and *confirms that the same is a Revenue Land (Government Land).* The claim of the Defendant that he has obtained Mining Lease over an area of 3.36 ha under survey No.27 appears to be dubious or it may be pertaining to some other land. In addition to this, the Plaintiff has paid Rs.104 crore towards Net Present Value Compensatory Afforestation charges on the 1615.64 of forest land and Rs.2,07,79,920/- towards Environmental Protection Fee on the 247.38 ha of Revenue land held by it under Mining Lease Nos. 2580 (Old No.1179)."

13. Mr. Dave vehemently argued that inasmuch as the High Court had overlooked the material on record it had fallen in a palpable error in assuming that the land leased to the appellant could possibly overlap the area leased to respondent no.3 M/s SIMORE. So long as the two lessees were claiming surface rights over their respective lease areas under different owners the question of overlapping did not arise argued the learned counsel. At any rate the area leased to the appellant was not only verified as to its nature and ownership but was spot inspected and demarcated, which fact was evidenced from the reports placed on record. It was, therefore, wholly futile for any one to suggest that the areas granted to the two lessees were overlapping, contended Mr. Dave.

14. On behalf of respondent no.3 SIMORE it was on the other hand contended by Mr. T.R. Andhyarujina, senior counsel that the respondent no.3 SIMORE did not claim any private land to be a part of its lease area. He submitted that even when that was so the overlapping which the Director, Mines and Geology

had referred to was possible as according to SIMORE the area leased to appellant ought to be treated as a part of government land. Alternatively, it was contended that while the appellant may claim to have obtained a lease in respect of privately owned land the fact of the matter was that the area in which the appellant intended to conduct his mining activities was a part of the area leased to respondent no.3.

15. Ms. Anitha Shenoy, counsel appearing for the State Government and its functionaries argued that the orders passed by the Director (Mines) suspending mining operations were on the basis of the conclusion drawn by the drawing section of the mining department according to which the two areas forming the subject matter of the two leases were overlapping. She contended that even when the report of the drawing section and the basis on which this overlapping had been prima facie established had not been placed on record, the site plans/maps placed on record supported the conclusion that there was some overlapping. Learned counsel further submitted that the orders passed by the Director (Mines) were interim in nature and the question whether or not there was any overlapping had yet to be determined by the competent authority. She fairly conceded that in the process of any such determination the rival claimants shall have to be heard by the competent authority.

16. We have given our careful consideration to the submissions made at the Bar and perused the record. The facts emerging from the record place the controversy within a narrow compass. While the appellant claims that the lease granted to it is in respect of a privately owned area, respondent no.3 SIMORE claims that the area leased in its favour comprises government and forest land only. If that be so, as indeed are the positions taken by the parties there is no question of any overlapping of the two areas for what is government or forest land cannot be privately owned and vice-versa. Mr. Andhyarujina all the same made a valiant attempt to persuade us to hold that the area falling in Survey No.27 qua which the appellant has obtained a lease is, in fact, government land and

that no part of it is or was at any stage privately owned. What he argued in support of that contention was that the grant of occupancy rights in favour of Pennaiah was not warranted in the facts and circumstances of the case, and if that were so, any such grant could be ignored. We regret our inability to accept that submission. We say so firstly because, the validity of the grant of occupancy rights in favour of Pennaiah by the Statutory Tribunal was not under challenge before the High Court nor was any challenge ever thrown to the orders passed by it or the implementation thereof in the relevant revenue record before any other forum. Even the State under whom respondent No.3 SIMORE claims the right to carry out mining operations, never found fault with the grant of land in favour of Pennaiah. It is, therefore, too late in the day for any one to question the legality of the order granting land situate in Survey No. 27 to Pennaiah, or to assert that notwithstanding what has happened in the statutory proceedings, the area falling under Sy. No. 27 must be recognised as government land, hence a part of area leased to SIMORE. Secondly because in the record of rights Survey No.27 is shown to be privately held by Pennaiah and after his death by Yallamma his widow. The State Government and Kumaraswamy Devaru Temple to whom the land was dedicated before its grant to Pennaiah, have accepted that position; and raised no dispute or question as to the correctness of the revenue record. The report submitted by the Deputy Commissioner, the spot inspection, and the very grant of a lease qua the area in question, all lend credence to the revenue record that recognises the land in question to be private land.

17. Such being the case the only question that calls for determination is whether respondent no.3 SIMORE is right in insisting that the area in which the appellant proposes to carry on his mining activity is a part of the area leased to former. It was argued by Mr. Andhyarujina that the area sought to be exploited for mining purposes by the appellant comprised the workers colony of SIMORE. That assertion was stoutly denied

by the appellant according to whom the mining operations are confined to the area originally demarcated at the time of the grant of the lease. Be that as it may what needs to be examined is whether the appellant is mining within his lease area or beyond. This would in turn require the area leased to the appellant to be demarcated again assuming that an earlier demarcation had also taken place, especially because SIMORE denies any such previous demarcation having been conducted. According to SIMORE the officer said to have done so was placed under suspension for dereliction of duties. It is unnecessary for us to go into the validity of any previous demarcation. It is obvious that when large areas are granted for mining purposes, some confusion as to the boundaries of such areas especially if they are adjacent to each other is nothing abnormal. What in such cases needs to be done is to conduct a fresh demarcation and fix boundaries so that the parties holding such areas stay within the limits of their respective areas instead of straying into the adjacent area.

18. We may at this stage advert to another submission made by Mr. Dave that the Director (Mines) could not have stopped the mining operations of the appellant on the basis of what was according to Mr. Dave a frivolous complaint filed by SMIORE that alleged overlapping of the lease areas. He contended that a valid lease having been granted to the appellant after following the requisite formalities and the procedure prescribed under the relevant rules and after proper demarcation of the privately held area that was available for mining, the Director should not have on a sketchy report from the Drawing Section of the Department stopped the mining activities. It was further contented by Mr. Dave that since the mining activity had been stopped under the orders of the Director (Mines), the High Court was in error in not only upholding the said direction but extending their efficacy till such time the dispute between the parties was resolved by the Civil Court.

19. The mere pendency of a suit in a Civil Court could not

be an impediment for the appellant to start or continue his mining activity, unless there was an injunction restraining him from doing so. No such injunction has been issued by the Civil Court. That does not, however, mean that the Government or the Director (Mines) for that matter could not in the event of any dispute between the appellant and SIMORE regarding the identity and demarcation of the area leased to both of them direct the appellant to refrain from carrying on the mining activity as an interim measure till such time the issue was sorted out. But once such an interim direction was issued, the authority doing so had to take steps to resolve the dispute. It could not let the dispute fester and result in a stalemate. So also the restraint order could not be continued by the High Court till the dispute was adjudicated upon by the Civil Court. Doing so would amount to one authority making an interim order pending a final order to be made by another. The power to make an interim order is, except where it is specifically taken away by the statute, implicit in the power to make a final order. It is exercised by the authority who has to make the final order or an authority exercising appellate or revisional jurisdiction, against an order granting or refusing an interim order. The exercise of the power implies that the authority seized of the proceedings in which such an order is made will eventually pass a final order; the interim order serving only as a step in aid of such final order. The law, in our view, does not permit the making of an interim order by one authority or Court pending adjudication of the dispute by another except in the situation mentioned above. Ms. Shenoy was, therefore, right in her submission that the order of restraining mining operation was meant to be a temporary and interim arrangement meant to remain in force only till such time the Director (Mines) examined the issue regarding the alleged overlapping of the area and passed a final order on the subject.

20. Ms. Shenoy was, however, unable to justify the restraint order passed by the Director (Mines) in the absence of the report of the Drawing Section which was the sole basis for the

order passed by the Director (Mines). If the Drawing Section had indeed undertaken an exercise the same ought to have been disclosed to the High Court and to this Court so that the validity of any such exercise could be examined. Absence of the report said to have been made by the Drawing Section and non-production of any material indicating the process by which the Drawing Section came to the conclusion that there was overlapping of the two areas, one privately owned and the other belonging to the State, lend support to the submission made by Mr. Dave that the order of restraint passed by the Director was made in haste. We do not, however, propose to dwell any further on this aspect nor do we propose to vacate the interim restraint order issued by the Director on the ground that it was based on material that was tenuous and remained un-substantiated before us. In our opinion the real problem lies in the demarcation of the two areas leased to the appellant on the one hand and SIMORE on the other. As observed earlier the ownership of the areas claimed by both the lessees vests in different owners. So long as the areas leased to them are identifiable on spot by different survey numbers and boundaries, there is no question of any overlapping. The confusion regarding boundaries in turn is a matter the answer to which lies only in a proper demarcation of the areas.

21. It was submitted by Mr. Dave that dispute between the appellant and SIMORE has considerably delayed the mining activity of the appellant, and that a direction ought to be issued to the authorities to expedite the process of demarcation. He urged that keeping in view the bad blood generated between the parties it would be more appropriate to entrust the entire process of demarcation and identification of the leased areas to the Geological Survey of India. We, however, see no reason to issue any such direction at this stage. While the appellant may have some apprehensions about the fairness of the officers of the concerned department we do not consider them to be sufficient for us to mistrust the State functionaries in the absence of any material to suggest that there is any real likelihood of bias. That does not mean that the process of

identification and demarcation of the area leased to the appellant should not be undertaken by senior level officers of the State Government to ensure that there is no scope for any mischief or miscarriage of justice.

22. In the result we allow these appeals, set aside the impugned order passed by the High Court and allow Writ Petition No. 17281 of 2010 filed by the appellant in part and to the following extent:

(1) The Secretary, Department of Industries and Commerce, Government of Karnataka, shall constitute a Committee of officers for conduct of the demarcation and identification of the boundaries of the area leased to the appellant in terms of Mining Lease No.2622. The Committee so constituted shall include the Deputy Commissioner of the District concerned, the Chief Conservator of Forests or his nominee who shall be an officer not below the rank of Assistant Conservator of Forests, the Director of Survey and a Senior Officer of the Mines Department to be nominated by the Secretary. The Secretary shall be free to nominate any other official or officials whom he considers suitable for the purpose of identification and demarcation of boundaries of the areas covered by the mine held by the appellant.

(2) The Secretary shall monitor the progress made by the Committee from time to time. A suitable order based on the report and other material, if any, placed before the Secretary shall then be passed by him after affording to each party an opportunity of being heard in the matter. The order so passed shall supersede the order dated 5.3.2010 passed by the Director (Mines).

(3) The above directions shall be carried out by the Secretary expeditiously but not later than six months from the date a copy of this order is received/served upon the Secretary to Government by the parties.

(4) The parties shall bear their own costs.

N.J. Appeals allowed.

RAMJI VEERJI PATEL & ORS.
v.
REVENUE DIVISIONAL OFFICER & ORS.
(Civil Appeal No. 137 of 2003)

NOVEMBER 2, 2011

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

Land Acquisition Act, 1894 – ss. 4(1) and 6 – Land acquisition for expansion of depot of Roadways Corporation – Notification u/s. 4(1) that land belonging to appellants was needed for public purpose – Objections raised by the appellants that they had incurred expenditure in raising the level of the land; raised the building and installed a saw mill and their family was solely dependant upon the income from the saw mill; and alternative land were available for expansion of the depot – Objections considered by the Government but not convinced by the same – Issuance of declaration u/s. 6 – Writ petition challenging the notification and declaration – Dismissed by the High Court – Appeal also dismissed – On appeal, held: Land suggested by the appellants was not found to be equally suitable – Government gave reasons as to why the appellants' land was found to be more suitable for expansion of the depot – Appellants land is adjacent to the existing depot of the Corporation having easy access to the main road – Thus, the decision taken by the Government is not vitiated by any error of law nor it is irrational or founded on the extraneous reasons – Corporation or its successor not being a 'company' as defined in s. 3(e), Part VII of the Act is not applicable and as such procedure contemplated in Part VII having not followed, it cannot be said that acquisition is bad in law – No doubt appellants have been put to hardship by compulsory acquisition of their land, they can suitably compensated – The said litigation has taken about 22 years and public purpose has been stalled for the said period –

Nothing should be done that would result in frustrating the acquisition of land completed long back by following the procedure under the Act and possession taken in 2001, by giving full opportunity to the appellants u/s. 5-A – Thus, not a case fit for exercise of power under Article 142 – Constitution of India, 1950 – Article 142.

Appellants and their family members purchased agricultural land. They incurred expenditure in raising the level of the land and made improvements; raised the building and installed a saw mill. The Roadways Corporation made a requisition for making available land for expansion of their depot for a workshop. The State Government issued a notification under Section 4(1) of the Land Acquisition Act, 1894 that the land of the appellant's was needed for the public purpose. The said notification was also published. The appellants filed objections before the Revenue Divisional Officer (RDO) that the other lands behind the existing depot of the Corporation were available and could be used for the purpose of expansion of the depot; and that their family was dependant upon the income from the saw mill existing on the land and by compulsory acquisition of their land, they would be deprived of the sole means of livelihood. The RDO considered the objections and submitted his report to the Government. Meanwhile, the appellants sent a representation to the Government that the land just behind the existing depot which belonged to TELC was advertised for sale and, therefore, instead of resorting to the compulsory acquisition of the appellants' land, the land of TELC may be acquired. The Government was not convinced by the objections and issued a declaration under Section 6 and the same was published in the Gazette as also by other modes. The appellants filed a writ petition challenging the notification and declaration under Section 6 of the Act. The Single Judge of the High Court dismissed the writ petition. The

appeal was also dismissed. Therefore, the appellants filed the instant appeals.

Dismissing the appeal, the Court

HELD: 1.1 The submission that the land belonging to the TELC is suitable as that land is situated just behind the existing depot; the existing depot has already access to the main road from Chidambaram to Cuddalore and on acquisition of the land of TELC, the acquired land too would have access to the main road through the existing depot of the Corporation, thus, the suitability aspect was not at all been rationally considered by the Government, cannot be accepted. In the counter affidavit filed by the Government before the High Court, the averment that the land acquired exists adjacent to the existing depot and has easy access to the main road from Chidambaram to Cuddalore and it is found to be more suitable in all aspects for the expansion of the depot remains unrebutted and unchallenged by the appellants as no rejoinder was filed. [Paras 21, 22]

1.2 If the land proposed to be acquired and the alternative land suggested by the owners/persons interested are equally suitable for the purpose for which land is being acquired, the satisfaction of the Government, if not actuated with ulterior motive, must get primacy. In the judicial review, it is not open to the court to examine the aspect of suitability as a court of appeal and substitute its opinion. The instant case is not a case where the other lands suggested by the appellants have been found to be equally suitable. The Government gave reasons as to why the appellants' land was found to be more suitable for expansion of the depot. The appellants' land is adjacent to the existing depot of the Corporation having easy access to the main road. The manner in which the decision was taken by the Government regarding suitability of the appellants' land for expansion of the depot of the Corporation is not vitiated by any error of law nor it is irrational or founded on the extraneous reasons. [Para 23]

1.3 On consideration of and perusal of the site plan referred there is no doubt that the land of the appellants is more suitable than the land of TELC situate behind the existing depot. TELC land has no direct access from the Chidambaram to Cuddalore main road. It has access from a different side road passing adjacent to the canal. The size of the TELC's land is also awkward; it is a long piece of land of which width narrows down from 175 feet to 56 feet west to east. On the other hand, the appellants' land is adjacent on the southern side to the existing depot and has access from the Chidambaram to Cuddalore main road. Having regard to the purpose for which the land is sought to be acquired, namely, expansion of existing depot, particularly, for a workshop, the appellants' land is definitely more suitable. Pertinently, in their objections, the appellants did not challenge the public purpose for the acquisition of their land. It cannot be said that suitability aspect was not been reasonably or rationally considered by the Government. [Para 24]

1.4 The Corporation and the TNSTC fall within the definition of Section 3(cc) of the Land Acquisition (Amendment) Act, 1984. Both may not have been divested of their character as a government company but sub-clause (i) of Section 3(e) excludes a government company from the definition of company. Part VII (Sections 38 to 44B) of the Act provides for acquisition of land for companies. In view of the definition of the 'company' in Section 3(e) which excludes government company, the Corporation or for that matter its successor TNSTC does not fall within the definition of the 'company' and, therefore, is not covered by Part VII of the Act at all.

Thus, Part VII of the Act has no application to the instant case as the acquisition of land is not for a 'company' as defined in Section 3(e). [Paras 27 and 30]

State of Punjab and Ors. v. Raja Ram and Ors. **(1981) 2 SCC 66 : 1981 (2) SCR 712 – referred to.**

1.5 There is no doubt that by compulsory acquisition of their land, the appellants have been put to hardship. As a matter of fact, the RDO was alive to this problem. In his report dated September 14, 1989, the RDO did observe that the land owners have spent considerable money to raise the level of the land for constructing compound wall and running saw mill. He was, however, of the opinion that the appellants' land was very suitable for the expansion of the depot and the suitable compensation can be paid to the land-owners to enable them to purchase an alternative land. The appellants, however, proceeded to challenge the acquisition. The litigation has traversed upto this Court and taken about 22 years. The public purpose has been stalled for more than two decades. Being the Highest Court, an extraordinary power has been conferred on this Court under Article 142 to pass any decree, order or direction in the matter to do complete justice between the parties. The power is plenary in nature and not inhibited by constraints or limitations. However, the power under Article 142 is not exercised routinely. It is rather exercised sparingly and very rarely. In the name of justice to the appellants, under Article 142, nothing should be done that would result in frustrating the acquisition of land which has been completed long back by following the procedure under the Act and after giving full opportunity to the appellants under Section 5-A. The possession of the land has also been taken as far back as on July 25, 2001. The appellants made an application I.A. No. 2/2002 for direction to the respondents not to interfere with the

functioning of the saw mill and permit them to use the saw mill but this Court in its order dated May 8, 2002 only said that the saw mill shall not be demolished till further orders. No permission was granted to the appellants to use the saw mill. In other words, for more than ten years the saw mill is closed after possession was taken over from the appellants. In the circumstances, this is not a case fit for exercise of power under Article 142 and declare the acquisition of the appellants' land bad although the acquisition proceedings have been completed in accordance with law. [Para 31]

1.6 In the application I.A. No. 4 the appellants offered for amicable settlement by expressing their readiness and willingness to give an area of land admeasuring 13250 square feet out of the total land of 1.45 acres (i.e. 1 acre and 19445 sq. ft.) free of cost to the Corporation. However, the same was not acceptable to the respondent since such a small area was of no use for expansion of the existing depot. There is no unreasonableness in the submission that an area of 13250 square feet would not meet the purpose for which the appellants' land has been acquired. [Para 32]

Delhi Administration v. Gurdip Singh Uban and Ors. **(2000) 7 SCC 296: 2000 (2) Suppl. SCR 496;** *Hindustan Petroleum Corpn. Ltd. v. Darius Shapur Chenai and Ors.* **(2000) 7 SCC 627: 2005 (3) Suppl. SCR 388;** *Radhy Shyam (Dead) Through LRs. and Ors. v. State of Uttar Pradesh and Ors.* **(2011) 5 SCC 553;** *Munshi Singh and Ors. v. Union of India* **(1973) 2 SCC 337: 1973 (1) SCR 973;** *Union of India v. Mukesh Hans* **(2004) 6 SCC 14 – referred to**

Case Law Reference:

2000 (2) Suppl. SCR 496	**Referred to**	**Para 8**
2005 (3) Suppl. SCR 388	**Referred to**	**Para 8**

(2011) 5 SCC 553	**Referred to**	**Para 8**
1981 (2) SCR 712	**Referred to**	**Para 9**
1973 (1) SCR 973	**Referred to**	**Para 14**
(2004) 6 SCC 14	**Referred to**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 137 of 2003.

From the Judgment & Order dated 25.07.2001 of the High Court of Judicature at Madras in Writ Appeal No. 915 of 1999.

Pallav Shishodia, T.R.B. Sivakumar, K.V. Vijaykumar for the Appellants.

B. Balaji, Rakesh Sharma, Subramomium Prasad, T. Harish Kumar for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The appellants were unsuccessful in challenging the acquisition of their land before the Single Judge as well as the Division Bench of the Madras High Court. They are in appeal, by special leave.

2. On the requisition of Cholan Roadways Corporation Limited, Kumbakonam (for short, 'the Corporation') for making available land for expansion of their depot, particularly for a workshop, at Chidambaram, the State Government of Tamil Nadu (for short, 'the Government') issued a notification under Section 4(1) of the Land Acquisition Act, 1894 (for short, 'the Act') which was published in the Gazette on March 3, 1989 notifying for general information that the land mentioned therein, namely, land admeasuring 1.45 acres comprised in T.S. No. 14, classified as government wet land in Chidambaram Municipal Town, South Arcot District was needed for the above public purpose. The notification under Section 4(1) was also published in the two newspapers on November 18, 1988 and

in the locality on March 27, 1989. The appellants filed objections to the acquisition before the Revenue Divisional Officer (for short, 'RDO'), Chidambaram. The diverse objections to the acquisition were raised; one of such objections being that the other lands behind the existing depot of the Corporation were available and could be used for the purpose for which their land was sought to be acquired. They stated that their family was dependant upon the income from the saw mill existing on the land and by compulsory acquisition of their land, they would be deprived of the sole means of livelihood.

3. The RDO considered the objections put forth on behalf of the appellants and submitted his report to the Government on conclusion of the enquiry under Section 5-A of the Act.

4. It appears that when the report of the RDO was under consideration, the appellants sent a representation to the Government bringing to its notice that the land belonging to Tamil Nadu Evengelical Lutheran Church ('TELC') just behind the existing depot has been advertised for sale and, therefore, instead of resorting to the compulsory acquisition of the appellants' land, the land of TELC may be acquired.

5. The Government was not persuaded by the appellants' objections and the declaration under Section 6 of the Act was issued which was published in the Gazette on March 21, 1990. The publication of the Section 6 declaration was made by other modes as well.

6. The appellants challenged the notification under Section 4(1) and declaration under Section 6 of the Act in the writ petition before the Madras High Court. In opposition to the writ petition, counter affidavit was filed on behalf of the Government. The learned Single Judge of the High Court dismissed the writ petition by his order dated November 18, 1998.

7. Against the order of the Single Judge, the appellants preferred intra-court appeal which has been dismissed by the

impugned order on July 25, 2001.

8. Mr. Pallav Shishodia, learned senior counsel for the appellants raised two-fold contention. His first contention was that the appellants' objections about the availability of land belonging to TELC which is situated behind the existing depot of the Corporation and was available for sale were not rationally considered by the RDO and the Government. He submitted that the livelihood of about 40 members of the family was directly affected by the compulsory acquisition of their land and, therefore, the objections ought to have been considered in a reasonable manner more so since the public purpose for which the appellants' land was sought to be acquired could have been easily met by the acquisition of the TELC's land. In this regard, he referred to three decisions of this Court, namely, (i) *Delhi Administration v. Gurdip Singh Uban and Others*[1], *(ii) Hindustan Petroleum Corpn. Ltd. v. Darius Shapur Chenai and others*[2] and (iii) *Radhy Shyam (Dead) Through LRs. and others v. State of Uttar Pradesh and Others*[3].

9. The second contention of the learned senior counsel for the appellants was that the acquisition of the appellants' land by the Government was for the purposes of the Corporation and the Corporation being a 'company' for the purposes of the Act, the procedure contemplated in Part VII of the Act was required to be mandatorily followed and since the said procedure has not been followed, the acquisition is bad in law. In this regard, Mr. Pallav Shishodia placed reliance upon a decision of this Court in *State of Punjab and Others v. Raja Ram and others*[4].

10. On the other hand, Mr. B. Balaji, learned counsel for the State of Tamil Nadu supported the view taken by the Single Judge and the Division Bench of the High Court. He submitted

1. (2000) 7 SCC 296.
2. (2005) 7 SCC 627.
3. (2011) 5 SCC 553.
4. (1981) 2 SCC 66.

that the proceedings for acquisition of the appellants' land have been initiated and concluded in accordance with the procedure prescribed in the Act. There is no illegality in the acquisition of the appellants' land. He referred to the counter affidavit filed on behalf of the Government before the High Court in opposition to the writ petition.

11. The Act was enacted in 1894 for the acquisition of land needed for public purposes and for companies and for determining the amount of compensation to be made on such acquisition. The Act has undergone some amendments in 1919, 1921, 1923, 1933, 1962, 1967 and 1984; the last major amendments being by the Land Acquisition (Amendment) Act, 1984 (Act 68 of 1984).

12. The provisions contained in the Act, of late, have been felt by all concerned, do not adequately protect the interest of the land owners/persons interested in the land. The Act does not provide for rehabilitation of persons displaced from their land although by such compulsory acquisition, their livelihood gets affected. For years, the acquired land remains unused and unutilised. To say the least, the Act has become outdated and needs to be replaced at the earliest by fair, reasonable and rational enactment in tune with the constitutional provisions, particularly, Article 300A of the Constitution. We expect the law making process for a comprehensive enactment with regard to acquisition of land being completed without any unnecessary delay.

13. Reverting back to the Act, that Section 5-A of the Act confers a valuable right on the person interested in any land which has been notified under Section 4(1) as being needed for a public purpose or likely to be needed for public purpose is beyond doubt. By this right, the owner/person interested may put forth his objections not only in respect of public purpose but also the suitability of the acquisition in respect of his land. The objector gets an opportunity under Section 5-A to persuade the Collector that his land is not suitable for the purpose for which

the acquisition is being made or the availability of other land suitable for that purpose. Section 5-A proceedings are two-tier proceedings. In the first step, the objections by the owner/ person interested are heard by the Collector and a report is submitted to the Government. In the second step, the final decision is taken by the Government on the objections so furnished by the person interested and the consideration of the report submitted by the Collector.

14. In *Munshi Singh and others v. Union of India*[5], in paragraph 7 of the Report, this Court stated as follows :

> "7. Section 5-A embodies a very just and wholesome principle that a person whose property is being or is intended to be acquired should have a proper and reasonable opportunity of persuading the authorities concerned that acquisition of the property belonging to that person should not be made. ... The legislature has, therefore, made complete provisions for the persons interested to file objections against the proposed acquisition and for the disposal of their objections. It is only in cases of urgency that special powers have been conferred on the appropriate Government to dispense with the provisions of Section 5-A:"

15. The above legal position has been reiterated by this Court in various decisions including the decisions of this Court in *Hindustan Petroleum Corpn. Ltd.*[2] and *Radhy Shyam*[3] cited by Mr. Pallav Shishodia. In *Hindustan Petroleum Corpn. Ltd.*[2], this Court in paragaraph 6 of the Report stated thus :

> **"6.** It is not in dispute that Section 5-A of the Act confers a valuable right in favour of a person whose lands are sought to be acquired. Having regard to the provisions contained in Article 300-A of the Constitution, the State in exercise of its power of "eminent domain" may interfere with the right of property of a person by acquiring the same but the same must be for a public purpose and reasonable compensation therefor must be paid."

5. (1973) 2 SCC 337.

16. In *Union of India v. Mukesh Hans*[6], this Court referred to *Munshi Singh5* and in paragraph 35 of the Report stated that the limited right given to the owner/person interested under Section 5-A of the Act to object to the acquisition proceedings is not an empty formality and is a substantive right.

17. As a matter of law, under the Act, the only right that the owner/person interested has, is to submit objections to the compulsory acquisition of his land under Section 5-A. No question, such right and the consideration of objections filed by the land-owner/person interested in exercise of such right must be given the importance it deserves. The question before us, is whether the consideration of the appellants' objections to the acquisition of their land by the Government suffers from any illegality or irrationality.

18. The appellants and their family members purchased the subject land admeasuring 1.45 acres on January 27, 1981. The said land was agricultural at the time of purchase and was depressed in as much as it was low in level than the main road. The appellants incurred expenditure in raising the level of the land and made improvements; raised the building thereon and installed a saw mill somewhere in 1986. In their objections filed on May 24, 1989 before the RDO, the facts concerning the expenditure incurred by them for converting the agricultural land into building site; the deprivation of their sole means of livelihood and the availability of other lands were stated. The objectors also stated that the workshop of Thanthai Periyar Transport Corporation was originally put up in Anna Kalayarangam land owned by the Municipality. Later, they had purchased four acres of land comprised in T.S. Nos. 133 and 151 at Lal Puram main road, and constructed a workshop and that workshop was

6. (2004) 8 SCC 14.

functioning. The Corporation, the objectors submitted, can acquire any extent of land next to them to construct a workshop.

19. The RDO considered the above objections raised by the appellants and in the proceedings drawn on September 14, 1989 overruled the same. The RDO held that when the requisitioning authority approached TELC for making available their land, the TELC refused to sell the said land and informed them that they required their land for their religious purposes. The RDO, in this backdrop, observed that TELC's land cannot be acquired for the purpose of expansion of depot. As regards the availability of lands near Thanthai Periyar Transport Corporation, the RDO observed that these lands were one kilometre away from the Corporation's depot and, thus, the land of the appellants alone was suitable for the expansion of depot. The RDO, accordingly, forwarded its report to the Government.

20. On October 26, 1989, TELC issued a public notice in a daily newspaper 'Dina Malhar' for sale of its land referred to above. The appellants sent the copy of the said notice to the Government. However, the Government was not persuaded to accept the landowners' objections and on consideration of the RDO's report proceeded with the issuance and publication of declaration under Section 6 of the Act.

21. Mr. Pallav Shishodia, learned senior counsel for the appellants vehemently contended that the land belonging to the TELC is suitable as that land is situated just behind the existing depot; the existing depot has already access to the main road from Chidambaram to Cuddalore and on acquisition of the land of TELC, the acquired land too would have access to the main road through the existing depot of the Corporation. He, thus, submitted that suitability aspect has not at all been rationally considered by the Government.

22. It is difficult to accept the contention of the learned senior counsel for more than one reason. In the first place, in paragraph 5 of the counter affidavit filed by the Government

before the High Court, inter alia, following averment was made:

> "…….The land acquired exists adjacent to the existing depot and it has easy access to the main road from Chidambaram to Cuddalore and it is found to be more suitable in all aspects for the expansion of the depot………."

The above averment remains unrebutted and unchallenged by the appellants as no rejoinder was filed.

23. Secondly, if the land proposed to be acquired and the alternative land suggested by the owners/persons interested are equally suitable for the purpose for which land is being acquired, the satisfaction of the Government, if not actuated with ulterior motive, must get primacy. In the judicial review, it is not open to the court to examine the aspect of suitability as a court of appeal and substitute its opinion. In any case the present case is not a case where the other lands suggested by the appellants have been found to be equally suitable. The Government has given reasons as to why the appellants' land has been found to be more suitable for expansion of the depot. The appellants' land is adjacent to the existing depot of the Corporation having easy access to the main road. In our view, the manner in which the decision has been taken by the Government regarding suitability of the appellants' land for expansion of the depot of the Corporation is not vitiated by any error of law nor it is irrational or founded on the extraneous reasons.

24. Third and more important, at the insistence of the learned senior counsel for the appellants, we considered the site plan referred to by him and from a perusal thereof no doubt is left that the land of the appellants is more suitable than the land of TELC situate behind the existing depot. TELC land has no direct access from the Chidambaram to Cuddalore main road. It has access from a different side road passing adjacent

to the canal. The size of the TELC's land is also awkward; it is a long piece of land of which width narrows down from 175 feet to 56 feet west to east. On the other hand, the appellants' land is adjacent on the southern side to the existing depot and has access from the Chidambaram to Cuddalore main road. Having regard to the purpose for which the land is sought to be acquired, namely, expansion of existing depot, particularly, for a workshop, the appellants' land is definitely more suitable. Pertinently, in their objections, the appellants have not challenged the public purpose for the acquisition of their land. In what we have indicated above, it cannot be said that suitability aspect has not been reasonably or rationally considered by the Government.

25. Then comes the second contention of Mr. Pallav Shishodia. He relied upon the decision of this Court in the case of *Raja Ram*[4] and submitted that the erstwhile Corporation or the successor Tamil Nadu State Transport Corporation (TNSTC) is a 'government company' for the purposes of the Act and, therefore, compliance with the provisions of Part VII of the Act had to be made in order to lawfully acquire any land for its purpose. In this regard, he referred to the averment made in the reply to I.A. No. 3 of 2003 that TNSTC was the beneficiary of the acquisition; it is they who have remitted the extent of compensation quantified by the authorities under the land acquisition.

26. With regard to the above contention of Mr. Pallav Shishodia, it is enough to say that it overlooks Section 3(cc) and Section 3(e) of the Act, substituted by Act 68 of 1984. The definition of 'company' in Section 3(e) after substitution in 1984 is as follows:

"S.3(e).- the expression "company" means—

(i) a company as defined in section 3 of the Companies Act, 1956 (1 of 1956), other than a Government company referred to in clause (cc);

(ii) A society registered under the Societies Registration Act, 1860 (21 of 1860), or under any corresponding law for the time being in force in a State, other than a society referred to in clause (cc);

(iii) A co-operative society within the meaning of any law relating to co-operative societies for the time being in force in any State, other than a co-operative society referred to in clause (cc)".

Section 3(cc) of the Act defines the expression "corporation owned or controlled by the State" as follows :

"S.3(cc).- the expression "corporation owned or controlled by the State" means any body corporate established by or under a Central, Provincial or State Act, and includes a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956), a society registered under the Societies Registration Act, 1860 (21 of 1860), or under any corresponding law for the time being in force in a State, being a society established or administered by Government and a co-operative society within the meaning of any law relating to co-operative societies for the time being in force in any State, being a co-operative society in which not less than fifty-one per centum of the paid-up share capital is held by the Central Government, or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments;"

27. That Corporation and the TNSTC fall within the definition of Section 3(cc) is not in dispute. Both may not have been divested of their character as a government company but sub-clause (i) of Section 3(e) excludes a government company from the definition of company. Part VII (Sections 38 to 44B) of the Act provides for acquisition of land for companies. In view

of the definition of the 'company' in Section 3(e) which excludes government company, the Corporation or for that matter its successor TNSTC does not fall within the definition of the 'company' and, therefore, is not covered by Part VII of the Act at all.

28. In *Raja Ram*[4], the definition of 'company' in Section 3 (e) of the Act prior to its substitution fell for consideration. The definition of 'company' under consideration read as follows :

> "the expression "company" means a company registered under the Indian Companies Act, 1890 or under the (English) Companies Acts, 1862 to 1882 or incorporated by an Act of Parliament of the United Kingdom or by an Indian law, or by Royal Charter or Letters Patent and includes a society registered under the Societies Registration Act, 1860, an a registered society within the meaning of the Cooperative Societies Act, 1912, or any other law relating to cooperative societies for the time being in force in any State."

29. It was in the context of the above definition that this Court held in *Raj Ram*[4] that the Food Corporation of India was not divested of its character as a company within the meaning of definition of clause (e) of Section 3 of the Act. As noticed above, the definition of 'company' has undergone complete change and the government company has been expressly excluded from the expression 'company' for the purposes of the Act.

30. For the above reasons, it has to be held that Part VII of the Act has no application to the present case as the acquisition of land is not for a 'company' as defined in Section 3(e).

31. Mr. Pallav Shishodia, learned senior counsel also urged that the appellants are migrants from Gujarat. They have settled in Chidambaram about thirty years back and the livelihood of

the entire family of the appellants which comprised of about 40 members is dependant on the saw mill existing on the subject land. Having regard to these facts, he would submit that we invoke our jurisdiction under Article 142 of the Constitution and declare the acquisition of the appellants' land bad in law to do complete justice. There is no doubt that by compulsory acquisition of their land, the appellants have been put to hardship. As a matter of fact, the RDO was alive to this problem. In his report dated September 14, 1989, the RDO did observe that the land owners have spent considerable money to raise the level of the land for constructing compound wall and running saw mill. He was, however, of the opinion that the appellants' land was very suitable for the expansion of the depot and the suitable compensation can be paid to the land-owners to enable them to purchase an alternative land. The appellants, however, proceeded to challenge the acquisition. The litigation has traversed upto this Court and taken about 22 years. The public purpose has been stalled for more than two decades. Being the Highest Court, an extraordinary power has been conferred on this Court under Article 142 to pass any decree, order or direction in the matter to do complete justice between the parties. The power is plenary in nature and not inhibited by constraints or limitations. However, the power under Article 142 is not exercised routinely. It is rather exercised sparingly and very rarely. In the name of justice to the appellants, under Article 142, nothing should be done that would result in frustrating the acquisition of land which has been completed long back by following the procedure under the Act and after giving full opportunity to the appellants under Section 5-A. The possession of the land has also been taken as far back as on July 25, 2001. The appellants made an application (I.A. No. 2 of 2002) for direction to the respondents not to interfere with the functioning of the saw mill and permit them to use the saw mill but this Court in its order dated May 8, 2002 only said that the saw mill shall not be demolished till further orders. No permission was granted to the appellants to use the saw mill. In other words, for more than ten years the saw mill is closed after possession

was taken over from the appellants. In the circumstances, this is not a case fit for exercise of power under Article 142 and declare the acquisition of the appellants' land bad although the acquisition proceedings have been completed in accordance with law.

32. Lastly, the learned senior counsel invited our attention to the application (I.A. No. 4) wherein the appellants offered for amicable settlement by expressing their readiness and willingness to give an area of land admeasuring 13250 square feet out of the total land of 1.45 acres (i.e. 1 acre and 19445 sq. ft.) free of cost to the Corporation. The offer is not acceptable to Mr. B. Balaji. He submitted that such a small area is of no use for expansion of the existing depot. We do not find any unreasonableness in the submission of the counsel that an area of 13250 square feet would not meet the purpose for which the appellants' land has been acquired.

33. In view of the above, there is no merit in the appeal and it is dismissed. I.A. No. 4 and other pending applications, if any, stand disposed of. No costs.

N.J. Appeal dismissed.

CHIEF GENERAL MANAGER, CALCUTTA TELEPHONES DISTRICT, BHARAT SANCHAR NIGAM LIMITED AND ORS.

v.

SURENDRA NATH PANDEY AND ORS.

(Civil Appeal No. 9058 of 2011)

NOVEMBER 3, 2011

[ALTAMAS KABIR, SURINDER SINGH NIJJAR AND GYAN SUDHA MISRA, JJ.]

SERVICE LAW: Promotion – Examination for promotion to the post of Junior Accounts Officers – Respondents appeared in the examination – Their result not declared on the ground of cancellation of their candidature for their adopting unfair means in the examination which was detected at the time of evaluating the papers by the examiner – Constitution of Committee to submit report – Committee observed that the observation of the examiner was correct and all answers were taken from guide book used by candidates in the examination which were not permitted to be taken into the examination centre – Single Judge of the High Court held that the appellants had failed to establish that respondents were guilty of mass-copying and were, therefore, obliged to intimate to the respondents the marks secured by them in the examination; and directed appellants to consider them for promotion if successful in the examination and also awarded adhoc promotion to the respondents – Division Bench of the High Court affirmed the decision of the Single Judge and held that the respondent had been granted adhoc promotion which wiped out all past alleged misconduct – On appeal, held: High Court ought not to have interfered with the decision taken by the appellants requiring the candidates, who appeared in the cancelled examination, to reappear in the subsequent examination, in order to qualify for regular promotion – r.18

of Part I of the rules deals with the situation where a candidate is found or discovered to be using unfair means in the examination itself – It is only in these circumstances that the candidate has to be subjected to disciplinary proceeding which has to be conducted on the basis of the report submitted under r.14(4) – Since this was a case of mass-copying, which was discovered only at the time of the review of the answer books, r.18 would have no relevance – Merely because no disciplinary proceedings were initiated against the respondents, it would not be justified to hold that the cancellation of the result was in any manner, impermissible – The respondents were given equal opportunity to compete in the examination subsequent to the cancellation of their examination result – It is a matter of record that 42 candidates who were similarly placed took advantage of the order and appeared in the subsequent examination – They were promoted in accordance with the rule to the next higher post – The respondents, however, chose not to appear in the examination – They cannot at this stage be permitted to complain that they have been treated unfairly – In view of that, the judgments of the High Court were not sustainable – The procedure adopted by the appellants cannot be said to be suffering from any such irrationality or unreasonableness, which would have enabled the High Court to interfere with the decision – Junior Accounts Officers Service Postal Wing (Group C) Recruitment Rules, 1977 – rr.14, 18.

ADMINISTRATIVE LAW: Natural Justice – Purpose of – Held: The purpose of rules of natural justice is to ensure that the order causing civil consequences is not passed arbitrarily – It is not that in every case there must be an opportunity of oral hearing – The decisions taken by the competent authority could be corrected provided it is established that the decision is so perverse that no sensible person, who had applied his mind to the question to be decided could have arrived at it – The said principle is based on the ground of irrationality and is known as Wednesbury Principle – The Court can interfere with a decision, if it is so absurd that no reasonable authority could have taken such a decision – Doctrines/Principles – Wednesbury Principle.

The respondents were employees of the appellants. They appeared in an examination for being promoted to Junior Accounts Officers. However, their results were not declared. The respondents requested for intimation of the marks secured by them which request was not accepted nor did the authorities reply to their representation. The respondents filed original application before the Central Administrative Tribunal. By order dated 26th July, 2000, the Tribunal directed the appellants to publish the result of the said examination and also to dispose of their representation and allowed the respondents to appear in the examination the next year. The appellants complied with the order of the Tribunal holding that the respondent's candidature was cancelled on account of some irregular practices having been noticed on their part and on account of that, it was not permissible to communicate the marks obtained by the respondents in the said examination contemplating disciplinary proceedings for adopting unfair means. The respondent filed a writ petition seeking the quashing of the order of cancellation of their candidature. The Single Judge of the High Court held that the appellants had failed to establish their claim wherein the respondents were accused of mass copying and were, therefore, obliged to intimate to the respondents the marks secured by them in the examination; the vigilance report submitted by the vigilance wing which was a prerequisite for the promotion stated that the examination was conducted in fair and peaceful manner; the appellants were, therefore, directed to inform the respondents of the marks obtained by them and to consider them for promotion if successful in the examination and awarded ad hoc promotion to the respondents to the post of Junior Accounts Officer. The

Division Bench of the High Court affirmed the decision of the Single Judge and held that the respondent had been granted adhoc promotion and the promotion wiped out all past alleged misconduct. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1. It was not disputed that all the respondents had participated in the departmental examination. The respondents were permitted the use of books specifically prescribed for the purpose of answering the question paper. The books that were prescribed did not include the guide book which was used by all the candidates. Upon completion of the examination, the supervisor undoubtedly gave a report that the examination was held peacefully and in a fair manner. The said report at best indicated that the examination was not disrupted by any untoward incident. No doubt, the use of unfair means was not detected in the examination centre. It was detected by the examiner of the answer books of Paper X. It was noticed that the answers written by 66 candidates at the centre at which the respondents along with other candidates had taken the examination were so similar as to indicate that it was a case of suspected mass copying. The examiner, therefore, did not evaluate the answer books of the candidates allegedly involved in mass-copying. With a view to look into the observations of the examiner, it was decided by the Adviser (Finance), DOT that the answer books of the candidates suspected to have indulged in mass-copying be gone through by three high ranking officers of the department. Therefore, a three member committee was constituted to submit its report. The said committee examined all the 66 answer books through evaluated answer books which were supplied for comparison and review. The Committee observed that the observation of the examiner was correct and it was

an established case of mass copying; the mass copying was made easy because the paper was set from one guide book only and all answers were available in the same book. Co-incidentally guide book was written by the officer stationed at Calcutta so it was presumed that this guide book might be readily available with candidates. Though guide was not authorised as a reference book, it seemed that the centre supervisor had not taken proper care and because of his negligence the guide book might be available in the examination hall. [Paras 15-17]

2.1. The appellants adopted a reasonable and fair procedure in the peculiar circumstances of the case. It cannot be said to be in breach of rules of natural justice. It must be remembered that rules of natural justice are not embodied rules. They cannot be put in a strait-jacket. The purpose of rules of natural justice is to ensure that the order causing civil consequences is not passed arbitrarily. It is not that in every case there must be an opportunity of oral hearing. In the instant case, there was not even a denial that the answers were taken from the guidebook. Mass copying was accepted on the plea that it was permissible to take books into the examination. This plea was rejected by the Expert Committee, as the candidates were only allowed to use the books prescribed in the syllabus. The guidebook used by the candidates was not permitted to be taken into the examination centre. A bonafide enquiry into the fact situation was conducted by a Committee of high ranking officers of the department. The High Court was wholly unjustified in interfering with the decision taken by the appellants in the peculiar circumstances of the case. It is settled beyond cavil that the decisions taken by the competent authority could be corrected provided it is established that the decision is so perverse that no

sensible person, who had applied his mind to the question to be decided could have arrived at it. The said principle is based on the ground of irrationality and is known as Wednesbury Principle. The Court can interfere with a decision, if it is so absurd that no reasonable authority could have taken such a decision. The procedure adopted by the appellants cannot be said to be suffering from any such irrationality or unreasonableness, which would have enabled the High Court to interfere with the decision. [Paras 18, 19, 21]

Bihar School Education Board v. Subhas Chandra Sinha **1970 (1) SCC 648: 1970 (3) SCR 968;** ***Union of India & Ors. v. Anand Kumar Pandey & Ors.*** **1994(5) SCC 663: 1994 (1) Suppl. SCR 750;** ***B. Ramanjini & Ors. v. State of A.P.*** **& Ors. 2002(5) SCC 533: 2002 (3) SCR 506 – relied on.**

2.2. The High Court ought not to have interfered with the decision taken by the appellants requiring the candidates, who appeared in the cancelled examination, to reappear in the subsequent examination, in order to qualify for regular promotion. Rule 18 of Part I of the Junior Accounts Officers Service Postal Wing (Group C) Recruitment Rules, 1977 deals with the situation where a candidate is found or discovered to be using unfair means in the examination itself. It is only in these circumstances that the candidate has to be subjected to disciplinary proceeding which has to be conducted on the basis of the report submitted under Rule 14(4). Since this was a case of mass- copying, which was discovered only at the time of the review of the answer books, Rule 18 would have no relevance. Rule 14 would not, in any manner, improve the case of the respondents as it merely enables the disciplinary authority to impose major penalty on a candidate who is found to have used unfair means. Merely because no disciplinary proceedings have

been initiated against the respondents, it would not be a justification to hold that the cancellation of the result is in any manner, impermissible. The Division Bench was not justified in holding that merely because the respondents had been given ad-hoc promotion, the previous alleged misconduct stands wiped out. The respondents were given equal opportunity to compete in the examination subsequent to the cancellation of their examination result. It was a matter of record that 42 candidates who were similarly placed took advantage of the order passed by the CAT on 26th July, 2000 and appeared in the subsequent examination. They were promoted in accordance with the rule to the next higher post. The respondents, however, chose not to appear in the examination. They cannot at this stage be permitted to complain that they have been treated unfairly. In view of that, the judgment of the Single Judge and the Division Bench impugned were not sustainable. [Paras 23-26]

The Board of High School & Intermediate Education U.P. v. *Bagleshwar Prasad* **1962 3 SCR 767;** *Union Public Service Commission* v. *Jagannath Mishra* **2009 (9) SCC 237;** *Madhyamic Shiksha Mandal, M.P. Vs. Abilash Shiksha Prasar Samiti* **1998 (9) SCC 236;** *Chairman J & K State Board Education v. Feyaz Ahmed Malik & Ors.* **2000 (3) SCC 59: 2000 (1) SCR 402;** *Chairman, All India Railway Recruitment Board v. K. Shyam Kumar & Ors.* **2010 (6) SCC 614: 2010 (6) SCR 291 – referred to.**

Case Law Reference:

1970 (3) SCR 968	**relied on**	**Para 18**
1994 (1) Suppl. SCR 750	**relied on**	**Para 20**
2002 (3) SCR 506	**relied on**	**Para 22**
1962 3 SCR 767	**referred to**	**Para 12**

2009 (9) SCC 237	**referred to**	**Para 12**
1998 (9) SCC 236	**referred to**	**Para 12**
2000 (1) SCR 402	**referred to**	**Para 12**
2010 (6) SCR 291	**referred to**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9058 of 2011.

From the Judgment & Order dated 01.09.2009 of the High Court at Calcutta in F.M.A. No. 807 of 2009.

Pinky Anand, Ankur Mittal, Prabal Bagchi for the Appellants.

Vidyut Kumar Mukherjee, A. Subhashini, Ranjan K. Kali for the Respondents.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1._Leave granted.

2. This appeal is directed against the final judgment and order of the High Court of Judicature at Kolkata dated 1st September, 2009, in F.M.A. No. 807 of 2009. The Division Bench of the High Court in the impugned order dismissed the appeal of the appellants thereby affirming the order passed by the Learned Single Judge in W.P. No. 18313 of 2004, directing the appellants herein, to inform the respondents about the marks obtained by them in the examination in question and grant promotion to the respondents pursuant to the result of the departmental examination.

3. The respondents are employees of the appellants, i.e., Department of Telecommunication within the Department of Post & Telegraph, Government of India, now renamed Bharat Sanchar Nigam Limited. They appeared in an examination for being promoted to Junior Accounts Officers. Junior Accounts

Officers Service Postal Wing (Group C) Recruitment Rules, 1977 regulate recruitment and conditions of service for this post. The rules provided for a two stage departmental examination for appointment to this post.

4. The appellants conducted the aforementioned departmental examination on 20th February, 1999, 21st February, 1999 & 22nd February, 1999 for appointing Junior Accounts Officers in the Department of Telecommunication under the Ministry of Communication. The respondents appeared in the said examination; however, when the result consisting of lists featuring names of both successful and unsuccessful candidates was displayed, their names did not appear in either of the lists.

5. The respondents in order to know their result deposited Rs. 25/- each for being apprised of the marks secured by them along with a representation before the appropriate authority. The respondent's request was in accordance with Rule 13 of the (Rules Relating to Departmental Examination, Part I General) of Post & Telegraph Manual, Volume IV. Rule 13 states:

> "Communication of Marks: (a) After the result of an examination has been announced, the marks obtained in such paper by a candidate maybe communicated to him, and to him alone, on application, and on payment of a fee of Re.1/- per examination per candidate.....
>
> (d) Application for supply of marks should be given priority at all stages."

Thereafter, the Assistant General Manager, Recruitment & Establishment, Calcutta Telephones wrote a letter to the Assistant Director General (Departmental Examination), New Delhi on 9th February, 2000 requesting disclosure of marks obtained by the respondents in the said examination.

6. The respondents' request for being intimated of the marks secured was not acceded to, nor did the authorities reply to the representation.

7. Thereafter, the respondents filed O.A. No. 629 of 2000 before the Central Administrative Tribunal seeking disclosure of marks and disposal of the representation by the respondents. Vide its order dated 26th July, 2000 the tribunal directed the appellants to publish the result of the said examination, dispose off the representation and allow the respondents to appear in the examination next year.

8. The Chief General Manager, Calcutta Telephones complying with the order of the tribunal disposed of the respondent's representation by means of a speaking order. It was stated therein, that the respondent's candidature was cancelled on account of some irregular practices having been noticed on their part. It was further stated that on account of cancellation of candidature, it was not permissible to communicate the marks obtained by the respondents in the said examination contemplating disciplinary proceedings for adopting unfair means.

9. Challenging the abovementioned order passed by the Chief General Manager, Calcutta Telephones, the respondents filed W.P. No. 18313 of 2004 in the Calcutta High Court. The writ petition was allowed, quashing the order of cancellation of candidature of the respondents. The learned Single Judge held that the appellants had failed to establish their claim wherein the respondents were accused of mass copying and were, therefore, obliged to intimate to the respondents, the marks secured by them in the examination. The learned counsel for the appellants had alleged before the learned Single Judge that the syllabus for the examination prescribed the books allowed to be used by the candidates for answering questions however; the respondents had used guide books for answering questions in the examination. Use of guide books was not permissible. The Learned Single Judge observed that, the allegation was

unfounded since the supervising officers in the examination hall did not prevent the respondents from using the guide books. Moreover, no disciplinary action was initiated against the respondents. On the other hand, the respondents were awarded ad hoc promotion to the post of Junior Accounts Officer; an unmarred vigilance report is a pre-requisite for the same. The reports submitted by the vigilance wing stated that the examination was conducted in a fair and peaceful manner. The appellants were, therefore, directed to inform the respondents of the marks obtained by them and to consider them for promotion if successful in the examination. They were also held entitled to the financial benefits that would have accrued to them since the date of adhoc promotion.

10. The appellants aggrieved by the order and judgment of the learned Single Judge, filed appeal before the Division Bench of the Calcutta High Court vide FMA No. 807 of 2009. The Division Bench dismissed the appeal by affirming the decision of the learned Single Judge. The Division Bench has observed that the appellants' contention of there being no scope for disciplinary action against the erring employees could not be accepted, especially since the respondents had been granted ad-hoc promotion. The Division Bench stated that it is well settled that promotion wipes out all past alleged misconduct. It was also observed that the respondent's decision not to appear in the examination in the subsequent year could not act as an *estoppel* for challenging the action of the appellants. Hence, the present appeal.

11. We have heard the learned counsel for the parties.

12. Ms. Pinki Anand, learned senior counsel appearing for the appellants submitted that both the learned Single Judge as well as the Division Bench have erred in coming to the conclusion that the decision for cancellation of the examination was in breach of rules of natural justice. She submits that this is a case of mass-copying; therefore, the question of giving opportunity of hearing to each individual candidate did not

arise. Rule 18 is applicable in the case of individual candidate who is found to have used unfair means. In this case, mass-copying was discovered only because the answers given to some of the questions were identical. Subsequently, it was discovered that answers to questions in Paper X given by 66 candidates was so much similar as to indicate suspected mass-copying. Consequently, a three member committee was constituted to examine the issues. Upon examination of the relevant material, the committee concluded that it was a case of mass-copying. On the basis of their report, the candidature of 66 candidates including the respondents herein was cancelled. Learned senior counsel further submitted that the candidates had copied the answers from guide book which was not permissible. They were only entitled to make the use of the books which was on the list of the prescribed books. It is further submitted that undoubtedly the candidates had been given ad-hoc promotion. However, for regular promotion, it was necessary for the candidates to pass the departmental examination. She further submits that CAT in its order dated 26th July, 2000 had directed the appellants to allow the respondents and all other candidates to appear in the examination, if they were otherwise eligible or if they wish to appear. Taking advantage of this direction, 42 candidates, who were similarly situated as the respondents, appeared in the subsequent examination. They were duly given regular promotion. However, the respondents did not avail of the chance. Therefore, they can not claim promotion on regular basis. In support of her submissions, learned senior counsel relied on the judgments in the case of *The Board of High School & Intermediate Education U.P. Vs. Bagleshwar Prasad*[1], *Union Public Service Commission Vs. Jagannath Mishra*[2], *Madhyamic Shiksha Mandal, M.P. Vs. Abilash Shiksha Prasar Samiti*[3], *Chairman J & K State Board Education Vs. Feyaz Ahmed Malik & Ors.*[4], and *Chairman, All India Railway Recruitment Board Vs. K. Shyam Kumar & Ors*[5].

13. Mr. Bidyut Kumar Mukherjee, learned senior counsel appearing for the respondents submits that the SLP does not involve any substantial question of law. The learned Single Judge as well as the Division Bench has only redressed the injustice that had been done to the respondents. Learned senior counsel submits that this plea of mass-copying is an afterthought; initially when the respondents had approached the CAT, the appellants did not take any plea with regard to the cancellation of the whole examination. The respondents only came to know about it when they received the speaking order. Learned senior counsel further submitted that during the proceeding before the learned Single Judge, the appellants did not produce the original record, therefore, the question would arise as to 'how' and 'who' cancelled the result of the entire examination. It is submitted by Mr. Mukherjee that the report of the three member departmental committee was available with the department on 3rd January, 2000. The same was not brought to the notice of the CAT when it delivered its order on 26th July, 2000. It is further submitted that there is no provision under the rules for constituting a three member committee. In any event, the proceedings before the committee are shrouded in mystery. None of the candidates was asked to appear before the committee, even the examiners and/or the supervising staff were not called for questioning. By his letter dated 14th October, 1999, DGM (Admn.) Calcutta Telephones forwarded the report of DE (Vigilance)/CTD to ADG (DE), New Delhi. In this report, it was stated that the examination was conducted in a fair and peaceful manner on all the three dates as per the report of the Officers of the Vigilance Wing. Making a reference to the rules relating to the departmental examination, Part III of the rules relates to instructions for the supervising officers. Rule 4C requires that the supervising officer should make certain announcements before the commencement of the examination. These are that: candidates should make sure that they have no unauthorized books or paper with them; they should carefully read and follow the instructions on the cover of the answer book as also on the question paper and they will be expelled from

the examination hall for resorting to unfair means and subjected to departmental proceedings. Rule 4E provides that supervision must be effective and active. It is not sufficient for them to be merely present in the examination hall. Referring to Rule 26, learned senior counsel submits that on conclusion of the examination after the last paper, the supervising officer is required to give a very comprehensive certificate in the form prescribed in the aforesaid rules. According to the learned senior counsel, once the certificate was issued by the supervising staff, a presumption would arise that the candidates had not used any books of reference except those authorised for answering papers. Learned senior counsel further submitted that action against the departmental candidates is to be taken under Rule 18 contained in Part I of the Rules relating to departmental examination. Under this rule, there is no provision for cancellation of the report. Under Rule 14 of Part IV, disciplinary proceedings have to be initiated against the candidate for using unfair means. None of the candidates were proceeded against, departmentally. It is submitted that the result could be cancelled only after the candidate is found guilty. This can only be on the basis of a finding of unfair means given by a properly constituted committee. Without completing the proceeding under the aforesaid rules, 42 candidates were permitted to take the examination on the basis of the order passed by the CAT on 26th July, 2000. Those candidates had been given regular promotion on the basis of the subsequent examination. The respondents have been denied the promotions as they have not appeared in the examination. According to the learned senior counsel, the action of the respondents in not permitting the respondents promotion on a regular basis is violative of Articles 14 and 16 of the Constitution. It is emphasised by Mr.Mukherjee that all the respondents have been given ad-hoc promotion and are continuing on the promoted post. Since the ad-hoc promotion can be given only with the clearance from the vigilance department, according to the learned senior counsel, the respondents are entitled to be regularized on the post on which

they have been promoted on ad-hoc basis on numerous occasions. Finally, it is submitted by Mr.Mukherjee that, in fact, there is no conclusive proof that the respondents have indulged in mass copying from the guide book which had not even been published at the time of the examination. It is pointed out that the guide book was published in December, 1999 whereas the examination had been held on 18th, 19th & 20th of February, 1999. According to the learned senior counsel the judgment of the Division Bench correctly recorded the conclusion that since the respondents have been given ad-hoc promotion in the next higher rank, any past alleged misconduct is wiped out.

14. In reply, Ms. Pinki Anand, learned senior counsel reiterated that rule 18 has no application in the facts and circumstances of this case. There is no provision under the rules specifically dealing with cases of mass-copying. The rule only deals with the cases of individual use of unfair means. Learned senior counsel further submitted that the respondents have not pleaded either in the OA or in reply to the writ petition in the High Court that the cancellation of the examination was in breach of rules of natural justice. Even the submissions with regard to breach of rules of natural justice are made for the first time in this Court.

15. We have considered the submissions made by the learned counsel for the parties at length. The undisputed facts are that all the respondents had participated in the departmental examination. The respondents were permitted the use of books specifically prescribed for the purpose of answering the question paper. The books that are prescribed do not include the guide book which was used by all the candidates. Upon completion of the examination, the supervisor undoubtedly gave a report that the examination has been held peacefully and in a fair manner.

16. On this basis, Mr. Mukherjee has submitted that this would lead to a presumption that no unfair means had been used. We are unable to accept such a submission. The report

at best indicates that the examination was not disrupted by any untoward incident. It has been rightly pointed out by Ms. Pinki Anand that the use of unfair means was not detected in the examination centre. It was detected by the examiner of the answer books of Paper X. It was noticed that the answers written by 66 candidates at the centre at which the respondents along with other candidates had taken the examination were so similar as to indicate that this case is a suspected mass copying. The examiner, therefore, did not evaluate the answer books of the candidates allegedly involved in mass-copying. With a view to look into the observations of the examiner, it was decided by the Adviser (Finance), DOT that the answer books of the candidates suspected to have indulged in mass-copying be gone through by three high ranking officers of the department. Therefore a three member committee was constituted to submit its report on the following points:

(a) Whether the observation of the examiner is correct that the answers written by the candidates tally word for word with those given in the key and therefore full marks would have to be awarded to all these candidates suspected to have indulged in mass-copying;

(b) Whether the observation of the examiner regarding suspected mass-copying is reasonably substantiated on the basis of the review of the answer-books; and

(c) In case the inference of mass-copying is not reasonably established, the committee should also suggest guidelines, if any, considered necessary for evaluating these answer-books.

17. The aforesaid committee examined all the 66 answer books through evaluated answer books which were supplied for comparison and review. The Committee observed as follows:

1. The observation of the examiner is correct. This is an established case of mass copying.

2. The mass copying was made easy because the paper was set from one guide book only and all answers were available in the same book.

3. Co-incidentally guide book is written by the officer stationed at Calcutta so it is presumed that this guide book might be readily available with candidates.

4. Though guide is not authorised as a reference book it seems that the centre supervisor has not taken proper care and because of his negligence the guide book might be available in the examination hall.

18. We are of the considered opinion that the procedure adopted by the appellants can not be said to be unfair or arbitrary. It was a reasonable and fair procedure adopted in the peculiar circumstances of the case. It can not be said to be in breach of rules of Natural Justice. It must be remembered that rules of Natural Justice are not embodied rules. They can not be put in a strait-jacket. The purpose of rules of Natural Justice is to ensure that the order causing civil consequences is not passed arbitrarily. It is not that in every case there must be an opportunity of oral hearing. We may notice here the observations made by this Court in the case of *Bihar School Education Board Vs. Subhas Chandra Sinha*[6], wherein a similar plea with regard to breach of rules of Natural Justice was examined. In this case, the appellant board had cancelled the examination upon detection of mass copying without affording the affected candidates the right to be heard. This Court rejected the plea of breach of rules of Natural Justice, as follows:-

"This is not a case of any particular individual who is being

> charged with adoption of unfair means but of the conduct of all the examinees or at least a vast majority of them at a particular centre. If it is not a question of charging any one individually with unfair means but to condemn the examination as ineffective for the purpose it was held. Must the Board give an opportunity to all the candidates to represent their cases? We think not. It was not necessary for the Board to give an opportunity to the candidates if the examinations as a whole were being cancelled. The Board had not charged any one with unfair means so that he could claim to defend himself. The examination was vitiated by adoption of unfair means on a mass scale. In these circumstances it would be wrong to insist that the Board must hold a detailed inquiry into the matter and examine each individual case to satisfy itself which of the candidates had not adopted unfair means. The examination as a whole had to go."

(emphasis supplied)

19. In the present case, there is not even a denial that the answers have been taken from the guidebook. Mass copying is accepted on the plea that it was permissible to take books into the examination. This plea was rejected by the Expert Committee, as the candidates were only allowed to use the books prescribed in the syllabus. The guidebook used by the candidates was not permitted to be taken into the examination centre. Given the fact situation in the present case, the appellant constituted a three members Committee of high ranking officers to enquire into the matter. Since there is no provision under the rules with regard to mass copying, the appellants were fully justified in constituting a Committee to enquire into the matter.

20. We may also make a reference here to the observations made by this Court in the case of *Union of India & Ors. Vs. Anand Kumar Pandey & Ors.*[7] In this case, the Railway Recruitment Board, Patna invited applications for

selection and recruitment of various posts of Non-technical Popular categories in the Eastern Railway. The selection was to be made on the basis of a written examination followed by a viva-voce test. A large number of candidates appeared in the written test from various centres in the city of Katihar. The respondents in the appeal had appeared in the written examination and duly qualified. They had also qualified in the viva-voce test and their names were included in the panel of selected candidates, which was published. On a complaint of mass copying at Centre No. 115, the Railway Authorities conducted an enquiry and found the complaint to be correct. The Railway Authorities decided to subject the 35 candidates, who had qualified the written test from Centre No. 115, to a fresh examination. The CAT set aside this decision of the Railway Authorities as being violative of rules of Natural Justice. It was held that a panel of selected candidates having been prepared and published, the same could not be cancelled without assigning any reason and without affording opportunity to the empanelled candidates. On appeal by the Union of India, this Court set aside the decision of the Tribunal. It was held that the Tribunal was wholly unjustified in interfering the order of the appellants, calling on the respondents to sit in the written examination again. In Paragraph 9 of the aforesaid judgment, it is observed as follows:-

> "This Court has repeatedly held that the rules of natural justice cannot be put in a strait-jacket. Applicability of these rules depends upon the facts and circumstances relating to each particular given situation. Out of the total candidates who appeared in the written test at the Centre concerned only 35 candidates qualified the test. In that situation the action of the railway authorities in directing the 35 candidates of Centre No. 115 to appear in a fresh written examination virtually amounts to cancelling the result of the said centre. Although it would have been fair to call upon all the candidates who appeared from Centre No. 115 to take the written examination again but in the

facts and circumstances of this case no fault can be found with the action of the railway authorities in calling upon only 35 (empanelled candidates) to take the examination afresh. The purpose of a competitive examination is to select the most suitable candidates for appointment to public services. It is entirely different than an examination held by a college or university to award degrees to the candidates appearing at the examination. Even if a candidate is selected he may still be not appointed for a justifiable reason. In the present case the railway authorities have rightly refused to make appointments on the basis of the written examination wherein unfair means were adopted by the candidates. No candidate had been debarred or disqualified from taking the exam. To make sure that the deserving candidates are selected the respondents have been asked to go through the process of written examination once again. We are of the view that there is no violation of the rules of natural justice in any manner in the facts and circumstances of this case."

21. As noticed earlier, in the present case, the appellants had adopted a very reasonable and a fair approach. A bonafide enquiry into the fact situation was conducted by a Committee of high ranking officers of the department. In our opinion, the High Court was wholly unjustified in interfering with the decision taken by the appellants in the peculiar circumstances of the case. It is settled beyond cavil that the decisions taken by the competent authority could be corrected provided it is established that the decision is so perverse that no sensible person, who had applied his mind to the question to be decided could have arrived at it. The aforesaid principle is based on the ground of irrationality and is known as Wednesbury Principle. The Court can interfere with a decision, if it is so absurd that no reasonable authority could have taken such a decision. In our opinion, the procedure adopted by the appellants can not be said to be suffering from any such irrationality or unreasonableness, which would have enabled

the High Court to interfere with the decision.

22. It is perhaps keeping in mind the aforesaid principles that this Court in the case of *B. Ramanjini & Ors. Vs. State of A.P. & Ors.*[8], indicated that a decision taken by the competent authority on the basis of relevant material ought not to be lightly interfered with by the Court in exercise of its power of judicial review. In Paragraph 8 of the aforesaid judgment, this Court observed as follows:

"Further, even if it was not a case of mass copying or leakage of question papers or such other circumstance, it is clear that in the conduct of the examination, a fair procedure has to be adopted. Fair procedure would mean that the candidates taking part in the examination must be capable of competing with each other by fair means. One cannot have an advantage either by copying or by having a foreknowledge of the question paper or otherwise. In such matters wide latitude should be shown to the Government and the courts should not unduly interfere with the action taken by the Government which is in possession of the necessary information and takes action upon the same. The courts ought not to take the action lightly and interfere with the same particularly when there was some material for the Government to act one way or the other."

(emphasis supplied)

23. In view of these observations, we are of the considered opinion that the High Court ought not to have interfered with the decision taken by the appellants requiring the candidates, who appeared in the cancelled examination, to reappear in the subsequent examination, in order to qualify for regular promotion.

24. We also do not find any merit in the submissions of Mr.Mukherjee that all cases of unfair means have to be examined on the basis of Rule 18 of Part I of the rules. The

aforesaid rule deals with the situation where a candidate is found or discovered to be using unfair means in the examination itself. It is only in these circumstances that the candidate has to be subjected to disciplinary proceeding which has to be conducted on the basis of the report submitted under Rule 14(4). Since this is a case of mass- copying, which was discovered only at the time of the review of the answer books, Rule 18 would have no relevance. Rule 14 would not, in any manner, improve the case of the respondents as it merely enables the disciplinary authority to impose major penalty on a candidate who is found to have used unfair means. Merely because no disciplinary proceedings have been initiated against the respondents, it would not be a justification to hold that the cancellation of the result is in any manner, impermissible.

25. We are also of the considered opinion that the Division Bench was not justified in holding that merely because the respondents had been given ad-hoc promotion, the previous alleged misconduct stands wiped out. The respondents were given equal opportunity to compete in the examination subsequent to the cancellation of their examination result. It is a matter of record that 42 candidates who were similarly placed took advantage of the order passed by the CAT on 26th July, 2000 and appeared in the subsequent examination. They have been promoted in accordance with the rule to the next higher post. The respondents, however, chose not to appear in the examination. They cannot at this stage be permitted to complain that they have been treated unfairly.

26. In view of the above, we are of the opinion, that the judgment of the learned Single Judge and the Division Bench impugned herein are not sustainable. Consequently, the appeal is allowed and the judgments of the learned Single Judge as well as the Division Bench are hereby set aside.

D.G. Appeal allowed.

PRITHIPAL SINGH ETC.
v.
STATE OF PUNJAB & ANR. ETC.
(Criminal Appeal Nos. 523-527 of 2009)

NOVEMBER 04, 2011

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

Penal Code, 1860 – ss. 302/34, 364/34 and 201/4 – Conviction and sentence under – Abduction and murder of human right activist by police officials – Activist working on abduction and cremation of unclaimed/unidentified bodies during the disturbed period in Punjab – Senior Superintendent of Police and other police persons hatched conspiracy and abducted the activist – Activist kept under illegal detention, killed and thereafter, thrown in a canal – No investigation carried out and whereabouts of the activist not known – Writ petition filed by wife of the activist – Supreme Court transferred investigation to CBI – Charges framed against the appellant and accused (police officials) – Conviction of DSP and ASI u/ss. 302/34 and imposed life imprisonment and also convicted and sentenced u/ss. 120-B, 364/34 and 201/34 – Conviction of four appellants u/ss. 120-B and 364/34 and sentenced to RI for five years and seven years respectively – High Court acquitted ASI, however, appeal by the appellants were dismissed – On revision filed by the wife of the activist, the High Court enhanced the sentence of four appellants from 7 years rigors imprisonment to life imprisonment – Interference with – Held: It is very difficult to get evidence against the policemen responsible for custodial death – Court cannot be a silent spectator where the facts warrant interference in order to serve the interest of justice – There was motive on behalf of the police department to kidnap and ultimately to eliminate him – Testimonies of the witnesses had been consistent with each

other and they identified the accused correctly in the court – Minor variation in the version from time to time is natural since the witnesses were threatened and implicated in false cases – There is trustworthy evidence in respect of abduction of the activist as well as his illegal detention – Courts below found that accused/appellants abducted the activist – In such a situation only accused could explain as to what happened to deceased and why his corpus delicti could not recovered – All the accused failed to explain any inculpating circumstance even in their respective statements u/s. 313 Cr.P.C. – Such a conduct provides for an additional link in the chain of circumstances – Courts below rightly drew the presumption that the appellants were responsible for his abduction, illegal detention and murder – More so, accused could not establish plea of alibi – Also, since the charges had been framed prior to the statements recorded by PW 16, trial court ought to have altered the charges but it failed to do so – Thus, order of the High Court was justified.

s.302/34 – Person charged u/s.302/34, other accused persons stand acquitted – Effect of – Held: It is impossible to hold that accused shared the common intention with other co-accused who is acquitted unless it is shown that some other unknown persons were also involved in the offence – Accused can be charged for being shared the common intention with another or others unknown, if either by direct evidence or by legitimate inference

Murder case – Corpus Delicti – Recovery of – Held: Conviction for offence of murder does not necessarily depend upon corpus delicti being found – Corpus delicti in a murder case has two components-death as result and criminal agency of another as the means – Where there is a direct proof of one, the other may be established by circumstantial evidence.

Constitution of India,1950 – Articles 21 and 22 – Police

atrocities, torture, custodial death and illegal detention – Protection of victim against – Held: State must ensure prohibition of torture, cruel, inhuman and degrading treatment to any person particularly at the hands of any State agency/ police force – Such victims suffer enormous consequences psychologically – If there is some material on record to reveal the police atrocities, the court must take stern action against the erring police officials in accordance in law.

Code of Criminal Procedure, 1973 – s.386(e) – Scope of – Power of High Court u/s.386(e) to enhance the sentence suo motu – Held: High Court is competent to enhance the sentence suo motu – However, it is permissible only after giving opportunity of hearing to the accused.

Evidence:

Evidence of an accomplice not put on trial – Conviction on basis of his uncorroborated testimony – Held: Such an accomplice is a competent witness – He deposes in the Court after taking oath and there is no prohibition in any law not to act upon his deposition without corroboration – However, no reliance can be placed on the evidence of accomplice unless evidence is corroborated in material particulars – There has to be some independent witness tending to incriminate the accused in the crime.

Testimony of sole eye-witness – Reliability of – Held: There is no legal impediment in convicting a person on the sole testimony of a single witness – If there are doubts about testimony, the court would insist on corroboration – Test is whether the evidence is cogent, credible and trustworthy or otherwise.

Criminal trial:

Non-mentioning the name of accused by witness at the time of recording his statement u/s.161 Cr.P.C. – Accused

named for the first time in his deposition in court – Held: Accused is entitled to benefit of doubt.

Extra-ordinary case – Extra-ordinary situations demand extra-ordinary remedies – In an unprecedented case, the court has to innovate the law and may also pass unconventional order keeping in mind the extra-ordinary measures.

Evidence Act, 1872 – s.106 – Applicability of – Burden of proof under – Held: Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of accused beyond reasonable doubt – It is designed to meet certain exceptional cases, in which, it would be impossible for prosecution to establish certain facts which are particularly within the knowledge of the accused.

'JSK', a human right activist had been working on abduction and cremation of unclaimed/unidentified bodies during the disturbed period in Punjab. He raised his voice against the same. The local police did not like it. They tried to desist him from exposing the illegal activities of the police in these districts but he did not deter. The local police then hatched a criminal conspiracy and abducted him. They kept him under illegal detention, killed him and threw his body into a canal. PW 15 witnessed the abduction. PW 7 also saw appellants alongwith other accused persons rushing with 'JSK' inside the van. PW 2, wife of 'JSK' lodged an FIR. However, no investigations were carried out nor whereabouts of 'JSK' were known. PW2 filed a *Habeas Corpus* petition before the Supreme Court. This Court transferred the investigation to CBI. CBI registered a case under Sections 365, 220 and 120-B IPC against the police officers, (the appellants and other accused) that all of them agreed to abduct and eliminate 'JSK'. The main accused was 'ASS', SSP but the charges could not be framed against 'ASS' since he committed suicide before framing of the charges. During course of trial, 'AK' died

and 'RS' was discharged. PW 16, Special Police Officer, made voluntary statement to CBI in respect of abduction and murder of 'JSK'. PW 14, who was convicted under the Narcotic Drugs and Psychotropic Substances Act, 1985 in his statement recorded by CBI under Section 161 Cr.P.C. revealed about the detention of 'JSK'. The Sessions Judge convicted the appellants and some other accused persons under Sections 364/34 IPC; appellant 'JS' and 'AS' under Sections 302/34 IPC and under Sections 201/34 IPC and awarded sentences. The appellants and accused filed appeals. PW2, wife of 'JSK' filed revision for enhancement of sentences of the four appellants from seven years rigorous imprisonment to imprisonment for life under Section 364 IPC. The High Court acquitted 'AS' however, maintained conviction of other appellants. Notices were issued to four appellants for enhancing the sentences awarded to them while dismissing their appeal. The High Court enhanced the sentence of four appellants from seven years RI to life imprisonment. Therefore, the appellants filed the instant appeals.

Dismissing the appeal, the Court

HELD:

POLICE ATROCITIES :

1. There is no reason to interfere with the well reasoned judgment and order of the High Court. The facts of the case do not warrant review of the findings recorded by the courts below. [Para 49]

2.1. In view of the provisions of Article 21 of the Constitution, any form of torture or cruel, inhuman or degrading treatment is inhibited. Torture is not permissible whether it occurs during investigation,

interrogation or otherwise. The wrong-doer is accountable and the State is responsible if a person in custody of the police is deprived of his life except in accordance with the procedure established by law. However, when the matter comes to the court, it has to balance the protection of fundamental rights of an individual and duties of the police. It cannot be gainsaid that freedom of an individual must yield to the security of the State. Latin maxim *salus populi est suprema lex*-the safety of the people is supreme law; and *salus reipublicae suprema lex*-safety of the State is supreme law, co-exist. However, the doctrine of the welfare of an individual must yield to that of the community. [Para 7]

2.2. The right to life has rightly been characterised as 'supreme' and 'basic'; it includes both so-called negative and positive obligations for the State. The negative obligation means the overall prohibition on arbitrary deprivation of life. Positive obligation requires that State has an overriding obligation to protect the right to life of every person within its territorial jurisdiction. The obligation requires the State to take administrative and all other measures in order to protect life and investigate all suspicious deaths. The State must protect victims of torture, ill-treatment as well as the human rights defender fighting for the interest of the victims, giving the issue serious consideration for the reason that victims of torture suffer enormous consequences psychologically. The problems of acute stress as well as a post-traumatic stress disorder and many other psychological consequences must be understood in correct perspective. Therefore, the State must ensure prohibition of torture, cruel, inhuman and degrading treatment to any person, particularly at the hands of any State agency/ police force. [Para 7]

2.3. The Protection of Human Rights Act, 1993, also provide for protection of all rights to every individual. It inhibits illegal detention. Torture and custodial death have always been condemned by the courts in this country. In its 113th report, the Law Commission of India recommended the amendment to the Evidence Act, 1872, to provide that in case of custodial injuries, if there is evidence, the court may presume that injury was caused by the police having the custody of that person during that period. Onus to prove contrary is on the police authorities. Law requires for adoption of a realistic approach rather than narrow technical approach in cases of custodial crimes. [Para 8]

2.4. In absence of any research/data/ material, a general/sweeping remark that a "substantial majority of the population in the country considered the police force as an institution which violates human rights" cannot be accepted. However, in a given case if there is some material on record to reveal the police atrocities, the court must take stern action against the erring police officials in accordance with law. [Para 13]

2.5. Police atrocities are always violative of the constitutional mandate, particularly, Article 21 (protection of life and personal liberty) and Article 22 (person arrested must be informed the grounds of detention and produced before the Magistrate within 24 hours). Such provisions ensure that arbitrary arrest and detention are not made. Tolerance of police atrocities, as in the instant case, would amount to acceptance of systematic subversion and erosion of the rule of law. Therefore, illegal regime has to be glossed over with impunity, considering such cases of grave magnitude. [Para 48]

Dilip K. Basu v. State of W.B. & Ors, **AIR 1997 SC 3017: 1997 (3) Suppl. SCR 219;** *N.C. Dhoundial v. Union of India & Ors.* **AIR 2004 SC 1272 : 2003 (6) Suppl. SCR 674;**

A *Munshi Singh Gautam (D) & Ors. v. State of M.P.* **AIR 2005 SC 402: 2004 (5) Suppl. SCR 1092;** *Raghubir Singh v. State of Haryana* **AIR 1980 SC 1087 : 1980 (3) SCR 277;** *Gauri Shanker Sharma etc. v. State of U.P. etc.,* **AIR 1990 SC 709 : 1990 SCR 29 ;** *State of Madhya Pradesh v.* B *Shyamsunder Trivedi & Ors.,* **(1995) 4 SCC 262 : 1995 (1) Suppl. SCR 44 ;** *The State of U.P. v. Mohd. Naim* **AIR 1964 SC 703: 1964 SCR 363;** *People's Union for Civil Liberties v. Union of India & Anr.,* **AIR 2005 SC 2419;** *Rubabbuddin Sheikh v. State of Gujarat & Ors.* **(2010) 2 SCC 200: 2010 (1)** C **SCR 991;** *Jaywant P.Sankpal v. Suman Gholap & Ors.* **(2010) 11 SCC 208 : 2010 (9) SCR 102;** *Narmada Bai v. State of Gujarat & Ors.* **(2011) 5 SCC 79 : 2011 (5) SCR 729 – relied on.**

SCOPE OF SECTION 386(e) Cr.P.C.

D **3. The High Court in exercise of its power under Section 386(e) Cr.P.C. is competent to enhance the sentence *suo motu.* However, such a course is permissible only after giving opportunity of hearing to the accused. [Para 17]** E

Eknath Shankarrao Mukkawar v. State of Maharashtra **AIR 1977 SC 1177 : 1977 (3) SCR 513;** *Surendra Singh Rautela @ Surendra Singh Bengali v. State of Bihar (Now State of Jharkhand)* **AIR 2002 SC 260 : 2001 (5) Suppl. SCR** F **340;** *Nadir Khan v. The State (Delhi Administration)* **AIR 1976 SC 2205: 1975 Suppl. SCR 489;** *Govind Ramji Jadhav v. State of Maharashtra* **(1990) 4 SCC 718 : 1990 (1) SCR 855;** *K. Pandurangan etc. v. S.S.R. Velusamy & Anr.* **AIR 2003 SC 3318;** *Jayaram Vithoba & Anr. v. The State of Bombay*, **AIR** G **1956 SC 146 : 1955 SCR 1049 – relied on.**

EVIDENCE OF AN ACCOMPLICE – Not put on trial:

4. An accomplice is a competent witness and conviction can lawfully rests upon his uncorroborated H

A **testimony, yet the court is entitled to presume and may indeed, be justified in presuming in the generality of cases that no reliance can be placed on the evidence of an accomplice unless the evidence is corroborated in material particulars, which means that there has to be** B **some independent witness tending to incriminate the particular accused in the commission of the crime. The deposition of an accomplice in a crime who has not been made an accused/put to trial, can be relied upon, however, the evidence is required to be considered with** C **care and caution. An accomplice who has not been put on trial is a competent witness as he deposes in the court after taking oath and there is no prohibition in any law not to act upon his deposition without corroboration. [Paras 18 and 21]**

D *Rameshswar S/o Kalyan Singh v. The State of Rajasthan* **AIR 1952 SC 54 : 1952 SCR 377 ;** *Sarwan Singh Rattan Singh v. State of Punjab* **AIR 1957 SC 637 : 1957 SCR 953** *K. Hasim v. State of Tamil Nadu* **AIR 2005 SC 128 : 2004 (6) Suppl. SCR 1** *Suresh Chandra Bahri v. State of Bihar* **AIR** E **1994 SC 2420: 1994 (1) Suppl. SCR 483;** *Chandran alias Manichan alias Maniyan & Ors. v. State of Kerala* **(2011) 5 SCC 161;** *Laxmipat Choraria & Ors. v. State of Maharashtra* **AIR 1968 SC 938:1968 SCR 624 – relied on.**

F **ACCUSED NAMED FIRST TIME IN THE COURT:**

5. In case the witness does not involve a particular accused in a crime at the time of recording his statement under Section 161 Cr.P.C., and name him first time in his deposition in the court, the accused becomes entitled to G **benefit of doubt. [Para 22]**

Rudrappa Ramappa Jainpur & Ors. v. State of Karnataka, **AIR 2004 SC 4148** *State represented by Inspector of Police, Tamil Nadu v. Sait alias Krishnakumar*, **(2008) 15 SCC 440** H

: 2008 (14) SCR 120 – relied on.

PERSON CHARGED UNDER SECTION 302/34 IPC - OTHER ACCUSED PERSONS STAND ACQUITTED :

6. It is impossible to reach a conclusion that the appellant/accused shared the common intention with other co-accused in case other accused stand acquitted, unless it is shown that some other unknown persons were also involved in the offence. It is permissible in law to charge an accused in the alternative for being shared the common intention with another or others unknown, but even then the common intention would have to be proved either by direct evidence or by legitimate inference. [Para 23]

Prabhu Babaji Navle v. State of Bombay **AIR 1956 SC 51;** *Sukhram v. State of Madhya Pradesh* **AIR 1989 SC 772;** *Madan Pal v. State of Haryana* **(2004) 13 SCC 508;** *Koppula Jagdish alias Jagdish v. State of A.P.* **(2005) 12 SCC 425;** *Sanichar Sahni v. State of Bihar* **AIR 2010 SC 3786 : 2009 (10) SCR 112;** *Willie (William) Slaney v. State of M.P.* **AIR 1956 SC 116 : 1955 SCR 1140;** *State of A.P. v. Thakkidiram Reddy & Ors,* **AIR 1998 SC 2702 : 1998 (3) SCR 1088;** *Ramji Singh & Anr. v. State of Bihar* **AIR 2001 SC 3853 and** *Gurpreet Singh v. State of Punjab* **AIR 2006 SC 191: 2005 (5) Suppl. SCR 90;** *Lok Pal Singh v. State of M.P.* **AIR 1985 SC 891 – referred to.**

EVIDENCE OF THE SOLE EYE-WITNESS :

7. As a general rule, the Court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act. But if there are doubts about the testimony, the court would insist on

corroboration. In fact, it is not the number or the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value, weight and quality of evidence, rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence. [Para 26]

Vadivelu Thevar v. The State of Madras **AIR 1957 SC 614 : 1957 SCR 981;** *Sunil Kumar v. State Govt. of NCT of Delhi* **(2003) 11 SCC 367: 2003 (4) Suppl. SCR 767;** *Namdeo v. State of Maharashtra,* **(2007) 14 SCC 150 : 2007 (3) SCR 939;** *Bipin Kumar Mondal v. State of West Bengal* **AIR 2010 SC 3638 : 2010 (8) SCR 1036 – relied on.**

EXTRA-ORDINARY CASE:

8. Extra-ordinary situations demand extraordinary remedies. While dealing with an unprecedented case, the Court has to innovate the law and may also pass unconventional order keeping in mind that extraordinary fact situation requires extraordinary measures. Thus, it is evident that while deciding the case, the Court has to bear in mind the peculiar facts, if so exist, in a given case. [Para 27]

B.P. Achala Anand v. S. Appi Reddy & Anr. **AIR 2005 SC 986 : 2005 (2) SCR 3 – relied on.**

CORPUS DELICTI – Recovery of :

9. In a murder case, it is not necessary that the dead body of the victim should be found and identified, i.e.

conviction for offence of murder does not necessarily depend upon *corpus delicti* being found. The *corpus delicti* in a murder case has two components - death as result, and criminal agency of another as the means. Where there is a direct proof of one, the other may be established by circumstantial evidence. [Para 28]

Mani Kumar Thapa v. State of Sikkim **AIR 2002 SC 2920;** *Ram Chandra & Anr. v. State of Uttar Pradesh* **AIR 1957 SC 381;** *Ashok Laxman Sohoni & Anr. v. The State of Maharashtra* **AIR 1977 SC 1319;** *Rama Nand & Ors. v. The State of Himachal Pradesh* **AIR 1981 SC 738 : 1981 (2) SCR 444 - relied on.**

BURDEN OF PROOF UNDER SECTION 106

10. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. [Para 29]

State of West Bengal v. Mir Mohammad Omar & Ors. etc. etc., **AIR 2000 SC 2988 : 2000 (2) Suppl. SCR 712;** *Shambhu Nath Mehra v. The State of Ajmer* **AIR 1956 SC 404 : 1956 SCR 199;** *Sucha Singh v. State of Punjab* **AIR 2001 SC 1436 : 2001 (2) SCR 644;** *Sahadevan @ Sagadevan v. State Rep. by Inspector of Police, Chennai* **AIR 2003 SC 215 – relied on.**

11.1. There are concurrent findings of facts by two courts that all the appellants are guilty of abducting 'JSK' with an intent to eliminate him. The findings so recorded are based on appreciation of evidence which had been recorded after eight years of the incident. In spite of the best efforts of this Court, and passing order after order in the Writ Petition for Habeas Corpus, it could not be known as to whether 'JSK' was dead or alive. Had this Court not issued directions and transferred the case to the CBI for investigation, perhaps the mystery of death of 'JSK' could not have surfaced. There is sufficient evidence on record to show that the appellants and other co-accused remained posted in the districts of Taran Taran and Amritsar and they stood transferred from those districts only on the directions of this Court as the CBI had pointed out that it would not be possible to conduct a fair investigation till the appellants and other co-accused remain posted in those two districts. The witnesses had been threatened and implicated in false cases. They could muster the courage to speak only after getting proper security/protection under the orders of this Court passed in the Writ Petition filed by the complainant PW-2. [Para 37]

11.2. Sufficient material was placed before the courts below as well as before this Court to show that 'JSK' was a human rights activist and had raised the voice against ÁSS' the then SSP of Taran Taran District, about the killing of innocent persons and cremation of thousands of unidentified bodies unceremoniously. 'ASS' directly and indirectly tried that 'JSK could desist from exposing the illegal activities of the police in those districts. However, he did not deter and therefore, there was a motive on behalf of the police department to kidnap and make him understand the consequence that he would face and, ultimately, to eliminate him. 'JSK' persisted in

pursuing the truth and fighting for human rights. The motive of the accused police officers to abduct and kill 'JSK' comes out clearly from the testimonies of PW.2, PW.5, a Judge, PW.6, PW.8, PW.11, PW.12, PW.15 and PW.19. Some of these witnesses had deposed that 'JSK' had been receiving death threats in reference to his investigations into illegal encounters and cremations. There is nothing on record to discredit the testimonies of either of these witnesses in this regard, rather their testimonies had been consistent with each other and inspired confidence. The accused had been identified correctly in the court by various witnesses. [Paras 38 and 39]

11.3. The courts below considered all the issues and taking into consideration the entire fact-situation in which the incident had taken place and whereabouts of 'JSK' could not be known in spite of the best efforts of this Court, case of the prosecution cannot be brushed aside. The Court has to take into consideration the ground realities particularly that it is very difficult to get evidence against the policemen responsible for custodial death. In a case where the person is alleged to have died in police custody, it is difficult to get any kind of evidence. "Rarely in cases of police torture or custodial death, direct ocular evidence is available of the complicity of the police personnel, who alone can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues". In view of the persistent threats hurled by the accused and other police officials to the complainant and witnesses throughout the investigation and trial, variation in his version from time to time is natural. However, it can be inferred that deposition to the extent of illegal detention, killing and throwing away the dead body of

'JSK', can safely be relied upon as the same stand corroborated by other circumstantial evidence and the deposition of other witnesses. There is trustworthy evidence in respect of abduction of 'JSK' by the appellants; as well as his illegal detention. The position remains the same in case a solitary witness deposed regarding the illegal detention and elimination of 'JSK'. [Para 41 and 42]

11.4. Most of the appellants had taken alibi for screening themselves from the offences. However, none of them could establish the same. However, it is clarified that the conduct of accused subsequent to the commission of crime in such a case, may be very relevant. If there is sufficient evidence to show that the accused fabricated some evidence to screen/absolve himself from the offence, such circumstance may point towards his guilt. [Para 43]

Anant Chintaman Lagu v. The State of Bombay **AIR 1960 SC 500 : 1960 SCR 460 – referred to.**

11.5. Both the courts below found that the accused/ appellants have abducted 'JSK''. In such a situation, only the accused person could explain as what happened to 'JSK' and if he had died, in what manner and under what circumstances he had died and why his corpus delicti could not be recovered. All the accused/appellants failed to explain any inculpating circumstance even in their respective statements under Section 313 Cr.P.C. Such a conduct also provides for an additional link in the chain of circumstances. The fact as what had happened to the victim after his abduction by the accused persons, has been within the special knowledge of the accused persons, therefore, they could have given some explanation. In such a fact-situation, the Courts below have rightly drew the presumption that the appellants

were responsible for his adduction, illegal detention and murder. [Para 44]

11.6. It is possible for the appellate or the revisional court to convict an accused for offence in which no charge was framed unless the Court is of the opinion that the failure of justice could be, in fact, occasioned. In order to judge whether a failure of justice has been occasioned, it would be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him, were explained to him clearly and whether he got a fair chance to defend himself. The Court cannot lose sight of the fact that 'JSK', appellant, had also been charged and convicted under Sections 364/34 IPC alongwith all other appellants. He was not arrayed as a party/respondent in the Criminal Revision filed by PW.2, complainant for enhancement of punishment as he had already been given life imprisonment for the offences punishable under Sections 302/34 IPC. Had he been acquitted for the said offences and convicted under Sections 364/34 IPC, his sentences could also have been enhanced by the High Court as it so happened in the cases of other accused/ appellants. In addition thereto, admittedly, at the initial stage of the proceedings, main accused had been 'ASS' - SSP, who committed suicide before framing of the charges. 'JS'- DSP, appellant, cannot succeed on mere technicalities. In view of the provisions of Section 464 Cr.P.C., and in the peculiar facts of the instant case, the submission that the appellant alone cannot be convicted for the offences punishable under Sections 302 read with 34 IPC, cannot be accepted. [Para 45]

11.7. The charges had been framed prior to the statements recorded by PW.16 and in such a fact-situation, the trial court ought to have altered the charges,

but it failed to do so. The offence proved against the appellants has been abducting 'JSK' so that he could be murdered. The High Court is justified in enhancing the punishment particularly in the peculiar facts of this case. The court cannot be a silent spectator where the stinking facts warrant interference in order to serve the interest of justice. In the fact situation of the instant case, if the court remains oblivious to the patent facts on record, it would be tantamount to failure in performing its obligation under the law. [Para 46]

12. After appreciating the evidence on record and considering the judgments of the courts below, it is concluded:

(i) 'JSK' being a human right activist, had taken the task to expose the mis-deeds of police in Districts Amritsar and Taran Taran killing innocent people under the pretext of being terrorists and cremating them without any identification and performing any ritual.

(ii) The Police authorities did not like such activities of 'JSK' and tried to desist him from the same. 'JSK' was being threatened over the telephone by the police officials.

(iii) 'JSK' informed a large number of persons about the threats and being watched by unidentified suspicious persons, who had been wandering around his house and had been followed by such elements.

(iv)'JSK' was able to generate public pressure against the police authorities which was a source of anger and pressure upon the police.

(v) 'AS' SSP, hatched a conspiracy with appellants

and some other police personnel to abduct 'JSK' and eliminate him or to put him in danger of being murdered.

(vi) At the time of abduction, the accused did not permit 'JSK' even to change his clothes. One of the witnesses, PW.15 was pushed away.

(vii) PW.15 immediately informed various persons including PW.2 and PW.5, a Judge about the incident of kidnapping.

(viii) In spite of the best efforts made by PW.2, wife of the deceased and others particularly, 'RS'-PW.15 who went from pillar to post, whereabouts of 'JSK' were not made known to them.

(ix)The police authorities did not cooperate in helping the complainant, though the witnesses had named the persons involved in the abduction of 'JSK'.

(x) Report dated 6.9.1995 submitted by PW2 had not properly been recorded by the SHO Police Station, Islamabad. The version therein had been different from what she had reported. It so happened because of connivance of police officials.

(xi) The accused in the case had been high police officials and there was every possibility that statement of the complainant had not been recorded as reported by her.

(xii) Before approaching this Court by filing a Habeas Corpus Writ Petition, PW.2 approached the National Human Rights Commission at New Delhi in respect of the incident. However, she was advised to approach this Court.

(xiii) This Court passed several orders in a writ petition filed by wife of the deceased, but whereabouts of 'JSK' could not be known and in view thereof, investigation of the case was transferred to the CBI.

(xiv) In spite of transfer of the investigation of the case to the CBI, the Punjab police officials did not cooperate with the CBI and were not lending proper support in conducting the investigation. The police officials of Punjab united in an unholy alliance as their colleagues were involved and the case was going to tarnish the image of Punjab police. The witnesses named the police officials in their statements before the CBI and they identified the accused persons in the court.

(xv) In order to find out the whereabouts of 'JSK' the CBI made public appeal by putting his photographs in electronic media. A large number of posters having his photograph had been affixed on the walls of the cities particularly in Taran Taran, Majitha and Amritsar and made a declaration that person giving information about him, would be rewarded with a sum of Rs.1 lakh.

(xvi) The witnesses were so scared/terrified of the action of the police atrocities/criminal intimidation that they could not muster the courage to reveal the truth. The witnesses could not name the accused while filing affidavits in this Court in the writ petition.

(xvii) The appellants and other accused police officials attempted to prevent the testimony of the witnesses by threatening, harassing and involving them in false criminal cases and physical intimidation. A large number of false documents had

been created by one of the witnesses because of police threats and fear put by the accused.

(xviii) The witnesses had been acquitted by the courts as they had falsely been involved in criminal cases of a very serious nature. This was so done only to prevent them to support the prosecution. The witnesses suffered with criminal intimidation at the hands of the police officials. Even the complaints filed by the witnesses against other witnesses had been found to be false.

(xix) The depositions made by the witnesses in the court had been consistent with their statements recorded under Section 161 Cr.P.C.

(xx) The depositions of all the witnesses including PW.14 and PW.16 are worth acceptance in spite of all the discrepancies pointed out by the accused/ appellants.

(xxi) All the accused had taken the plea of alibi to show that none of them was present at the place of occurrence on the relevant date. However, none of them could successfully prove the same and the plea of alibi taken by them was found to be false. This points towards their guilt.

(xxii) Charges had been framed prior to recording the statements of PW.16 and in such a fact-situation the trial court ought to have altered the charges.

(xxiii) Sufficient evidence is available on record in respect of abduction of 'JSK' and the witnesses, particularly, PW.2, PW.15 and PW.7 have identified the appellants as the persons who have abducted 'JSK'. PW.14 has deposed about his illegal detention in Police Station. In such a fact-situation, the burden

shifts on the respondents to disclose as what happened to 'JSK'.

(xxiv) Though the dead body of 'JSK' could not be recovered from the canal as the investigation commenced after a long time, recovery of the dead body is not a condition precedent for conviction of the accused for murder. [Para 47]

Case Law Reference:

1997 (3) Suppl. SCR 219	Relied on	Para 8
2003 (6) Suppl. SCR 674	Relied on	Para 8
2004 (5) Suppl. SCR 1092	Relied on	Para 8,11
1980 (3) SCR 277	Relied on	Para 9
1990 SCR 29	Relied on	Para 10
1995 (1) Suppl. SCR 44	Relied on	Para 11
1964 SCR 363	Relied on	Para 12
AIR 2005 SC 2419	Relied on	Para 12
2010(1)SCR 991	Relied on	Para 12
2010 (9) SCR 102	Relied on	Para12
2011 (5) SCR 729	Relied on	Para 12
1977 (3) SCR 513	Relied on	Para 14
2001 (5) Suppl. SCR 340	Relied on	Para 15
1975 Suppl. SCR 489	Relied on	Para 15
1990 (1) SCR 855	Relied on	Para 15
AIR 2003 SC 3318	Relied on	Para 15
1955 SCR 1049	Relied on	Para 16

1952 SCR 377	**Relied on**	**Para 18**
1957 SCR 953	**Relied on**	**Para 18**
2004 (6) Suppl. SCR 1	**Relied on**	**Para 19**
1994 (1) Suppl. SCR 483	**Relied on**	**Para 19**
(2011) 5 SCC 161	**Relied on**	**Para 20**
1968 SCR 624	**Relied on**	**Para 20**
AIR 2004 SC 4148	**Relied on**	**Para 22**
2008 (14) SCR 120	**Relied on**	**Para 22**
AIR 1956 SC 51	**Referred to**	**Para 23**
AIR 1989 SC 772	**Referred to**	**Para 24**
(2004) 13 SCC 508	**Referred to.**	**Para 24**
(2005) 12 SCC 425	**Referred to.**	**Para 24**
2009 (10) SCR 112	**Referred to**	**Para 25**
1955 SCR 1140	**Referred to**	**Para 25**
1998 (3) SCR 1088	**Referred to**	**Para 25**
AIR 2001 SC 3853	**Referred to**	**Para 25**
2005 (5) Suppl. SCR 90	**Referred to**	**Para 25**
AIR 1985 SC 891	**Referred to**	**Para 25**
1957 SCR 981	**Relied on**	**Para 26**
2003 (4) Suppl. SCR 767	**Relied on**	**Para 26**
2007 (3) SCR 939	**Relied on**	**Para 26**
2010 (8) SCR 1036	**Relied on**	**Para 26**
2005 (2) SCR 3	**Relied on**	**Para 27**

AIR 2002 SC 2920	**Relied on**	**Para 28**
AIR 1957 SC 381	**Relied on**	**Para 28**
AIR 1977 SC 1319	**Relied on**	**Para 28**
1981 (2) SCR 444	**Relied on**	**Para 28**
2000 (2) Suppl. SCR 712	**Referred to**	**Para 28**
1956 SCR 199	**Relied on**	**Para 28**
2001 (2) SCR 644	**Relied on**	**Para 28**
AIR 2003 SC 215	**Relied on**	**Para 28**
1960 SCR 460	**Referred to**	**Para 43**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 523-527 of 2009.

From the Judgment & Order dated 8.10.2007 of the High Court of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal Nos. 2062-SB, 2073-SB, 2074-SB, 2075 of 2005 and Order dated 16.10.2007 in Crl. Revision Petition No. 323 of 2006.

WITH

Crl. Appeal No. 528 of 2009.

Mohan Jain, ASG, Sushil Kumar, Jaspal Singh, Vivek Goyal, AAG, Aditya Kumar, Priyanka Singh, Sanjay Jain, Vipin Gogia, Jaspreet Gogia, Kuldeep Singh, D.K. Thakur, R.K. Tanwar, Karthik, Ashok, Mudrika Bansal, A.K. Sharma, Kamini Jaiswal, R.S. Bains, Shomila Bakshi for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. All the above appeals have been preferred against the common judgment and order dated 8.10.2007 passed by the High Court of Punjab & Haryana at

Chandigarh in Criminal Appeal Nos. 864-DB of 2005, 2062-SB of 2005, 2073-SB of 2005, 2074-SB of 2005, 2075-SB of 2005 and order dated 16.10.2007 in Crl. R.P. No. 323 of 2006, whereby the High Court has dismissed the appeals of the appellants filed against the conviction and sentences awarded to them by the Additional Sessions Judge, Patiala, in Sessions Case No. 49-T of 9.5.1998/30.11.2001 vide judgment and order dated 18.11.2005, whereby he had convicted Jaspal Singh, DSP – appellant in Criminal Appeal No. 528 of 2009 and one Amarjit Singh, ASI, under Sections 302/34 of Indian Penal Code, 1860 (hereinafter referred as 'IPC'), and sentenced them to undergo imprisonment for life and to pay a fine of Rs.5,000/- each, in default of payment of fine, to further undergo Rigorous Imprisonment (hereinafter called 'RI') for five months. Both were also convicted under Section 120-B IPC and sentenced to undergo RI for five years and to pay a fine of Rs.2,000/-, in default of payment of fine, to further undergo RI for two months. They were further convicted under Sections 364/34 IPC and sentenced to undergo RI for seven years and to pay a fine of Rs. 5000/- each, in default of payment of fine, to further undergo RI for five months. They were also convicted under Sections 201/34 IPC and sentenced to undergo RI for two years and to pay a fine of Rs.2,000/-, in default of payment of fine, to further undergo RI for two months.

Prithipal Singh, Satnam Singh, Surinderpal Singh and Jasbir Singh, appellants, were convicted under Section 120-B IPC and sentenced to undergo RI for five years and to pay a fine of Rs.2,000/- each, and in default of payment of fine, to further undergo RI for two months. These four accused/ appellants were also convicted under Sections 364/34 IPC and sentenced to undergo for seven years RI and to pay a fine of Rs.5,000/- each, in default of payment of fine, to further undergo RI for five months.

The High Court while dismissing the Criminal Appeals filed by appellants, allowed the Criminal Revision Petition No. 323

of 2006 filed by Smt. Paramjit Kaur (PW.2), wife of the deceased, vide order dated 16.10.2007 and enhanced the sentence of the four appellants from seven years RI to imprisonment for life under Section 364 IPC.

2. **FACTS:**

A. Shri Jaswant Singh Khalra, a human right activist, having allegiance to Shiromani Akali Dal, was alleged to have been abducted from his residential house No. 8, Kabir Park, Amritsar, on 6.9.1995 at 1.00 O'Clock. Shri Rajiv Singh (PW.15) was present in the house of Shri Khalra at the time of abduction, Kirpal Singh Randhawa (PW.7) had seen appellants, namely, Jaspal Singh, DSP, Surinderpal Singh, Jasbir Singh and Satnam Singh alongwith other accused persons rushing through Kabir Park with the deceased Jaswant Singh Khalra inside a Maruti van.

B. Smt. Paramjit Kaur (PW.2) wife of the deceased, came to her house from the University, where she was working, on being informed by Rajiv Singh (PW.15). She made a search for her husband but in vain. She made a complaint on the same day at 4.00 PM making a statement to SI Baldev Singh at Kabir Park that her husband had been kidnapped at 1.00 O'Clock by some persons in police uniform in Maruti van of white colour bearing No. DNB-5969. On the basis of the said statement, an FIR No. 72 (Ex.PA) was registered on 7.9.1995 at P.S. Islamabad, District Amritsar, at 9.30 AM under Section 365 IPC. However, no progress in investigation could be made and whereabouts of Jaswant Singh Khalra could not be known.

C. Smt. Paramjit Kaur (PW.2), wife of the deceased, filed Criminal Writ Petition No. 497 of 1995 before this Court, wherein this Court vide order dated 5.11.1995 transferred the investigation to the Central Bureau of Investigation (hereinafter referred as 'CBI'). The CBI registered R.C.No. 14/S/95/SCB-I/Delhi dated 18.12.1995 (Ex.PO) under Sections 365, 220 and 120-B IPC.

In spite of best efforts made by the CBI, whereabouts of said Jaswant Singh Khalra could not be traced. Even an award of Rs.1 lakh was announced for anyone giving information regarding his whereabouts.

D. Kulwant Singh (PW.14) in his statement recorded by the CBI under Section 161 Cr.P.C. revealed that he had been detained in a case under the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called 'NDPS Act') on 4.9.1995 by the police officials of Police Station Jhabal. Shri Jaswant Singh Khalra was also brought to the said Police Station on 6.9.1995 and Shri Khalra had disclosed his identity to the said witness and told him that he was not knowing as to why he had been brought to the police station by the appellants Satnam Singh and Jaspal Singh, DSP.

E. After completion of the investigation, the chargesheet was filed in the court of Special Judicial Magistrate (CBI Cases), Patiala, against the appellants and other accused persons under Sections 120-B, 365 and 220 IPC. The matter was committed to Sessions Court. It was revealed before the Sessions Judge that there was some evidence that Jaswant Singh Khalra had been murdered by the appellants and other accused persons secretly and his dead body had been thrown in the canal near Harike at midnight just after Diwali in the year 1995. So, the prosecution was directed to file supplementary report under Section 173 (8) of Criminal Procedure Code, 1973 (hereinafter referred as 'Cr.P.C.').

F. It was on 2.3.1998, i.e., after filing of the charge-sheet that Kuldip Singh (PW.16) revealed the facts to the CBI (New Delhi Office) in respect of abduction and murder of Jaswant Singh Khalra. Kuldip Singh (PW.16), made voluntary statement to the CBI that he was a privy to all that happened with Shri Jaswant Singh Khalra from the time he was brought to the Police Station, Jhabal till his death. He was Special Police Officer (hereinafter called 'SPO') attached to Satnam Singh,

SHO, Police Station Jhabal, and was promised to be inducted into the Punjab Police permanently. Shri Jaswant Singh Khalra had been detained in a room in Police Station Jhabal and the witness had been assigned the duty by Satnam Singh, SHO, to serve him meals etc. He had been directed to keep the matter most secret and not to disclose anything to anybody. He had been serving the meals to Shri Khalra who had become very weak and fragile and was having scratch marks on his body. After 4-5 days, Ajit Singh Sandhu, SSP, Jaspal Singh, DSP, alongwith his bodyguard Arvinder Singh came in a Maruti car without having any registration number at 7.00 PM. After sometime, Satnam Singh, SHO, Jasbir Singh, SHO and Prithipal Singh also came in another Maruti car. They all went to the room where Shri Khalra had been detained and Ajit Singh Sandhu, SSP, asked him to stop his activities. Shri Khalra was beaten by them and, thereafter, they left the said place. After about 3 days of the said incident, in the afternoon, Satnam Singh, SHO, had taken Shri Khalra alongwith the said witness to Taran Taran at the residence of Ajit Singh Sandhu, SSP. Some high officials of police including the then Director General of Police, Punjab, came there and they talked to Shri Jaswant Singh Khalra in a closed room. After sometime, Shri Khalra was brought back to Jhabal Police Station. On one day, at about 7.00 PM, Jaspal Singh, DSP, came there with his bodyguard Arvinder Singh and after sometime, Surinderpal Singh, Jasbir Singh and Prithipal Singh also came. They all went to the room where Shri Jaswant Singh Khalra had been detained and started beating him. The witness had been asked to bring hot water. As he went out of the room for arranging the same, he heard slow noise of gun firing twice. The life of Shri Khalra came to an end. His dead body was kept in a dicky of the van while blood was oozing from his body. All of them including the witness went in three cars to village Harike. The dead body of Shri Khalra was thrown in the canal and all three vehicles came back to the rest house of village Harike. Subsequently, at about midnight, the witness alongwith some

appellants came back to police station Jhabal. He could not reveal the incident to anybody because of fear till Ajit Singh Sandhu, SSP, was alive as he was apprehending about the safety of his own life in case he discloses the gruesome murder of Shri Khalra committed by the police.

G. The prosecution examined 22 witnesses to prove its case against the appellants and other accused persons. The defence also examined 12 witnesses to rebut the allegations of the CBI. Learned Additional Sessions Judge, Patiala, vide judgment and order dated 18.11.2005 convicted all the appellants and some other accused persons under Sections 364/34 IPC and convicted the appellant Jaspal Singh and one Amarjit Singh under Sections 302/34 IPC and under Sections 201/34 IPC and awarded the sentences as mentioned hereinabove.

H. Being aggrieved, the other accused Amarjit Singh filed Criminal Appeal No. 863-DB of 2005 and other appellants filed the criminal appeals as mentioned hereinabove. Smt. Paramjit Kaur (PW.2) filed Criminal Revision No. 323 of 2006 for enhancement of the sentences of the four appellants.

I. All the matters were heard together. The High Court vide its impugned judgment and order dated 8.10.2007 acquitted Amarjit Singh, however, the conviction of other appellants was maintained. Notices were issued to the four appellants for enhancing the sentences awarded to them while dismissing their appeals. On 16.10.2007, the High Court enhanced the sentence of four appellants, namely, Satnam Singh, Surinderpal Singh, Jasbir Singh and Prithipal Singh from seven years RI to life imprisonment.

Hence, these appeals.

3. Shri Sushil Kumar, learned senior counsel appearing for the appellants in Crl. Appeal Nos. 523-527/2008, has submitted that in the instant case, an FIR had been lodged

under Section 365 IPC without naming any person. The charge-sheet was filed under Sections 365/220 read with Section 120B IPC and the sanction dated 19.8.1996 had been obtained by the prosecution from the Competent Authority to prosecute the accused persons under Sections 365/220 read with Section 120B IPC. The appellants stood convicted under Section 364 read with Section 34 IPC and were awarded 7 years RI each. In case, the appeals of these appellants had been dismissed by the High Court, there was no justification for enhancing the punishment in exercise of the power under Section 386(e) Cr.P.C. The High Court committed error in observing that it was a fit case for enhancement of punishment though charges had never been framed for the offences providing more rigorous punishment. In case, there had been no material at the time of framing of the charges for a more serious offence, the High Court erred in enhancing the punishment *suo motu*. The prosecution witnesses failed to identify the abductors. Moreover, there had been inordinate delay in investigation and thus, there were a lot of improvements and manipulations in the record.

4. Shri Jaspal Singh, learned Senior counsel appearing for appellant Jaspal Singh, DSP, contended that none of the alleged eye-witnesses, namely, Paramjit Kaur (PW.2), Rajiv Singh (PW.15) and Kirpal Singh (PW.7), witnesses of first part of incident, i.e., kidnapping of Jaswant Singh Khalra from his house, is a reliable witness, for the reason, that Paramjit Kaur (PW.2) was examined in the court after 8 years of occurrence and, first time, she had named the appellant Jaspal Singh as one of the persons whom she had seen present outside her house on 6.9.1995, i.e., the date of kidnapping, but she could not furnish any explanation as to why the appellant had not been named in the FIR lodged on 6/7.9.1995. She deposed that she had disclosed the entire incident to Shri D.R. Bhati, D.I.G., who was not examined in the court. She did not even name the appellant in the writ petition filed under Article 32 of the

Constitution of India, 1950 (hereinafter called as 'Constitution') before this Court. She did not name the appellant when her statement was recorded by the CBI on 2.1.1996 under Section 161 Cr.P.C. Rajiv Singh (PW.15) filed affidavit in the writ petition before this Court, however, he also did not name the appellant. His statement was recorded by the CBI on 6.2.1996, but he did not name the said appellant. Material improvements/ contradictions exist between his statement in the court and before the CBI under Section 161 Cr.P.C. He had also accompanied Paramjit Kaur (PW.2) when she met Shri D.R. Bhati, D.I.G. but he has not stated before the CBI that he had accompanied her. Kirpal Singh (PW.7) also did not disclose in his statement under Section 161 Cr.P.C. the name of the appellant or any other person.

So far as the second part of the incident is concerned, i.e., detention of Shri Jaswant Singh Khalra, Kulwant Singh (PW.14) is the only material witness. No reliance could be placed on his evidence as he has been an opium addict and mostly spent his time in jail. He is a criminal and had escaped from judicial custody while he stood convicted in a case under the NDPS Act. He did not name the said appellant for years together and disclosed the same first time while his statement was recorded in court. No explanation could be furnished by the prosecution why the witness had not named the appellant Jaspal Singh, DSP when his statement was recorded by the CBI under Section 161 Cr.P.C.

So far as the third part of the incident, i.e. elimination of Jaswant Singh Khalra is concerned, Kuldip Singh (PW.16) has been described as a star witness of the incident. His deposition requires corroboration for various reasons. The said witness had strong grievances against the police officers in general and the accused persons in particular. There is nothing on record to show that he had been appointed permanently or temporarily as Special Police Officer (hereinafter called 'SPO') and had been assigned the duty of bodyguard to Satnam

Singh, SHO. His conduct throughout the proceedings could not be above board. He lodged several complaints giving different versions. One of the complaints had been against the complainant herself. Therefore, the question of reliance on his deposition does not arise. More so, Kuldip Singh (PW.16) has been an accomplice in the crime and over and above, he being a solitary witness, his evidence cannot be relied upon without corroboration. Jaspal Singh, DSP, appellant had been charged under Sections 302/34 IPC alongwith two others. In case of discharge of one by the trial court and acquittal of other co-accused of the said charges by the High Court, question of convicting the appellants under Sections 302/34 IPC could not arise. Kuldip Singh (PW.16) had never disclosed any name for long-long time. The dead body of Shri Jaswant Singh Khalra was not recovered. The appeals have merit and deserve to be allowed.

5. On the other hand, Shri Mohan Jain, learned ASG, Ms. Kamini Jaiswal and Shri R.S. Bains, learned counsel appearing for respondents, have submitted that the facts of the case do not warrant any interference by this Court with the impugned judgment. There are concurrent findings of facts. The witnesses were reliable under the facts and circumstances of the case. Most of the witnesses have rightly identified the appellants in court. Their testimonies corroborate with each other and are important to comprehend the chain of events. The eye-witness had always been threatened by the appellants who happened to be the police officials. The eye-witness had falsely been implicated in serious criminal cases. There had been FIR against Paramjit Kaur (PW.2) and Kirpal Singh Randhawa (PW.7). In fact, the offence could be unearthed because of directions issued by this Court in the writ petition filed by Smt. Paramjit Kaur (PW.2). The High Court was justified in enhancing the punishment so far as the appellants other than Jaspal Singh, DSP are concerned considering the gravity of the offence committed by them. The Police Force in India has

always been known for its notorious activities. Recovery of the dead body in a crime is not a condition precedent for conviction. Once the case of abduction by the appellants stands proved, the burden of proof is shifted on the respondents to disclose as what happened to Shri Jaswant Singh Khalra. The appeals lack merit and are liable to be dismissed.

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

LEGAL ISSUES:

POLICE ATROCITIES :

7. Police atrocities in India had always been a subject matter of controversy and debate. In view of the provisions of Article 21 of the Constitution, any form of torture or cruel, inhuman or degrading treatment is inhibited. Torture is not permissible whether it occurs during investigation, interrogation or otherwise. The wrong-doer is accountable and the State is responsible if a person in custody of the police is deprived of his life except in accordance with the procedure established by law. However, when the matter comes to the court, it has to balance the protection of fundamental rights of an individual and duties of the police. It cannot be gainsaid that freedom of an individual must yield to the security of the State. Latin maxim *salus populi est suprema lex* – the safety of the people is supreme law; and *salus reipublicae suprema lex* – safety of the State is supreme law, co-exist. However, the doctrine of the welfare of an individual must yield to that of the community.

The right to life has rightly been characterised as "'supreme' and 'basic'; it includes both so-called negative and positive obligations for the State". The negative obligation means the overall prohibition on arbitrary deprivation of life. In this context, positive obligation requires that State has an overriding obligation to protect the right to life of every person within its territorial jurisdiction. The obligation requires the

State to take administrative and all other measures in order to protect life and investigate all suspicious deaths.

The State must protect victims of torture, ill-treatment as well as the human rights defender fighting for the interest of the victims, giving the issue serious consideration for the reason that victims of torture suffer enormous consequences psychologically. The problems of acute stress as well as a post-traumatic stress disorder and many other psychological consequences must be understood in correct perspective. Therefore, the State must ensure prohibition of torture, cruel, inhuman and degrading treatment to any person, particularly at the hands of any State agency/police force.

8. In addition to the protection provided under the Constitution, the Protection of Human Rights Act, 1993, also provide for protection of all rights to every individual. It inhibits illegal detention. Torture and custodial death have always been condemned by the courts in this country. In its 113th report, the Law Commission of India recommended the amendment to the Indian Evidence Act, 1872 (hereinafter called "Evidence Act"), to provide that in case of custodial injuries, if there is evidence, the court may presume that injury was caused by the police having the custody of that person during that period. Onus to prove contrary is on the police authorities. Law requires for adoption of a realistic approach rather than narrow technical approach in cases of custodial crimes. (Vide: *Dilip K. Basu v. State of W.B. & Ors.,* AIR 1997 SC 3017; *N.C. Dhoundial v. Union of India & Ors.,* AIR 2004 SC 1272; and *Munshi Singh Gautam (D) & Ors. v. State of M.P.,* AIR 2005 SC 402).

9. This Court in *Raghubir Singh v. State of Haryana,* AIR 1980 SC 1087 while dealing with torture in police custody observed:

"We are deeply disturbed by the diabolical recurrence of

police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new peril when the guardians of the law gore human rights to death. The vulnerability of human rights assumes a traumatic, torturesome poignancy (when) the violent violation is perpetrated by the police arm of the State whose function is to protect the citizen and not to commit gruesome of fences against them as has happened in this case. Police lock-up if reports in newspapers have a streak of credence, are becoming more and more awesome cells. This development is disastrous to our human rights awareness and humanist constitutional order."

10. Similarly, in *Gauri Shanker Sharma etc. v. State of U.P. etc.,* AIR 1990 SC 709, this Court held :

"….it is generally difficult in cases of deaths in police custody to secure evidence against the policemen responsible for resorting to third degree methods since they are in charge of police station records which they do not find difficult to manipulate as in this case.

…..The offence is of a serious nature aggravated by the fact that it was committed by a person who is supposed to protect the citizens and not misuse his uniform and authority to brutally assault them while in his custody. Death in police custody must be seriously viewed for otherwise we will help take a stride in the direction of police raj. It must be curbed with a heavy hand. The punishment should be such as would deter others from indulging in such behaviour. There can be no room for leniency."

11. In *Munshi Singh Gautam* (Supra), this Court held that peculiar type of cases must be looked at from a prism different from that used for ordinary criminal cases for the reason that in a case where the person is alleged to have died in police

custody, it is difficult to get any kind of evidence. The Court observed as under:

"6. Rarely in cases of police torture or custodial death, direct ocular evidence is available of the complicity of the police personnel, who alone can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues…….

7. The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies are themselves fixed in the dock, ignoring the ground realities, the fact situation and the peculiar circumstances of a given case, ………….often results in miscarriage of justice and makes the justice-delivery system suspect and vulnerable. In the ultimate analysis society suffers and a criminal gets encouraged…….The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kinds of crime in a civilised society governed by the rule of law and poses a serious threat to an orderly civilised society. Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/ undertrial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in "khaki" to consider themselves to be above the law and sometimes even to become a law unto themselves. Unless stern measures are taken to check the malady of the very fence eating the crop, the foundations of the criminal justice-delivery system would be shaken and civilisation itself would risk the consequence of heading towards total decay resulting in anarchy and authoritarianism

reminiscent of barbarism. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may tend to gradually lose faith in the efficacy of the system of the judiciary itself, which if it happens, will be a sad day, for anyone to reckon with."

(See also: *State of Madhya Pradesh v. Shyamsunder Trivedi & Ors.,* (1995) 4 SCC 262).

12. In *The State of U.P. v. Mohd. Naim,* AIR 1964 SC 703, State of U.P. filed an appeal before this Court for expunging the following remarks made by the Allahabad High Court:

"That there is not a single lawless group in the whole of the country whose record of crime comes anywhere near the record of that organised unit which is known as the Indian Police Force.''

"…..Where every fish barring perhaps a few stinks, it is idle to pick out one or two and say that it stinks.''

This Court held that such general remarks could not be justified nor were they necessary for disposal of the said case. The Court expunged the aforesaid adverse remarks.

(See also: *People's Union for Civil Liberties v. Union of India & Anr.,* AIR 2005 SC 2419).

Undoubtedly, this Court has been entertaining petition after petition involving the allegations of fake encounters and rapes by police personnel of States and in a large number of cases transferred the investigation itself to other agencies and particularly the CBI.

(See : *Rubabbuddin Sheikh v. State of Gujarat & Ors.* (2010) 2 SCC 200; *Jaywant P.Sankpal v. Suman Gholap & Ors.* (2010) 11 SCC 208; and *Narmada Bai v. State of Gujarat & Ors.,* (2011) 5 SCC 79).

13. Thus, in view of the above, in absence of any research/ data/ material, a general/sweeping remark that a "substantial majority of the population in the country considered the police force as an institution which violates human rights" cannot be accepted. However, in a given case if there is some material on record to reveal the police atrocities, the court must take stern action against the erring police officials in accordance with law.

SCOPE OF SECTION 386(e) Cr.P.C.

14. In *Eknath Shankarrao Mukkawar v. State of Maharashtra,* AIR 1977 SC 1177, this Court held :

"6. We should at once remove the misgiving that the new Code of Criminal Procedure, 1973, has abolished the High Court's power of enhancement of sentence by exercising revisional jurisdiction, suo motu. The provision for appeal against inadequacy of sentence by the State Government or the Central Government does not lead to such a conclusion. High Court's power of enhancement of sentence, in an appropriate case, by exercising suo motu power of revision is still extant under section 397 read with Sec. 401 Criminal Procedure Code, 1973, inasmuch as the High Court can "by itself'' call for the record of proceedings of any inferior criminal court under its jurisdiction. The provision of Section 401 (4) is a bar to a party, who does not appeal, when appeal lies, but applies in revision. Such a legal bar under Section 401 (4) does not stand in the way of the High Court's exercise of power of revision, suo motu, which continues as before in the new Code."

15. In *Surendra Singh Rautela @ Surendra Singh Bengali v. State of Bihar (Now State of Jharkhand),* AIR 2002 SC 260, this Court reconsidered the issue and held:

"It is well settled that the High Court, suo motu in exercise of revisional jurisdiction, can enhance the sentence of an accused awarded by the trial Court and the same is not affected merely because an appeal has been provided under Section 377 of the Code for enhancement of sentence and no such appeal has been preferred."

(See also: *Nadir Khan v. The State (Delhi Administration),* AIR 1976 SC 2205; *Govind Ramji Jadhav v. State of Maharashtra* (1990) 4 SCC 718; and *K. Pandurangan etc. v. S.S.R. Velusamy & Anr.* AIR 2003 SC 3318).

16. In *Jayaram Vithoba & Anr. v. The State of Bombay,* AIR 1956 SC 146, this Court held that the *suo motu* powers of enhancement under revisional jurisdiction can be exercised only after giving notice/opportunity of hearing to the accused.

17. In view of the above, the law can be summarised that the High Court in exercise of its power under Section 386(e) Cr.P.C. is competent to enhance the sentence *suo motu.* However, such a course is permissible only after giving opportunity of hearing to the accused.

EVIDENCE OF AN ACCOMPLICE – Not put on trial:

18. An accomplice is a competent witness and conviction can lawfully rests upon his uncorroborated testimony, yet the court is entitled to presume and may indeed, be justified in presuming in the generality of cases that no reliance can be placed on the evidence of an accomplice unless the evidence is corroborated in material particulars, which means that there has to be some independent witness tending to incriminate the particular accused in the commission of the crime. (Vide: *Rameshswar S/o Kalyan Singh v. The State of Rajasthan,* AIR 1952 SC 54; and *Sarwan Singh Rattan Singh v. State of Punjab,* AIR 1957 SC 637).

19. In *K. Hasim v. State of Tamil Nadu,* AIR 2005 SC

128, this Court examined the issue while taking into consideration the provisions of Section 133 read with Section 114 Illustration (b) of the Evidence Act and held that the provision of Section 114 Illustration (b) embodies a rule of prudence cautioning the court that an accomplice does not generally deserve to be believed unless corroborated in material particulars. The legislature in its wisdom used the word 'may' and not 'must' and, therefore, the court does not have a right to interpret the word 'may' contained therein as 'must'. The court has to appreciate the evidence with caution and take a view as to the credibility of the evidence tendered by an accomplice. In case evidence of an accomplice is found credible and cogent, the court can record the conviction based thereon even if uncorroborated.

The Court further explained that the word "corroboration" means not mere evidence tending to confirm other evidence. Firstly, it is not necessary that there should be an independent corroboration of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the accomplice, should in itself be sufficient to sustain conviction. All that is required is that, there must be some additional evidence rendering it probable that the case of the accomplice is true and it is reasonably safe to act upon it. Secondly, the evidence on record must reasonably connect or tend to connect the case with the crime by confirming in some material particular the testimony of an accomplice. Thirdly, the circumstances involved in the case must be such as to make it safe to dispense with the necessity of corroboration, though, such evidence may be merely circumstantial evidence to show connection of the case with the crime.

(See also: *Suresh Chandra Bahri v. State of Bihar,* AIR 1994 SC 2420).

20. The issue was again considered by this Court in *Chandran alias Manichan alias Maniyan & Ors. v. State of*

Kerala, (2011) 5 SCC 161, wherein the Court had an occasion to appreciate the evidence of a person who had not been put on trial, but could have been tried jointly with accused and found his evidence reliable in view of the law laid down by this Court in *Laxmipat Choraria & Ors. v. State of Maharashtra,* AIR 1968 SC 938. The Court held as under:

> "78. The argument raised was that this evidence could not be taken into consideration and it would be inadmissible because this witness, though was an accomplice he was neither granted pardon under Section 306 CrPC nor was he prosecuted and the prosecution unfairly presented him as a witness for the prosecution. The contention is clearly incorrect in view of the decision of this Court in *Laxmipat Choraria* (supra). While commenting on this aspect, Hidayatullah, J. observed in AIR para 13 that there were a number of decisions in the High Courts in which the examination of one of the suspects as the witness was not held to be legal and accomplice evidence was received subject to safeguards as admissible evidence in the case. The Court in *Laxmipat Choraria* (supra) held:
>
> "13. On the side of the State many cases were cited from the High Courts in India in which the examination of one of the suspects as a witness was not held to be illegal and accomplice evidence was received subject to safeguards as admissible evidence in the case. In those cases, Section 342 of the Code and Section 5 of the Oaths Act were considered and the word 'accused' as used in those sections was held to denote a person actually on trial before a court and not a person who could have been so tried……. the evidence of an accomplice may be read although he could have been tried jointly with the accused. In some of these cases the evidence was received although the procedure of Section 337 of the Criminal Procedure Code was applicable but was not followed. It is not necessary to deal with this question any further because the consensus of opinion in India is that the competency of an accomplice is not destroyed because he could have been tried jointly with the accused but was not and was instead made to give evidence in the case. Section 5 of the Oaths Act and Section 342 of the Code of Criminal Procedure do not stand in the way of such a procedure."

21. In view of the above, the law on the issue can be summarised to the effect that the deposition of an accomplice in a crime who has not been made an accused/put to trial, can be relied upon, however, the evidence is required to be considered with care and caution. An accomplice who has not been put on trial is a competent witness as he deposes in the court after taking oath and there is no prohibition in any law not to act upon his deposition without corroboration.

ACCUSED NAMED FIRST TIME IN THE COURT:

22. In *Rudrappa Ramappa Jainpur & Ors. v. State of Karnataka,* AIR 2004 SC 4148, this Court considered the issue at length and held that in case the witness does not involve a particular accused in a crime at the time of recording his statement under Section 161 Cr.P.C., and names him first time in his deposition in the court, the accused becomes entitled to benefit of doubt.

A similar view has been re-iterated in *State represented by Inspector of Police, Tamil Nadu v. Sait alias Krishnakumar,* (2008) 15 SCC 440.

PERSON CHARGED UNDER SECTION 302/34 IPC - OTHER ACCUSED PERSONS STAND ACQUITTED :

23. In *Prabhu Babaji Navle v. State of Bombay,* AIR 1956 SC 51, this Court held that it is impossible to reach a conclusion that the appellant/accused shared the common intention with other co-accused in case other accused stand

acquitted, unless it is shown that some other unknown persons were also involved in the offence. It is permissible in law to charge an accused in the alternative for being shared the common intention with another or others unknown, but even then the common intention would have to be proved either by direct evidence or by legitimate inference.

24. In *Sukhram v. State of Madhya Pradesh,* AIR 1989 SC 772, this Court re-iterated the similar view observing that in case a co-accused is acquitted giving the benefit of doubt the other accused would also be entitled to acquittal.

(See also: *Madan Pal v. State of Haryana,* (2004) 13 SCC 508; and *Koppula Jagdish alias Jagdish v. State of A.P.* (2005) 12 SCC 425).

25. This Court in *Sanichar Sahni v. State of Bihar,* AIR 2010 SC 3786, while considering a similar situation and considering the earlier judgments of this Court, particularly in *Willie (William) Slaney v. State of M.P.,* AIR 1956 SC 116, *State of A.P. v. Thakkidiram Reddy & Ors.,* AIR 1998 SC 2702; *Ramji Singh & Anr. v. State of Bihar,* AIR 2001 SC 3853; and *Gurpreet Singh v. State of Punjab,* AIR 2006 SC 191, held that in case the charges have not properly been framed unless it is established that the accused persons were in any way prejudiced due to the errors or omissions in framing the charges against them, the appellate court may not interfere with conviction. The accused/appellant has to establish that he was not informed as what was the real case against him and that he could not defend himself properly. Intervention by a superior court on such technicalities is not warranted, for the reason that conviction order, in fact, is to be tested on the touchstone of prejudice theory.

A Three-Judge Bench judgment of this Court in *Lok Pal Singh v. State of M.P.,* AIR 1985 SC 891, observed that such argument is irrelevant in case the involvement of the accused is proved beyond reasonable doubt.

EVIDENCE OF THE SOLE EYE-WITNESS :

26. This Court has consistently held that as a general rule the Court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act. But if there are doubts about the testimony, the court will insist on corroboration. In fact, it is not the number or the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value, weight and quality of evidence, rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence. (See: *Vadivelu Thevar v. The State of Madras,* AIR 1957 SC 614; *Sunil Kumar v. State Govt. of NCT of Delhi,* (2003) 11 SCC 367; *Namdeo v. State of Maharashtra,* (2007) 14 SCC 150; and *Bipin Kumar Mondal v. State of West Bengal,* AIR 2010 SC 3638).

27. **EXTRAORDINARY CASE**:

Extraordinary situations demand extraordinary remedies. While dealing with an unprecedented case, the Court has to innovate the law and may also pass unconventional order keeping in mind that extraordinary fact situation requires extraordinary measures. In *B.P. Achala Anand v. S. Appi Reddy & Anr.,* AIR 2005 SC 986, this Court observed:

> "Unusual fact situation posing issues for resolution is an opportunity for innovation. Law, as administered by Courts, transforms into justice."

Thus, it is evident that while deciding the case, the Court has to bear in mind the peculiar facts, if so exist, in a given case.

28. **CORPUS DELICTI – Recovery of :**

In *Mani Kumar Thapa v. State of Sikkim,* AIR 2002 SC 2920, this Court held that in a trial for murder, it is *neither an absolute necessity nor an essential ingredient to establish corpus delicti.* The fact of the death of the deceased must be established like any other fact. *Corpus delicti* in some cases may not be possible to be traced or recovered. There are a number of possibilities where a dead body could be disposed of without any trace, therefore, if the recovery of the dead body is to be held to be mandatory to convict an accused, in many a case, the accused would manage to see that the dead body is destroyed to such an extent which would afford the accused complete immunity from being held guilty or from being punished. What is, therefore, required in law to base a conviction for an offence of murder is that there should be reliable and plausible evidence that the offence of murder like any other factum of death was committed and it must be proved by direct or circumstantial evidence albeit the dead body may not be traced.

(See also: *Ram Chandra & Anr. v. State of Uttar Pradesh,* AIR 1957 SC 381; *Ashok Laxman Sohoni & Anr. v. The State of Maharashtra,* AIR 1977 SC 1319; and *Rama Nand & Ors. v. The State of Himachal Pradesh,* AIR 1981 SC 738)

Therefore, in a murder case, it is not necessary that the dead body of the victim should be found and identified, i.e. conviction for offence of murder does not necessarily depend upon *corpus delicti* being found. The *corpus delicti* in a murder case has two components - death as result, and criminal agency of another as the means. Where there is a direct proof of one, the other may be established by circumstantial evidence.

29. **BURDEN OF PROOF UNDER SECTION 106**

In *State of West Bengal v. Mir Mohammad Omar & Ors. etc. etc.,* AIR 2000 SC 2988, this Court held that if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for prosecution to prove certain facts particularly within the knowledge of accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference. *Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused.*

(See also: *Shambhu Nath Mehra v. The State of Ajmer,* AIR 1956 SC 404; *Sucha Singh v. State of Punjab,* AIR 2001 SC 1436; and *Sahadevan @ Sagadevan v. State rep. by Inspector of Police, Chennai,* AIR 2003 SC 215)

30. **INVESTIGATION OF THE INSTANT CASE**:

In the instant case, the incident occurred on 6.9.1995. In spite of the fact that the matter had been brought to the notice of the superior authorities, no action was taken by the police at all. Ultimately, the complainant, Smt. Paramjit Kaur (PW.2) who could not even know whether her husband was alive or dead and, if alive, where he had been and none of the higher authorities in administration helped her or disclosed the whereabouts of her husband, approached this Court by filing a Habeas Corpus Petition i.e. Writ Petition (Crl.) No. 497 of 1995. As no information could be furnished by the State about the whereabouts of Shri Jaswant Singh Khalra, this Court

transferred the investigation to the CBI. The CBI during the course of investigation, realised that it was not possible to conduct the investigation fairly and properly unless some of the police officers involved in the case were transferred from the districts of Amritsar and Taran Taran. Thus, the CBI requested this Court to issue direction to transfer Jaspal Singh, DSP, Taran Taran, Surinderpal Singh, SHO, Satnam Singh, SHO. This Court vide order dated 15.3.1996 directed the Director General of Police, Punjab, to transfer the said officials out of those districts with a further direction that they should not be posted in adjoining districts also. This Court further directed the State Administration to provide full protection/security to all the witnesses who were assisting the CBI in the investigation.

31. The order dated 22.7.1996 passed by this Court reveals that the CBI in its interim report informed this Court that 984 dead bodies had been cremated as 'Lavaris' in the district Taran Taran alone and a large number of innocent persons had been killed by the police for which there was sufficient material to register criminal cases against the police officials. This Court directed the CBI to register the criminal cases for causing such heinous crimes. Considering a large number of cremations done as 'Lavaris', this Court asked the people at large to furnish information/material to the CBI so that the matter may be investigated properly. While passing the order dated 7.8.1996, this Court had taken note that Kulwant Singh (PW.14), a convict under the NDPS Act, was detained in Amritsar jail and the CBI had expressed certain doubts regarding his involvement in the said case. This Court directed the Jail Superintendent, Amritsar to file an appeal on behalf of Kulwant Singh (PW.14) before the High Court.

It may be pertinent to note here that the appeal filed before the High Court was allowed and Kulwant Singh (PW.14) was acquitted vide order dated 8.12.1997.

32. Order dated 7.8.1996 further reveals that there was sufficient material to prosecute Ajit Singh Sandhu, SSP,

District Taran Taran, Ashok Kumar, DSP and Jaspal Singh, DSP and it was made clear that in spite of the fact that the CBI was continuing further investigation regarding the whereabouts of Jaswant Singh Khalra, it could not be known upto 7.8.1996 as to whether he was alive or not. The State of Punjab was directed to pay a sum of Rs.10 lacs as an interim compensation to complainant Smt. Paramjit Kaur.

33. This Court in its order dated 28.8.1996 took note of the fact that the witnesses had been provided protection/security of Central Reserve Police Force/Border Security Force and counsel appearing for the State assured the Court to grant necessary sanction under Section 197 Cr.P.C., if so required for the prosecution of the police officials. The investigation was monitored by this Court. This Court's order dated 12.12.1996 reveals that according to the CBI, it was about 2097 bodies which had been cremated as unidentified and the press note issued by Shri Khalra in this respect was found to be correct.

It was in view of the above orders passed by this Court from time to time and monitoring the case for years together, the investigation conducted by the CBI could be completed.

INSTANT CASE:

34. The case requires to be examined by taking into consideration the aforesaid facts and settled legal propositions.

35. According to the prosecution, Shri Jaswant Singh Khalra was a human rights activist and had been General Secretary, Human Rights Wing of Shiromani Akali Dal. He had been working on abduction and cremation of unclaimed/unidentified bodies during the disturbed period in Punjab, particularly in districts Amritsar and Taran Taran. The police had been eliminating the young persons under the pretext of being militants and was disposing of their dead bodies without maintaining any record and without performing their last rites. Shri Jaswant Singh Khalra raised the voice against the same.

The local police did not like it and hatched a conspiracy to abduct him and in furtherance of that criminal conspiracy, he had been abducted by the local police officials on 6.9.1995 about 9.00 a.m. from his residence and after keeping him in the illegal detention, killed him and thrown his body into a canal in Harike area.

36. After investigating the matter in pursuance of orders passed by this Court, the CBI filed charge-sheet on 13.10.1996 in the court of Magistrate at Patiala against nine police officers, wherein the main accused was Ajit Singh Sandhu, the then SSP of Taran Taran District. However, the trial court vide order dated 25.7.1998 framed the charges against eight persons, namely, Ashok Kumar, Satnam Singh, Rachpal Singh, Jasbir Singh, Amarjit Singh, Surinderpal Singh, Prithipal Singh and Jaspal Singh, DSP. Charges could not be framed against Ajit Singh Sandhu, SSP, for the reason that he committed suicide before framing of the charges. The charges had been that all of them agreed to abduct and eliminate Shri Jaswant Singh Khalra. Thus, all of them stood charged under Section 120-B IPC. All of them were charged under Sections 364 read with 34 IPC. Three of them, namely, Jaspal Singh, DSP, appellant, Amarjit Singh and Rachpal Singh, as a result of criminal conspiracy, committed murder of Shri Khalra. Thus, they were charged under Sections 302 read with 34 IPC. Further for causing the corpus of Shri Jaswant Singh Khalra disappeared with the intention of screening themselves from legal punishment, the said three persons were charged under Sections 201 read with 34 IPC.

During the course of trial, Ashok Kumar died, Rachpal Singh was discharged before his statement under Section 313 Cr.P.C. could be recorded as no incriminating material appeared against him. Amarjit Singh has been acquitted by the High Court. Thus, we are concerned with only remaining five appellants.

37. There are concurrent findings of facts by two courts that all the appellants are guilty of abducting Shri Jaswant Singh Khalra with an intent to eliminate him. The findings so recorded are based on appreciation of evidence which had been recorded after eight years of the incident. In spite of the best efforts of this Court, and passing order after order in the Writ Petition for Habeas Corpus, it could not be known as to whether Shri Jaswant Singh Khalra was dead or alive. Had this Court not issued directions and transferred the case to the CBI for investigation, perhaps the mystery of death of Shri Jaswant Singh Khalra could not have surfaced. There is sufficient evidence on record to show that the appellants and other co-accused remained posted in the districts of Taran Taran and Amritsar and they stood transferred from those districts only on the directions of this Court as the CBI had pointed out that it would not be possible to conduct a fair investigation till the appellants and other co-accused remain posted in those two districts. The witnesses had been threatened and implicated in false cases. They could muster the courage to speak only after getting proper security/protection under the orders of this Court passed in the Writ Petition filed by the complainant Smt. Paramjit Kaur Khalra.

38. Sufficient material has been placed before the courts below as well as before this Court to show that Shri Jaswant Singh Khalra was a human rights activist and had raised the voice against Shri Ajit Singh Sandhu, the then SSP of Taran Taran District, about the killing of innocent persons and cremation of thousands of unidentified bodies unceremoniously. Ajit Singh Sandhu directly and indirectly tried that Shri Khalra could desist from exposing the illegal activities of the police in those districts. However, he did not deter and therefore, there was a motive on behalf of the police department to kidnap and make him understand the consequence that he would face and, ultimately, to eliminate him. Shri Khalra persisted in pursuing the truth and fighting for human rights. The motive of the accused police officers to

abduct and kill Shri Jaswant Singh Khalra comes out clearly from the testimonies of Smt. Paramjit Kaur (PW.2), Justice Ajit Singh Bains (PW.5), Satnam Singh (PW.6), Satwinderpal Singh (PW.8), Jaspal Singh Dhillon (PW.11), Surinderpal Singh (PW.12), Rajiv Singh (PW.15) and K.S.Joshi (PW.19). Some of these witnesses had deposed that Shri Khalra had been receiving death threats in reference to his investigations into illegal encounters and cremations. There is nothing on record to discredit the testimonies of either of these witnesses in this regard, rather their testimonies had been consistent with each other and inspired confidence.

39. The accused had been identified correctly in the court by various witnesses. Smt. Paramjit Kaur (PW.2) identified Jaspal Singh, Surinderpal Singh and Jasbir Singh; Kirpal Singh Randhawa (PW.7) identified Satnam Singh; Kulwant Singh (PW14) identified Jaspal Singh and Satnam Singh; Rajiv Singh (PW.15) identified Jaspal Singh, Satnam Singh and Prithipal Singh; and Kuldip Singh (PW.16) identified Jaspal Singh, Satnam Singh, Surinderpal Singh, Jasbir Singh and Prithipal Singh.

40. Smt. Paramjit Kaur (PW.2) had testified that she had been threatened by the accused persons on telephone for pursuing the case of her missing husband. Punjab Police officials persistently made attempts to exert undue pressure on the witnesses throughout the investigation and trial. The police also registered fake criminal cases against Smt. Paramjit Kaur (PW.2), Kirpal Singh Randhawa (PW.7), Kulwant Singh (PW.14) and Rajiv Singh (PW.15). Kikkar Singh (PW.1) turned hostile because of threats in spite of the fact that he was provided sufficient security and protection. Kirpal Singh Randhawa (PW.7) and Rajiv Singh (PW.15) had been involved in a case allegedly threatening to implicate the witnesses in a rape case. Kirpal Singh Randhawa (PW.7) was falsely enroped in a rape case in the year 2004. The police implicated Rajiv Singh (PW.15) in four cases during the trial. He had been

detained in July 1998 for allegedly forming a terrorist organisation, which was subsequently found to be totally fake on investigation by other agency. Kulwant Singh (PW.14) had been falsely involved and convicted in a case under NDPS Act, who was subsequently acquitted by the High Court. It may also be pertinent to mention here that in the said case, the appeal could be filed before the High Court only on the direction issued by this Court while entertaining the criminal Writ Petition filed by Smt. Paramjit Kaur (PW.2).

41. Kuldip Singh (PW.16) kept quiet till Ajit Singh Sandhu, SSP, committed suicide. He had been changing his version during the investigation as well trial of the case. He had also filed complaint against Smt. Paramjit Kaur (PW.2) allegedly paying him a sum of Rs.50,000/- as a bribe for deposing against the police authorities. Kuldip Singh (PW.16) was SPO and Bodyguard of Satnam Singh, SHO, accused/appellant. He was having several grievances against the police officers in general and accused persons in particular. His narration recorded regarding detention of Shri Khalra by the police did not get any corroboration from any corner including record of police station, log books of police vehicles. No employee/ person of the place where Shri Khalra had been detained or from the guest house where his body was taken before throwing away in the canal, has been examined to corroborate the testimony of Kuldip Singh (PW.16). There are some improvements also in his deposition in the court from statements recorded under Section 161 Cr.P.C.

However, all these issues/aspects have been considered by the courts below and taking into consideration the entire fact-situation in which the incident had taken place and whereabouts of Shri Khalra could not be known in spite of the best efforts of this Court, case of the prosecution cannot be brushed aside. The Court has to take into consideration the ground realities referred to hereinabove, particularly that it is very difficult to get evidence against the policemen responsible for custodial death.

In a case where the person is alleged to have died in police custody, it is difficult to get any kind of evidence. "Rarely in cases of police torture or custodial death, direct ocular evidence is available of the complicity of the police personnel, who alone can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues"

In view of the persistent threats hurled by the accused and other police officials to the complainant and witnesses throughout the investigation and trial, variation in his version from time to time is natural. However, it can be inferred that deposition to the extent of illegal detention, killing and throwing away the dead body of Shri Khalra, can safely be relied upon as the same stand corroborated by other circumstantial evidence and the deposition of other witnesses. As we have referred to hereinabove, there is trustworthy evidence in respect of abduction of Shri Khalra by the appellants; as well as his illegal detention.

42. In view of the law referred to hereinabove, same remains the position in case a solitary witness deposed regarding the illegal detention and elimination of Shri Jaswant Singh Khalra.

43. Most of the appellants had taken alibi for screening themselves from the offences. However, none of them could establish the same. The courts below have considered this issue elaborately and in order to avoid repetition, we do not want to re-examine the same. However, we would like to clarify that the conduct of accused subsequent to the commission of crime in such a case, may be very relevant. If there is sufficient evidence to show that the accused fabricated some evidence to screen/absolve himself from the offence, such circumstance may point towards his guilt. Such a view stand fortified by

judgment of this Court in *Anant Chintaman Lagu v. The State of Bombay,* AIR 1960 SC 500.

44. Both the courts below have found that the accused/appellants have abducted Shri Jaswant Singh Khalra. In such a situation, only the accused person could explain as what happened to Shri Khalra, and if he had died, in what manner and under what circumstances he had died and why his *corpus delicti* could not be recovered. All the accused/appellants failed to explain any inculpating circumstance even in their respective statements under Section 313 Cr.P.C. Such a conduct also provides for an additional link in the chain of circumstances. The fact as what had happened to the victim after his abduction by the accused persons, has been within the special knowledge of the accused persons, therefore, they could have given some explanation. In such a fact-situation, the Courts below have rightly drawn the presumption that the appellants were responsible for his adduction, illegal detention and murder.

45. Shri Jaspal Singh, learned senior counsel appearing on behalf of Jaspal Singh, DSP, appellant, has vehemently submitted that only three persons had been charged under Sections 302/34 IPC. Rachpal Singh stood discharged by the trial court before recording his statement under Section 313 Cr.P.C., and Amarjit Singh has been acquitted by the High Court. Law does not permit to convict Jaspal Singh, appellant, alone for the offence punishable under Sections 302 read with 34 IPC in view of law referred to hereinabove.

The arguments so advanced seem to be very attractive but cannot be accepted for the reason that the case is required to be considered in the factual backdrop mentioned hereinabove. This Court has consistently held that even otherwise "it is possible for the appellate or the revisional court to convict an accused for offence in which no charge was framed unless the Court is of the opinion that the failure of justice could be, in fact, occasioned. In order to judge whether a failure of justice has

been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him, were explained to him clearly and whether he got a fair chance to defend himself." The Court cannot lose sight of the fact that Jaspal Singh, appellant, had also been charged and convicted under Sections 364/34 IPC alongwith all other appellants. He was not arrayed as a party/ respondent in the Criminal Revision filed by Smt. Paramjit Kaur (PW.2), complainant for enhancement of punishment as he had already been given life imprisonment for the offences punishable under Sections 302/34 IPC. Had he been acquitted for the said offences and convicted under Sections 364/34 IPC, his sentences could also have been enhanced by the High Court as it so happened in the cases of other accused/appellants. In addition thereto, admittedly, at the initial stage of the proceedings, main accused had been Ajit Singh Sandhu, SSP, who committed suicide before framing of the charges. Jaspal Singh, DSP, appellant, cannot succeed on mere technicalities. In view of the provisions of Section 464 Cr.P.C., and in the peculiar facts of this case, this argument is not worth acceptance.

Be that as it may, the contention raised on behalf of Jaspal Singh, DSP, appellant, does not require further consideration in view of judgment of this Court in Lok Pal Singh (supra), wherein a similar contention stood rejected.

46. Undoubtedly, the charges had been framed prior to the statements recorded by Kuldip Singh (PW.16) and in such a fact-situation, the trial court ought to have altered the charges, but it failed to do so. The offence proved against the appellants has been abducting Shri Khalra so that he could be murdered. The High Court is justified in enhancing the punishment particularly in the peculiar facts of this case.

The court cannot be a silent spectator where the stinking

facts warrant interference in order to serve the interest of justice. In the fact-situation of a case, like instant, if the court remains oblivious to the patent facts on record, it would be tantamount to failure in performing its obligation under the law.

47. After appreciating the evidence on record, and considering the judgments of the courts below, we approve their following conclusions:

(i) Jaswant Singh Khalra, being a human right activist, had taken the task to expose the mis-deeds of police in Districts Amritsar and Taran Taran killing innocent people under the pretext of being terrorists and cremating them without any identification and performing any ritual.

(ii) The Police authorities did not like such activities of Shri Khalra and tried to desist him from the same. Shri Khalra was being threatened over the telephone by the police officials.

(iii) Jaswant Singh Khalra informed a large number of persons about the threats and being watched by unidentified suspicious persons, who had been wandering around his house and had been followed by such elements.

(iv) Jaswant Singh Khalra was able to generate public pressure against the police authorities which was a source of anger and pressure upon the police.

(v) Ajit Singh Sandhu, SSP, hatched a conspiracy with appellants and some other police personnel to abduct Jaswant Singh Khalra and eliminate him or to put him in danger of being murdered.

(vi) At the time of abduction, the accused did not permit Jaswant Singh Khalra even to change his clothes. One of the witnesses, namely, Rajiv Singh (PW.15) was pushed away .

(vii) Rajiv Singh (PW.15) immediately informed various persons including Smt. Paramjit Kaur (PW.2) and Justice Ajit

Singh Bains (PW.5) about the incident of kidnapping.

(viii) In spite of the best efforts made by Smt. Paramjit Kaur (PW.2), wife of the deceased and others particularly, Rajiv Singh (PW.15) who went from pillar to post, whereabouts of Jaswant Singh Khalra were not made known to them.

(ix) The police authorities did not cooperate in helping the complainant, though the witnesses had named the persons involved in the abduction of Shri Khalra.

(x) Report (Ex.PA) dated 6.9.1995 submitted by Smt. Paramjit Kaur had not properly been recorded by the SHO Police Station, Islamabad. The version therein had been different from what she had reported. It so happened because of connivance of police officials.

(xi) The accused in the case had been high police officials and there was every possibility that statement of the complainant Smt. Paramjit Kaur (Ex.PA) had not been recorded as reported by her.

(xii) Before approaching this Court by filing a Habeas Corpus Writ Petition, Smt. Paramjit Kaur (PW.2) had approached the National Human Rights Commission at New Delhi in respect of the incident. However, she was advised to approach this Court.

(xiii) This Court passed several orders in a writ petition filed by Smt. Paramjit Kaur, wife of the deceased, but whereabouts of Jaswant Singh Khalra could not be known and in view thereof, investigation of the case was transferred to the CBI.

(xiv) In spite of transfer of the investigation of the case to the CBI, the Punjab police officials did not cooperate with the CBI and were not lending proper support in conducting the investigation. The police officials of Punjab united in an unholy

alliance as their colleagues were involved and the case was going to tarnish the image of Punjab police. The witnesses named the police officials in their statements before the CBI and they identified the accused persons in the court.

(xv) In order to find out the whereabouts of Shri Khalra, the CBI made public appeal by putting his photographs in electronic media. A large number of posters having his photograph had been affixed on the walls of the cities particularly in Taran Taran, Majitha and Amritsar and made a declaration that person giving information about him, would be rewarded with a sum of Rs.1 lakh.

(xvi) The witnesses were so scared/terrified of the action of the police atrocities/criminal intimidation that they could not muster the courage to reveal the truth. The witnesses could not name the accused while filing affidavits in this Court in the writ petition.

(xvii) The appellants and other accused police officials attempted to prevent the testimony of the witnesses by threatening, harassing and involving them in false criminal cases and physical intimidation. A large number of false documents had been created by one of the witnesses because of police threats and fear put by the accused.

(xviii) The witnesses had been acquitted by the courts as they had falsely been involved in criminal cases of a very serious nature. This was so done only to prevent them to support the prosecution. The witnesses suffered with criminal intimidation at the hands of the police officials. Even the complaints filed by the witnesses against other witnesses had been found to be false.

(xix) The depositions made by the witnesses in the court had been consistent with their statements recorded under Section 161 Cr.P.C.

(xx) The depositions of all the witnesses including Kulwant Singh (PW.14) and Kuldip Singh (PW.16) are worth acceptance in spite of all the discrepancies pointed out by the accused/ appellants.

(xxi) All the accused had taken the plea of alibi to show that none of them was present at the place of occurrence on the relevant date. However, none of them could successfully prove the same and the plea of alibi taken by them was found to be false. This points towards their guilt.

(xxii) Charges had been framed prior to recording the statements of Kuldip Singh (PW.16) and in such a fact-situation the trial court ought to have altered the charges.

(xxiii) Sufficient evidence is available on record in respect of abduction of Shri Jaswant Singh Khalra and the witnesses, particularly, Smt. Paramjit Kaur (PW.2), Rajiv Singh (PW.15) and Kirpal Singh Randhawa (PW.7) have identified the appellants as the persons who have abducted Shri Khalra. Kulwant Singh (PW.14) has deposed about his illegal detention in Police Station Jhabal. In such a fact-situation, the burden shifts on the respondents to disclose as what happened to Shri Jaswant Singh Khalra.

(xxiv) Though the dead body of Shri Jaswant Singh Khalra could not be recovered from the canal as the investigation commenced after a long time, recovery of the dead body is not a condition precedent for conviction of the accused for murder.

48. Police atrocities are always violative of the constitutional mandate, particularly, Article 21 (protection of life and personal liberty) and Article 22 (person arrested must be informed the grounds of detention and produced before the Magistrate within 24 hours). Such provisions ensure that arbitrary arrest and detention are not made. Tolerance of police atrocities, as in the instant case, would amount to acceptance of systematic subversion and erosion of the rule of law. Therefore, illegal regime has to be glossed over with impunity, considering such cases of grave magnitude.

49. In view of the above, we do not find any reason to interfere with the well reasoned judgment and order of the High Court. The facts of the case do not warrant review of the findings recorded by the courts below.

50. The appeals lack merit and are accordingly dismissed.

N.J. Appeals dismissed.

ASHIWIN S. MEHTA & ANR.
v.
UNION OF INDIA & ORS.
(Civil Appeal No. 4263 of 2003)

NOVEMBER 8, 2011

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

Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992:

ss. 11, 3(3) and (4) – Attachment of the properties of the Notified persons – Sale of shares – Appellants, their family members and the corporate entities purchased more than 90 lakh shares in 'A' Company – Attachment of the majority of the holding – Order of the Special Court permitting the Custodian to sell 54,88,850 shares of 'A' Company at Rs. 90/- per share – Correctness of – Held: Special Court failed to make a serious effort to realise the highest possible price for the said shares – Special Court overlooked the norms laid down by it; ignored the directions by this Court and glossed over the procedural irregularities committed by the Custodian – Special Court failed to comply with the principles of natural justice – It rejected the prayer of the appellants to grant them time to secure a better offer which resulted in the realisation of lesser amount by way of sale of the subject shares, to the detriment of the appellants and other notified parties – Thus, the decision of the Special Court is vitiated and must be struck down in its entirety – However, sale of 54,88,850 shares was approved and all procedural modalities are stated to have been carried out and 36.90 lakh shares of 'A' Company are claimed to have been extinguished, the relief sought for by the appellants to rescind the entire sale of 54,88,850 shares would be impracticable and fraught with grave difficulties – Thus, matter is remitted to the Special Court for taking necessary steps to recover the 4.95% shares from 'A' Company or its management, and put them to fresh sale strictly in terms of the norms.

s. 10 – Sale of shares of attached properties of the Notified persons –Discretion exercised by Special Court under – Held: 'Discretion', when applied to a court of justice means discretion guided by law – It must not be arbitrary, vague and fanciful but legal and regular – Same principle would govern an appeal preferred u/s. 10 – On facts, Special Court exercised its discretion in complete disregard to its own scheme and 'terms and conditions' approved by it for sale of shares and in violation of the principles of natural justice, thus, the facts of the case calls for interference.

Object and purpose of the Act – Held: Is not only to punish the persons involved in the act of criminal misconduct by defrauding the banks and financial institutions but also to see that the properties, belonging to the persons notified by the Custodian were appropriated and disposed of for discharge of liabilities to the banks and financial institutions – Thus, a notified party has an intrinsic interest in the realisations, on the disposal of any attached property because it would have a direct bearing on the discharge of his liabilities in terms of s. 11 – Custodian has to deal with the attached properties only in such manner as the Special Court may direct – Custodian is required to assist in the attachment of the notified person's property and to manage the same thereafter – Special Court shall be guided by the principles of natural justice.

Doctrines/principles – Principles of natural justice – Extent and application of – Held: Requirement of giving reasonable opportunity of being heard before an order is made by an administrative, quasi judicial or judicial authority, when such an order entails adverse civil consequences – There can be exceptions to the said doctrine – Its extent and its application cannot be put in a strait-jacket formula –

Whether the principle has to be applied or not is to be considered bearing in mind the express language and the basic scheme of the provision conferring the power; the nature of the power conferred; the purpose for which the power is conferred and the final effect of the exercise of that power on the rights of the person affected.

Appellants, their family members and the corporate entities belonging to the family members purchased more than 90 lakh shares in 'A' Company. In the year 1992, the majority of the holding came to be attached by a Notification. Thereafter, on direction by this Court, the Custodian to draft a scheme for sale of shares of the notified parties and presented the same to the Special Court for the approval. The Special Court by order dated 17th August 2000, categorised the shares into routine shares, bulk shares and controlling block shares. The Special Court constituted a Disposal Committee for disposal of shares as per the norms laid down in respect of sale of controlling block of shares. The Special Court approved the scheme, propounded by the Custodian for sale of Controlling Block of Shares *in toto* and ordered sale of all registered shares, except the shares of A Company. The notified parties and 'A' Company challenged the order of the Special Court. This Court by order dated 23rd August, 2001 issued directions insofar as the sale of controlling block of shares. In compliance with the order, the Custodian drafted the terms and conditions of sale for sale of 54,88,850 shares of 'A' Company whereby it was stipulated that the Special Court after ascertaining the highest offer may give an opportunity to the management of the said Company to buy or to the Company to buy-back the said "Controlling Block" of shares as per provisions of the Companies Act, 1956. Pursuant thereto, the Custodian invited bids and only two bids were received, the highest being Rs. 80/- per share given by Punjab National Bank. The Disposal Committee evaluated the said bids so received and recommended that in addition to the said 54,88,850 shares, additional 8,15,485 benami shares also be sold to the highest bidder subject to sanction by the Special Court. The Special Court permitted the Custodian to sell 54,88,850 shares of respondent No. 3-A Company at Rs. 90/- per share. Thus, the appellants filed the instant appeals.

Partly allowing the appeal, the Court

HELD: 1.1 It is plain that the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 which is a special statute, is a complete code in itself. The purpose and object for which it was enacted was not only to punish the persons who were involved in the act of criminal misconduct by defrauding the banks and financial institutions but also to see that the properties, moveable or immovable or both, belonging to the persons notified by the Custodian were appropriated and disposed of for discharge of liabilities to the banks and financial institutions, specified government dues and any other liability. Therefore, a notified party has an intrinsic interest in the realisations, on the disposal of any attached property because it would have a direct bearing on the discharge of his liabilities in terms of Section 11 of the Special Court Act. It is also clear that the Custodian has to deal with the attached properties only in such manner as the Special Court may direct. The Custodian is required to assist in the attachment of the notified person's property and to manage the same thereafter. The properties of the notified persons, whether attached or not, do not at any point of time, vest in him, unlike a Receiver under the Code of Civil Procedure or an official Receiver under the Provincial Insolvency Act or official Assignee under the Presidency Insolvency Act. The statute also mandates that the Special Court shall be

guided by the principles of natural justice. [Para 21]

B.O.I. Finance Ltd. Vs. Custodian & Ors. **(1997) 10 SCC 488 : 1997 (3) SCR 51 – relied on.**

1.2. It emerges from the scheme formulated by the Custodian for sale of shares in terms of the directions issued by this Court in its order dated 11th March 1996 (CA No.5225/1995); the norms laid down by the Special Court vide order dated 17th August 2000 and the modification of these norms by this Court vide order dated 23rd August, 2001 (CA No.5326/1995) that the underlying object of the procedure/norms laid down in the scheme is to ensure that highest possible price on sale of shares is realised. It is manifest that with this end in view, this Court vide order dated 23rd August, 2001, left it to the Special Court to decide what procedure to adopt in order to realise the highest price for the shares. The scheme/norms was further modified by the Special Court and this Court in a way to inject flexibility in the scheme in order to secure the highest price for the shares. [Para 22]

1.3. In the light of the statutory provisions and the norms laid down for sale of the subject shares, the Special Court failed to make a serious effort to realise the highest possible price for the said shares. The Special Court overlooked the norms laid down by it in its order dated 17th August 2000; ignored the directions by this Court contained in order dated 23rd August 2001 and glossed over the procedural irregularities committed by the Custodian. Condition No.14 of the terms and conditions of sale, clearly stipulated that it was only after the Special Court had ascertained the highest offer that Apollo or its management was to be given an option to buy back the shares. However, the letter of the Custodian dated 28th April, 2003, addressed to Apollo clearly divulges the fact that the Custodian had, without any authority, invited Apollo and its management 'to bid' on 30th April, 2003, the settled date, when the report of the Disposal Committee was yet to be considered by the Special Court. It is evident from Condition No.15 of terms and conditions of sale, that the Special Court has the discretion to accept or reject any offer or bid that may be received for purchase of shares. Therefore, the stand of the Custodian that inviting Apollo to make the bid was necessarily in compliance of the scheme/condition of sale, cannot be accepted inasmuch as it was for the Special Court to take such a decision at the appropriate time and not the Custodian. The Custodian could not have foreseen that the Special Court would not accept the bid of the sole bidder viz. Punjab National Bank. So far as issue of notification in terms of Section 3(2) is concerned, the Custodian derives his power and authority from the Special Court Act but his jurisdiction to deal with property under attachment, flows only from the orders which may be made by the Special Court constituted under the said Act. It is obligatory upon the Custodian to perform all the functions assigned to him strictly in accordance with the directions of the Special Court. In the instant case, although there is no material on record which may suggest any malafides on the part of the Custodian yet it is convincing that by inviting Apollo to bid, vide letter dated 28th April, 2003, the Custodian did exceed the directions issued to him by the Special Court. However, being in the nature of a procedural omission, the alleged violation is not per se sufficient to nullify the sale of shares.[Para 23]

1.4. The rules of "natural justice" are not embodied rules. The phrase "natural justice" is also not capable of a precise definition. The underlying principle of natural justice, evolved under the common law, is to check arbitrary exercise of power by any authority, irrespective

of whether the power which is conferred on a statutory body or Tribunal is administrative or quasi judicial. The concept of "natural justice" implies a duty to act fairly i.e. fair play in action. The aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. It is thus, trite that requirement of giving reasonable opportunity of being heard before an order is made by an administrative, quasi judicial or judicial authority, particularly when such an order entails adverse civil consequences, which would include infraction of property, personal rights and material deprivation for the party affected, cannot be sacrificed at the alter of administrative exigency or celerity. Undoubtedly, there can be exceptions to the said doctrine and as aforesaid the extent and its application cannot be put in a strait-jacket formula. The question whether the principle has to be applied or not is to be considered bearing in mind the express language and the basic scheme of the provision conferring the power; the nature of the power conferred; the purpose for which the power is conferred and the final effect of the exercise of that power on the rights of the person affected. [Paras 25 and 27]

A.K. Kraipak Vs. Union of India **(1969) 2 SCC 262: 1970 (1) SCR 457 - relied on.**

Swadeshi Cotton Mills Vs. Union of India **(1981) 1 SCC 664 : 1981 (2) SCR 533 - referred to.**

1.5. In the instant case, the Special Court failed to comply with the principles of natural justice. The Special Court rejected the prayer of the appellants to grant them 48 hours' time to secure a better offer. In fact, by his letter dated 29th April, 2003 addressed by the Custodian to the notified parties, including the appellants, the right of the appellants to bring better offer was foreclosed by the Custodian, which evidently was without the permission of the Special Court. Furthermore, the Special Court also ignored its past precedents whereby it had granted time to the parties to get better offers for sale of shares of M/s Ranbaxy Laboratories Ltd. There is also force in the plea that the reason assigned by the Special Court in its order dated 30th April, 2003, for declining further time to the appellants, that deferment of decision on the sale of shares would have resulted in the share market falling down is unsound and unfounded. The share market was already aware of the sale of a big chunk of shares of Apollo in view of the advertisement published by the Custodian and therefore, there was hardly any possibility of further volatility in the price of said shares. Thus, the appellants have been denied a proper opportunity to bring a better offer for sale of shares, resulting in the realisation of lesser amount by way of sale of the subject shares, to the detriment of the appellants and other notified parties. [Para 28]

1.6. As regards the plea that the Special Court having exercised the discretion vested in it under the Special Court Act, keeping in view all the parameters relevant for disposal of the shares, the impugned order is not interfered with. There is no quarrel with the general proposition that an appellate court would not ordinarily substitute its discretion in the place of the discretion exercised by the trial court unless it is shown to have been exercised under a mistake of law or fact or in disregard of a settled principle or by taking into consideration irrelevant material. A 'discretion', when applied to a court of justice means discretion guided by law. It must not be arbitrary, vague and fanciful but legal and regular. Therefore, it is accepted that same principle would govern an appeal preferred under Section 10 of the Special Court Act. However, since it is concluded that the Special Court has exercised its discretion in complete

disregard to its own scheme and 'terms and conditions' approved by it for sale of shares and above all that the impugned order was passed in violation of the principles of natural justice, the facts of the case calls for interference, to correct the wrong committed by the Special Court.[Para 29 and 30]

R. Vs. Wilkes **(1770) 4 Burr 2527 - Referred to.**

1.7. In view of finding that the decision of the Special Court is vitiated on the afore-stated grounds, it must follow as a necessary consequence that in the normal course, the impugned order must be struck down in its entirety. However, bearing in mind the fact that the sale of 54,88,850 shares was approved and all procedural modalities are stated to have been carried out in the year 2003, it is accepted that at this stage, when 36.90 lakh shares of Apollo are claimed to have been extinguished, the relief sought for by the appellants to rescind the entire sale of 54,88,850 shares would be impracticable and fraught with grave difficulties. Therefore, the impugned order is set aside to the extent indicated and the case is remitted to the Special Court for taking necessary steps to recover the said 4.95% shares from Apollo or its management, as the case may be, and put them to fresh sale strictly in terms of the norms as approved by this Court vide order dated 23rd August, 2001. The shareholders who would be affected by this order shall be entitled to the sale consideration paid by them to the Custodian alongwith simple interest @6% p.a. from the date of payment by them upto the date of actual reimbursement by the Custodian in terms of this order. [Para 33]

Desh Bandhu Gupta Vs. N.L. Anand & Rajinder Singh **(1994) 1 SCC 131 : 1993 (2) Suppl. SCR 346;** *Gajadhar Prasad & Ors. Vs. Babu Bhakta Ratan & Ors.* **(1973) 2 SCC 629 : 1974 (1) SCR 372;** *Sudhir S. Mehta & Ors. Vs. Custodian & Anr.* **(2008) 12 SCC 84 : 2008 (8) SCR 1099;** *Ramji Dayawala And Sons (P) Ltd. Vs. Invest Import* **(1981) 1 SCC 80 : 1981 (1) SCR 899;** *Wander Ltd. And Anr. Vs. Antox India P. Ltd.* **1990 (Supp) SCC 727;** *Ashwin S. Mehta Vs. Custodian* **(2006) 2 SCC 385 : 2006 (1) SCR 56;** *Employees' State Insurance Corpn. & Ors. Vs. Jardine Henderson Staff Association & Ors.* **(2006) 6 SCC 581 : 2006 (4) Suppl. SCR 27;** *State of M.P. & Ors. Vs. Nandlal Jaiswal & Ors.* **(1986) 4 SCC 566 : 1987 (1) SCR 1;** *Ramana Dayaram Shetty Vs. International Airport Authority of India & Ors.* **(1979) 3 SCC 489 : 1979 (3) SCR 1014;** *Sesa Industries Limited Vs. Krishna H. Bajaj & Ors.* **(2011) 3 SCC 218 : 2011 (3) SCR 317;** *Rajesh D. Darbar Vs. Narasingrao Krishnaji Kulkarni* **(2003) 7 SCC 219 : 2003 (2) Suppl. SCR 273 – referred to.**

Susannah Sharp Vs. Wakefield & Ors. **(1891) A.C. 173 – referred to.**

Case Law Reference:

1997 (3) SCR 51	**relied on**	**Para 21**
1970 (1) SCR 457	**relied on**	**Para 25**
1981 (2) SCR 533	**referred to**	**Para 26**
(1770) 4 Burr 2527	**referred to**	**Para 29**
1993 (2) Suppl. SCR 346	**referred to**	**Para 29**
1974 (1) SCR 372	**referred to**	**Para 11**
2008 (8) SCR 1099	**referred to**	**Para 11**
1981 (1) SCR 899	**referred to**	**Para 13**
1990 (Supp) SCC 727	**referred to**	**Para 13**

2006 (1) SCR 56 referred to Para 13

2006 (4) Suppl. SCR 27 referred to Para 15

1987 (1) SCR 1 referred to Para 19

1979 (3) SCR 1014 referred to Para 19

2011 (3) SCR 317 referred to Para 19

2003 (2) Suppl. SCR 273 referred to Para 19

(1891) A.C. 173 referred to Para 19

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4263 of 2003.

From the Judgment & Order dated 2.5.2003 of the Special Court (Trial of offences relating to Transactions in Securities at Bombay) Act, 1992 in Misc. Petition No. 64 of 1998.

Joseph Vellapally. Dr. A.M. Singhvi, Kamini Jaiswal, Manik Karanjawala, Manu Nair Anuj Berry, Amit Bhandari (for Suresh A. Shroff & Co. Arvind Kumar Tewari, Subramonium Prasad, Varun Thakur, Varinder Kumar Sharma, for the appearing parties.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. This appeal under Section 10 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 (for short "the Special Court Act") is directed against the order dated 30th April, 2003, as corrected vide order dated 2nd May, 2003, passed by the Special Court at Bombay, in Misc. Petition No. 64 of 1998. By the impugned orders, the Special Court has permitted the Custodian to sell 54,88,850 shares of Apollo Tyres Ltd. (for short "Apollo"), respondent No. 3 in this appeal, at Rs.90/- per share.

2. The material facts giving rise to the appeal are as follows:

The appellants, one late Harshad S. Mehta, their other family members and the corporate entities belonging to the family members had purchased more than 90 lakh shares in Apollo. Except for the holding of two family members, the entire holding came to be attached by a notification on 6th June, 1992. Under the said notification, 29 entities both individual and corporate were notified under Section 3(2) of the Special Court Act. Prior to the issue of notification about 15 lakh shares of Apollo stood registered in the name of the notified parties and the balance shares were unregistered. About 39.16 lakh unregistered shares were disclosed by the late Harshad S. Mehta to the office of the Custodian, which were subsequently handed over to the Central Bureau of Investigation (hereinafter referred to as "the CBI"). The CBI seized about 7 to 8 lakh un-registered shares in 1992, which also were handed over by them to the Custodian. The Custodian was also authorised to deal with a few lakh shares, identified as benami shares. Thereafter, the Custodian moved an application before the Special Court seeking orders for effecting registration of unregistered shares in the name of the Custodian and for recovery of lapsed benefits that accrued on the said unregistered shares. The management of Apollo objected to the proposed registration, alleging violation of the takeover code and raised the question of ownership. However, the Special Court, vide order dated 19th November, 1999, allowed the registration of the un-registered shares in the name of the Custodian.

3. By order dated 11th March, 1996, in Civil Appeal No.5225 of 1995, this Court, in a suo motu action, directed the Custodian to draft a scheme for sale of shares of the notified parties, which constituted bulk of the attached assets. Accordingly, a scheme was drafted by the Custodian in consultation with the Government of India and thereafter,

presented to this Court. Vide order dated 13th May, 1998, in Civil Appeal No. 5326 of 1995, this Court directed that the said scheme may be considered by the Special Court, with further modifications, if any. In furtherance of the said direction, the scheme was presented to the Special Court for its approval. The notified parties strongly opposed the said scheme on several grounds. All the objections of the notified parties were overruled and the Special Court, vide order dated 17th August, 2000, categorised the shares into three classes – (i) routine shares; (ii) bulk shares and (iii) controlling block of shares. The Special Court constituted a Disposal Committee for disposal of shares as per the norms laid down in the said order. Norms in respect of sale of controlling block of shares read as follows:

> "NORMS FOR SALE OF CONTROLLING BLOCK OF SHARES:
>
> After completion of demat procedure for registered shares, the Custodian will give public advertisement in the newspapers inviting bids for purchase of Controlling Block of shares. The offers should be for the entire block of registered shares. The offers should be accompanied by a Demand Draft/Pay Order/Bankers' cheque representing 5% of the offered amount in cases of thinly traded shares of companies like Killick Nixon whereas in cases of highly valued shares like Apollo Tyres, the offers shall be accompanied by Demand Draft/Pay Order/Bankers' cheque representing 2% of the offered amount. The said Pay Order/Demand Draft/bankers' cheque should be drawn in favour of the Custodian, A/c – name of the notified parties say Dhanraj Mills. The offers can be made by individuals as well as by corporate and other entities. The offerer, whose offer is accepted by the Court, will be required to make payment within 15 days from the date of acceptance of the offer by the Court. **Here also, the Court reserves its rights to accept or reject any of the highest offer or bid that may be received by the Court without assigning any reason whatsoever. Once the highest offer is ascertained, the management of the company should be given an option to buy the shares**. This is to avoid destablization of the company. The purchaser(s) shall comply with all regulations including the Take Over Regulations of SEBI. In cases where the Custodian finds that as on the relevant date, he does not possess shares of a company to the extent of 5% or above, but he anticipates that in near future, the limit is likely to reach with the other shares coming in, then the Custodian shall submit his report to the Court for keeping aside such shares of a notified party for future disposal. However, public financial institutions will not be required to make any deposit along with their offer(s)."
>
> (Emphasis supplied)

4. The Special Court approved the scheme, propounded by the Custodian for sale of Controlling Block of Shares *in toto* and ordered sale of all registered shares, except the shares of Apollo because their objection regarding registration of unregistered shares in the name of Custodian/notified parties, was pending adjudication by this Court.

5. The order of the Special Court was challenged both by the notified parties and Apollo. By order dated 23rd August, 2001 in Civil Appeal No.7629 of 1999 [connected C.A. Nos. 7630 of 1999 and 5813 to 5814 of 2000], this Court, while approving the basic structure of the scheme and the directions given by the Special Court for disposal of shares, disposed of the appeal with the following directions insofar as the sale of controlling block of shares, was concerned:

> "In respect of the sale of controlling block of shares the only method laid down by the Special Court is to offer the sale of shares in a composite block. It is not known whether such a sale will get the best price in respect thereof. *We, therefore, direct that it will be open to the Special Court*

to decide whether to have the sale of the controlling block of shares either by inviting bids for purchase of controlling block as such or by selling the said shares according to the norms fixed for the sale of bulk shares or by the norms fixed in respect of routine shares. The object being that the highest price possible should be realised, it is left to the Court to decide what procedure to adopt.

If the Court thinks that it is best to adopt the norms laid down by it for sale of controlling block of shares (the 3rd method) then when highest offer is received and the Management of the Company is given an option to buy those shares at that price, then if the Management so desires the Court should give the Company an opportunity to buy back the shares at the highest price offered by complying with the provisions of Section 77A of the Companies Act. In other words, on the receipt of the offer for the sale of the controlling block, the Court will give an opportunity, if it chooses to consider the offer, to the Management to buy or to the Company to buy back under Section 77A of the Companies Act. No other change in the Scheme as formulated by the Special Court is called for.

It is made clear that in respect of the controlling block of shares the third method will first be adopted, namely, the norms for sale of controlling block of shares; and it is only if the Court is satisfied that by adopting that method the highest price is not available then it will have an option to follow the 2nd method relating to sale of bulk shares. Further, if the Court is satisfied that by following any of the above two methods the highest price is not available, then it will have an option to follow the norms as laid down for routine shares (the 1st method).

These appeals are disposed of in the aforesaid terms." (Emphasis supplied by us)

In compliance with the aforesaid orders/directions, the Custodian drafted the 'terms and conditions of sale' for sale of 54,88,850 shares of Apollo. Some of the terms and conditions, relevant for this appeal are as follows :

"...... ....

....

5. Even after acceptance of the offer/identification of the highest bidder by the Disposal Committee, the approval of sale will be subject to the sanction of Hon'ble Special Court.

....

7. The Bids are to be submitted for the entire lot of shares of the said Company viz. 54,88,850 shares. Bids in part (less number of shares than total) shall not be considered.

....

....

14. The Custodian will obtain directions of the Hon'ble Court for approval of the offer of the highest bidder so identified by the Disposal Committee. The Hon'ble Special Court after ascertaining the highest offer may give an opportunity to the management of the said Company to buy or to the Company to buy-back as per provisions of the Companies Act, 1956, the said "**Controlling Block**" of shares if it so desires.

15. The sale as stated herein above is subject to the sanction of Hon'ble Special Court. The Hon'ble Special Court reserves the right to accept or reject any of the offer or bids that may be received for purchase of the shares.

…… ………. …….. ……… ……... ………..”

6. Pursuant thereto, the Custodian invited bids from individuals as well as from the corporate and other entities. The offers were to reach the office of the Custodian by 3.00 p.m. on or before 25th April 2003. In response, only two bids were received, the highest being Rs. 80/- per share given by Punjab National Bank. The Disposal Committee evaluated the bids so received and vide its minutes dated 25th April 2003, recommended that in addition to the aforesaid 54,88,850 shares, additional 8,15,485 benami shares also be sold to the highest bidder subject to sanction by the Special Court. Accordingly, the Custodian submitted a report to the Special Court for consideration and appropriate orders. By the impugned order, dated 30th April, 2003, corrected vide order dated 2nd May, 2003, the Special Court directed sale of 54,88,850 shares to Apollo and its management at Rs.90/- per share. Being dissatisfied with and aggrieved by the order indicated hereinbefore, the appellants have preferred this appeal.

7. At the time of admission of this appeal on 29th May, 2003, the following interim order was made:

> “Appeal admitted.
>
> Mr. A.D.N. Rao, Ms. Manik Karanjawala and Ms. Pallavi Shroff, learned counsel accept notice on behalf of respondent Nos.1, 3 and 7 respectively. Learned counsel appearing for the Management – Respondent No.7 submits that as on date only 4.95% of the shares purchased alone are in existence. In regard to these existing shares, the learned counsel undertakes not to further alienate them. We record the said undertaking.”

8. Ms. Kamini Jaiswal, learned counsel appearing on behalf of the appellants, while assailing the impugned orders on several grounds, strenuously urged that the sale of 54,88,850 shares of Apollo ought to be rescinded, particularly because, the said sale was in conscious breach of the scheme as also the terms and conditions laid down for the sale of these shares and was also in violation of the principles of natural justice.

9. Elaborating her contention that the sale was in contravention of the scheme framed by the Custodian and duly approved by the Special Court by order dated 17th August, 2000 and with modifications by this Court vide order dated 23rd August, 2001, learned counsel argued that Condition No.14 in the ‘terms and conditions for sale’ had been violated on three counts: *viz.* (i) Apollo and/or its management could be invited to bid only after the Special Court had ascertained the highest offer and satisfied itself about the inadequacy of the other bids. But the Custodian vide letter dated 28th April 2003, invited Apollo to bid for purchase of the said shares on his own volition, even before the bids received were placed before the Special Court; (ii) the offer to bid was to be made either to Apollo ‘OR’ its management and not to both as was done in the present case and (iii) the buy back effected by Apollo was in complete violation of Section 77A of the Companies Act, 1956 (for short “the Companies Act”) as well as SEBI (Buy back of Securities) Regulations, 1998. It was also urged that by accepting the bids of Apollo and respondent Nos.5 to 8, who were the investment companies of the promoters of Apollo, Condition No.7 of the said terms and conditions was also violated because each bid had to be for the entire lot of shares and not for a part of shares.

10. Alleging collusion between the Custodian, Apollo and its management, learned counsel submitted that, though the appellants and their relatives and corporate entities promoted by them were together holding approximately one crore shares in Apollo, which were ready and available for sale, yet, the Custodian proposed sale of only 54,88,850 shares. Further, the Custodian never explained the rationale behind breaking up the controlling block of shares to only 15.1% of the equity capital

when the total share holdings were easily more than 25% of the capital of the company. It was asserted that, the offer for sale of 15.1% shares was deliberately resorted to by the Custodian only to ensure that no other bid came forward as such a prospective bidder would have been bound to make a further public offer for purchase of 20% of the capital under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997. It was strenuously urged that the Custodian, with ulterior motive, had made the conditions very stringent and onerous to restrict and for that matter, practically deny participation of any other institution or individual in the bidding process.

11. It was contended that the impugned sale was in complete violation of the order of this Court dated 23rd August, 2001, wherein it was stated that the object for laying down the norms was to realise the highest possible price for the shares. It was urged that in the instant case, instead of maximising the price, the shares were sold at a discount of 25% of the then prevailing market price, thereby defeating the very purpose of the scheme. It was thus, contended before us that the Disposal Committee and the Custodian ought not to have recommended the acceptance of the bid at Rs.90/- per share since both the offers received were way below the then prevailing market price as well as the book value of shares. Under the given circumstances, according to the learned counsel, the Special Court should have opted for the 2nd method relating to sale of bulk shares, as stipulated in the order of this Court dated 23rd August 2001. It was urged that the Special Court also failed to follow its past precedents, particularly in the case of M/s Ranbaxy Laboratories Ltd., when 8,04,777 shares were ordered to be sold @ Rs.565/- per share. In that case, the bid was received under the Bulk Category @ Rs.540/- per share but on the insistence of the Special Court, the offer was improved to bring it at par with the prevailing market price. In support of the proposition that the Custodian as also the Special Court having committed material irregularities, resulting in substantial injury to the appellants, the subject sale of shares is liable to be set aside, learned counsel placed reliance on the observations of this Court in *Desh Bandhu Gupta Vs. N.L. Anand & Rajinder Singh*[1] and *Gajadhar Prasad & Ors. Vs. Babu Bhakta Ratan & Ors*[2].

12. Learned counsel strenuously contended that the impugned order was also arbitrary and in violation of the principles of natural justice in as much as the Special Court not only outrightly rejected the prayer made by the notified parties during the course of proceedings on 30th April, 2003 for grant of 48 hours time to secure a better offer in the same manner as was done to secure a better offer for the Bulk category shares of M/s Ranbaxy Laboratories Ltd., it also failed to consider the objections raised by them in their written submissions filed on 2nd May, 2003. It was stressed that the Special Court rejected the legitimate request of the appellants without any justification and showed undue haste in ordering the sale of shares, even ignoring the direction of this Court, i.e., to explore the possibility of selling the shares either under the Bulk Category or as Routine Shares to secure maximum price for the shares. On the contrary, the Special Court granted Apollo and its management two days to bring their proper offer and earnest money on 2nd May, 2003, which fact is duly recorded in the impugned order dated 30th April, 2003. In order to bring home her allegation of discriminatory treatment at the hands of the Custodian as also by the Special Court, learned counsel referred to the two letters dated 28th April, 2003 and 29th April, 2003, addressed to the notified parties by the Custodian intimating them about the date when the Special Court would consider the bids received in response to the advertisement for sale of subject shares. While letter dated 28th April, 2003 allowed the notified parties to submit offers independently received by them for purchase of the said shares, letter dated 29th April, 2003, made it clear that no offers brought by the notified parties to the Court would be considered. As regards the reasoning of the Special Court that any delay

in finalisation of the bid would have resulted in a crash in the market price of the shares because of break in the news of purchase of huge quantity of shares by one party, it was submitted that the said reasoning was again erroneous in as much as the news of sale of 54,88,850 shares of Apollo was already in public domain when advertisement for sale of these shares was published. It was thus, pleaded that the impugned order be set aside and the entire sale of 54.88 lakhs shares be rescinded in public interest and to achieve the object of the Special Court Act.

13. *Per contra*, Mr. Joseph Vellapally, learned senior counsel appearing for Apollo, supporting the order of the Special Court, at the outset, submitted that the said order had been passed by the Special Court in exercise of wide discretionary powers conferred on it by the Special Court Act as also by this Court and that such discretion can be interfered with only if it is shown to have been exercised in violation of the statutory provisions or contrary to the well established judicial principles. It was argued that in the present case the decision of the Special Court was based on the recommendation of the Disposal Committee, which consisted of experts in the field of securities and shares, and therefore, it cannot be said to be perverse so as to warrant interference by this Court. In order to highlight the role of the Disposal Committee and the probative value of its advice and recommendations, learned senior counsel commended us to a decision of this Court in *Sudhir S. Mehta & Ors. Vs. Custodian & Anr.*[3] In support of his submission that the Appellate Court should not lightly interfere with the discretion exercised by the Trial Court, learned counsel placed heavy reliance on the decisions of this Court in *Ramji Dayawala And Sons (P) Ltd. Vs. Invest Import*[4] and *Wander Ltd. And Anr. Vs. Antox India P. Ltd.*[5], wherein it was held that the Appellate Court would not ordinarily substitute its discretion in the place of the discretion exercised by the Trial Courts, save and except where the Trial Court had ignored the relevant evidence, sidetracked the approach to be adopted in the matter or overlooked various relevant considerations. The Appellate Court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. It was strenuously urged that the Special Court having acted reasonably and in a judicious manner, this Court should not interfere with the decision of the Special Court in approving the sale of shares to Apollo.

14. It was further contended by Mr. Vellapally that the appellants have no *locus standi* to assail the entire sale of 54.88 lakh shares as their shareholding was only 1,49,570 shares, as stated in the affidavit of the Custodian. It was pointed out that there was no averment in the appeal to the effect that the same was being filed in a representative capacity on behalf of other members of Harshad Mehta Group. At best, the appellants could impugn sale of 1,49,570 shares.

15. It was also contended by Mr. Vellapally that in terms of the order of the Special Court dated 17th August, 2000 and the order of this Court dated 23rd August, 2001, the management of Apollo had the right to buy and Apollo had the right to buy back its own shares under Section 77A of the Companies Act, once the highest offer is received from those entities who participated in the bid. Since the purchase of shares by Apollo was akin to an auction sale, its interests as a bonafide purchaser in the shares are saved, having no connection with the underlying dispute between the Custodian and the notified parties. In support of the contention, reliance was placed on *Ashwin S. Mehta Vs. Custodian*[6] wherein, according to the learned counsel, (albeit dealing with sale of commercial properties) in a similar situation, the interests of bona fide purchasers were protected.

16. Refuting the claim of the appellants that the said sale of shares of Apollo was at a loss, it was submitted by Mr.

Vellapally that it is a matter of common knowledge that transactions in the stock market are speculative in nature and cannot be predicted with accuracy. It was submitted that this Court in the matter of *Sudhir S. Mehta* (supra), while dealing with the notified parties' objections to a sale of shares of Reliance Industries Ltd. had observed that the sale of shares between the period '12.12.2000 to 1.11.2007' (said period covering the sale of shares of Apollo) could not be said to be at a loss, especially because of the fact that the said sale had been approved by the Disposal Committee, a committee of experts.

17. Lastly, learned senior counsel submitted that pursuant to the buy back of shares and on due compliance with the provisions of Section 77A read with Section 77A (7) of the Companies Act, Apollo had already extinguished 36.90 lakh shares so bought-back and therefore, to that extent, prayer of the appellants to rescind the purchase of shares is rendered infructuous. It was asserted that any order at this juncture, setting aside the impugned order, would not result in resurrection of the extinguished shares but entail a fresh issue of shares under Sections 79 and 81 of the Companies Act, which is fraught with statutory restrictions and difficulties, resultantly affecting the rights of third party shareholders, who are not parties to the present dispute.

18. Mr. Arvind Kumar Tewari, learned counsel appearing on behalf of the Custodian (respondent No. 2), supporting the impugned order, vehemently argued that the Special Court had not only followed all the norms settled by this Court, it was also successful in obtaining a price higher by Rs.10/- per share as compared to what was offered by the highest bidder, *viz.* Punjab National Bank. It was alleged that in spite of being informed by the Custodian in advance, vide letter dated 28th April, 2003, the appellants had failed to arrange for a purchaser who could bid higher than Apollo and had frivolously sought another two days time to arrange for a higher bid.

19. Dr. A. M. Singhvi, learned senior counsel appearing for respondents Nos. 3, 6 and 8, the co-bidders with Apollo, while adopting all the submissions made on behalf of Apollo, reiterated that the said respondents being bonafide bidders, having no concern with the procedure adopted by the Custodian for sale of shares, any interference by this Court with a well reasoned and equitable order passed by the Special Court would cause extreme hardship to them. In support of the submission that having regard to the nature of controversy sought to be raised by the appellants notified parties under the Special Court Act, this Court will be loath to interfere with the discretion exercised by the Special Court, learned senior counsel commended us to the decisions of this Court in *Employees' State Insurance Corpn. & Ors. Vs. Jardine Henderson Staff Association & Ors.*[7], *State of M.P. & Ors. Vs. Nandlal Jaiswal & Ors.*[8], *Ramana Dayaram Shetty Vs. International Airport Authority of India & Ors.*[9]; *Sesa Industries Limited Vs. Krishna H. Bajaj & Ors.*[10] and on a decision of the House of Lords in *Susannah Sharp Vs. Wakefield & Ors.*[11]. In the alternative, learned counsel submitted that if for any reason, this Court was to come to a conclusion that the price realised for sale of said shares was at a discount and/or less than the market price then the relief granted to the appellants ought to be confined to their shareholding and the promoters may be directed to pay the difference between the price paid by them for the purchase of shares i.e. Rs. 90/- per share and the then prevailing market price i.e. Rs. 120/- per share. In support of his proposition that this Court had sufficient powers under Article 142 of the Constitution of India to balance the equities between the parties and render complete justice by moulding the relief, learned senior counsel placed reliance on the observations made by this Court in *Rajesh D. Darbar Vs. Narasingrao Krishnaji Kulkarni*[12].

20. Before addressing the contentions advanced on behalf of the parties, it will be necessary and expedient to notice the overarching considerations behind the enactment of the

Special Court Act, which came into force on 6th June, 1992. It replaced the Special Court (Trial of Offences Relating to Transactions in Securities) Ordinance 1992, as promulgated on 6th June 1992, when large scale irregularities and malpractices pertaining to the transactions in both Government and other securities, indulged in by some brokers in collusion with the employees of various banks and financial institutions were noticed. The Special Court Act provides for establishment of a Special Court for speedy trial of offences relating to transactions in securities and disposal of properties attached thereunder. Section 3 of the Special Court Act relates to the appointment and functions of the Custodian. Sub-section (2) thereof clothes the Custodian with the power to notify in the official gazette, the name of a person, who has been involved in any offence relating to transactions in securities during the period as mentioned therein. Sub-sections (3) and (4) of Section 3 stipulate that with the issue of the aforesaid notification, properties, movable or immovable or both, belonging to the notified person shall stand attached, and such properties are to be dealt with by the Custodian in such manner as the Special Court may direct. Section 9A of the Special Court Act deals with the jurisdiction, power, authority and the procedure to be adopted by the Special Court in civil matters. In short, on and from the commencement of the Special Court Act, the Special Court exercises all such jurisdiction etc. as are exercisable by a Civil Court in relation to any matter or claim relating to any property that stands attached under sub-section (3) of Section 3 and it bars all other courts from exercising any jurisdiction in relation to any matter or claim referred to in the said Section. Sub-section (4) of Section 9A of the Special Court Act contemplates that the Special Court shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 and shall have the power to regulate its own procedure, but shall be guided by the principles of natural justice. The other provision, which is relevant for our purpose is Section 11 of the Special Court Act, which exclusively empowers the Special Court to give directions in the matter of disposal of the property of a notified person, under attachment. Sub-section (2) of Section 11 lists the priorities in which the liabilities of the notified person are required to be paid or discharged.

21. It is plain that the Special Court Act which is a special statute, is a complete code in itself. The purpose and object for which it was enacted was not only to punish the persons who were involved in the act of criminal misconduct by defrauding the banks and financial institutions but also to see that the properties, moveable or immovable or both, belonging to the persons notified by the Custodian were appropriated and disposed of for discharge of liabilities to the banks and financial institutions, specified government dues and any other liability. Therefore, a notified party has an intrinsic interest in the realisations, on the disposal of any attached property because it would have a direct bearing on the discharge of his liabilities in terms of Section 11 of the Special Court Act. It is also clear that the Custodian has to deal with the attached properties only in such manner as the Special Court may direct. The Custodian is required to assist in the attachment of the notified person's property and to manage the same thereafter. The properties of the notified persons, whether attached or not, do not at any point of time, vest in him, unlike a Receiver under the Civil Procedure Code or an official Receiver under the Provincial Insolvency Act or official Assignee under the Presidency Insolvency Act (See : *B.O.I. Finance Ltd. Vs. Custodian & Ors.*)[13]. The statute also mandates that the Special Court shall be guided by the principles of natural justice.

22. At this juncture, it would also be profitable to briefly note the salient features of the scheme formulated by the Custodian for sale of shares in terms of the directions issued by this Court in its order dated 11th March 1996 (CA No.5225/1995); the norms laid down by the Special Court vide order dated 17th August 2000 and the modification of these norms by this Court vide order dated 23rd August, 2001 (CA No.5326/1995). What

clearly emerges from the scheme/orders is that the underlying object of the procedure/norms laid down in the scheme is to ensure that highest possible price on sale of shares is realised. It is manifest that with this end in view, this Court vide order dated 23rd August, 2001, left it to the Special Court to decide what procedure to adopt in order to realise the highest price for the shares. The scheme/norms had been further modified by the Special Court and this Court in a way to inject flexibility in the scheme in order to secure the highest price for the shares.

23. Having examined the impugned order in the light of the Statutory provisions and the norms laid down for sale of the subject shares, we are of the opinion that there is substance and merit in the submissions made by learned counsel for the appellants to the extent that the Special Court failed to make a serious effort to realise the highest possible price for the said shares. We also feel that the Special Court overlooked the norms laid down by it in its order dated 17th August 2000; ignored the afore-extracted directions by this Court contained in order dated 23rd August 2001 and glossed over the procedural irregularities committed by the Custodian. As stated above, Condition No.14 of the terms and conditions of sale, clearly stipulated that it was only after the Special Court had ascertained the highest offer that Apollo or its management was to be given an option to buy back the shares. However, the letter of the Custodian dated 28th April, 2003, addressed to Apollo clearly divulges the fact that the Custodian had, without any authority, invited Apollo and its management 'to bid' on 30th April, 2003, the settled date, when the report of the Disposal Committee was yet to be considered by the Special Court. It is evident from Condition No.15 of terms and conditions of sale, that the Special Court has the discretion to accept or reject any offer or bid that may be received for purchase of shares. Therefore, the stand of the Custodian that inviting Apollo to make the bid was necessarily in compliance of the scheme/ condition of sale, cannot be accepted inasmuch as it was for the Special Court to take such a decision at the appropriate time and not the Custodian. The Custodian could not have foreseen that the Special Court would not accept the bid of the sole bidder viz. Punjab National Bank. As aforesaid, so far as issue of notification in terms of Section 3(2) is concerned, the Custodian derives his power and authority from the Special Court Act but his jurisdiction to deal with property under attachment, flows only from the orders which may be made by the Special Court constituted under the said Act. It is obligatory upon the Custodian to perform all the functions assigned to him strictly in accordance with the directions of the Special Court. In the present case, although we do not find any material on record which may suggest any malafides on the part of the Custodian yet we are convinced that by inviting Apollo to bid, vide letter dated 28th April, 2003, the Custodian did exceed the directions issued to him by the Special Court. However, we feel that this being in the nature of a procedural omission, the alleged violation is not *per se* sufficient to nullify the sale of shares.

24. The next question for determination is whether or not the impugned decision of the Special Court is in breach of the principles of natural justice, thereby vitiating its decision to sell the subject shares to Apollo and the companies managed by their promoters?

25. It is true that rules of "natural justice" are not embodied rules. The phrase "natural justice" is also not capable of a precise definition. The underlying principle of natural justice, evolved under the common law, is to check arbitrary exercise of power by any authority, irrespective of whether the power which is conferred on a statutory body or Tribunal is administrative or quasi judicial. The concept of "natural justice" implies a duty to act fairly i.e. fair play in action. As observed in *A.K. Kraipak Vs. Union of India,*[17] the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice.

26. In *Swadeshi Cotton Mills Vs. Union of India*[15], R.S. Sarkaria, J., speaking for the majority in a three-Judge Bench, lucidly explained the meaning and scope of the concept of "natural justice". Referring to several decisions, His Lordship observed thus: (SCC p. 666)

> "Rules of natural justice are not embodied rules. Being means to an end and not an end in themselves, it is not possible to make an exhaustive catalogue of such rules. But there are two fundamental maxims of natural justice viz. (i) *audi alteram partem* (ii) *memo judex in re sua.* The audi alteram partem rule has many facets, two of them being (a) notice of the case to be met; and (b) opportunity to explain. This rule cannot be sacrificed at the altar of administrative convenience or celerity. The general principle—as distinguished from an absolute rule of uniform application—seems to be that where a statute does not, in terms, exclude this rule of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the audi alteram partem rule at the pre-decisional stage. Conversely if the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature, and no full review or appeal on merits against that decision is provided, courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing, shorn of all its formal trappings and dilatory features at the pre-decisional stage, unless, viewed pragmatically, it would paralyse the administrative process or frustrate the need for utmost promptitude. In short, this rule of fair play must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. The court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications. *But, the core of it must, however, remain, namely, that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise."*
>
> (emphasis supplied by us)

27. It is thus, trite that requirement of giving reasonable opportunity of being heard before an order is made by an administrative, quasi judicial or judicial authority, particularly when such an order entails adverse civil consequences, which would include infraction of property, personal rights and material deprivation for the party affected, cannot be sacrificed at the alter of administrative exigency or celerity. Undoubtedly, there can be exceptions to the said doctrine and as aforesaid the extent and its application cannot be put in a strait-jacket formula. The question whether the principle has to be applied or not is to be considered bearing in mind the express language and the basic scheme of the provision conferring the power; the nature of the power conferred; the purpose for which the power is conferred and the final effect of the exercise of that power on the rights of the person affected.

28. In the backdrop of the aforenoted legal principles and the requirement of sub-section 4 of Section 9A of the Special Court Act, we are of the opinion that in the present case the Special Court failed to comply with the principles of natural justice. As noted above, the Special Court rejected the prayer of the appellants to grant them 48 hours' time to secure a better offer. In fact, by his letter dated 29th April, 2003 addressed by the Custodian to the notified parties, including the appellants, the right of the appellants to bring better offer was foreclosed by the Custodian, which evidently was without the permission of the Special Court. Furthermore, the Special Court also ignored its past precedents whereby it had granted time to the parties to get better offers for sale of shares of M/s Ranbaxy

Laboratories Ltd. There is also force in the plea of learned counsel appearing for the appellants that the reason assigned by the Special Court in its order dated 30th April, 2003, for declining further time to the appellants, that deferment of decision on the sale of shares would have resulted in the share market falling down is unsound and unfounded. As stated above, the share market was already aware of the sale of a big chunk of shares of Apollo in view of the advertisement published by the Custodian and therefore, there was hardly any possibility of further volatility in the price of said shares. We are thus, convinced that the appellants have been denied a proper opportunity to bring a better offer for sale of shares, resulting in the realisation of lesser amount by way of sale of the subject shares, to the detriment of the appellants and other notified parties. Therefore, the decision of the Special Court deserves to be set aside on that short ground.

29. We shall now advert to the plea strenuously canvassed on behalf of the respondents that the Special Court having exercised the discretion vested in it under the Special Court Act, keeping in view all the parameters relevant for disposal of the shares, this Court may not interfere with the impugned order. There is no quarrel with the general proposition that an Appellate Court will not ordinarily substitute its discretion in the place of the discretion exercised by the Trial Court unless it is shown to have been exercised under a mistake of law or fact or in disregard of a settled principle or by taking into consideration irrelevant material. A 'discretion', when applied to a court of justice means discretion guided by law. It must not be arbitrary, vague and fanciful but legal and regular. (See : *R. Vs. Wilkes*[16]).

30. We have therefore, no hesitation in agreeing with Mr. Vellapally to the extent that same principle would govern an appeal preferred under Section 10 of the Special Court Act. However, since we have come to the conclusion that the Special Court has exercised its discretion in complete disregard to its own scheme and 'terms and conditions' approved by it for sale of shares and above all that the impugned order was passed in violation of the principles of natural justice, we think that the facts in hand call for our interference, to correct the wrong committed by the Special Court.

31. For the view we have taken above, we deem it unnecessary to deal with the other contentions urged on behalf of the parties on the merits of the impugned order.

32. This brings us to the question of relief. In view of our finding that the decision of the Special Court is vitiated on the afore-stated grounds, it must follow as a necessary consequence that in the normal course, the impugned order must be struck down in its entirety. However, bearing in mind the fact that the sale of 54,88,850 shares was approved and all procedural modalities are stated to have been carried out in the year 2003, we are inclined to agree with Mr. Vellapally and Dr. Singhvi that at this stage, when 36.90 lakh shares of Apollo are claimed to have been extinguished, the relief sought for by the appellants to rescind the entire sale of 54,88,850 shares will be impracticable and fraught with grave difficulties. In our opinion, therefore, the relief in this appeal should be confined to 4.95% of the shares, subject matter of interim order, dated 29th May, 2003, extracted above.

33. In the result, we allow the appeal partly; set aside the impugned order to the extent indicated above and remit the case to the Special Court for taking necessary steps to recover the said 4.95% shares from Apollo or its management, as the case may be, and put them to fresh sale strictly in terms of the aforenoted norms as approved by this Court vide order dated 23rd August, 2001. The shareholders who will be affected by this order shall be entitled to the sale consideration paid by them to the Custodian alongwith simple interest @6% p.a. from the date of payment by them upto the date of actual reimbursement by the Custodian in terms of this order.

34. However, in the facts and circumstances of the case, the parties are left to bear their own costs.

N.J. Appeal partly allowed.

ABDUL REHMAN & ORS.

V.

K.M. ANEES-UL-HAQ

CRIMINAL APPEAL NOS.2090-2093 OF 2011

NOVEMBER 14, 2011

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

CODE OF CRIMINAL PROCEDURE, 1973:

s.195 – Complaint filed by appellant before CAW cell accusing respondent of commission of offence punishable under s. 406 read with s. 34 IPC and ss.3 and 4 of Dowry Prohibition Act – Complaint by respondent alleging that appellant had instituted criminal proceedings against him without any basis and falsely charged him with commission of offences knowing that there was no just or lawful ground for such proceedings or charge and thereby committed offences punishable u/ss.211 and 500 read with s.109, 114 and 34 IPC – Maintainability of – Plea of appellant that bar of s.195 was attracted to the complaint filed by the respondent inasmuch as the offence allegedly committed by them was "in relation to the proceedings" in the court which the respondent had approached for grant of bail and the court concerned had granted the bail prayed for by him – Held: The bail proceedings conducted by Sessions Judge in connection with the case which appellant had lodged with CAW Cell were judicial proceedings and the offence punishable under s.211 IPC alleged to have been committed by the appellant related to the said proceedings – Such being the case the bar contained in s.195 was attracted to complaint filed by respondent – Complaint of respondent was not, thus, maintainable – Penal Code, 1860 – ss.406 r/w s.34 – Dowry Prohibition Act – ss.3 and 4.

s.195 – Scope and ambit of – Discussed.

Aggrieved by the institution of criminal complaint against him by the appellant before the CAW cell under Section 406 read with Section 34 IPC and Sections 3 and 4 of the Dowry Prohibition Act, the respondent filed a complaint alleging that the appellants had instituted criminal proceedings against him without any basis and falsely charged him with commission of offences knowing that there was no just or lawful ground for such proceedings or charge and thereby committed offences punishable under Sections 211 and 500 read with Sections 109, 114 and 34 IPC. The Magistrate held that there was sufficient material to show commission of offences punishable under

Sections 211 and 500 IPC. The appellant preferred a criminal revision which was dismissed as time barred. The appellant then filed a petition under Section 482 Cr.P.C. before the High Court for quashing complaint pending before the Magistrate and all proceedings consequent thereto. The High Court dismissed the said petition holding that since no judicial proceedings were pending in any court at the time when the complaint under Sections 211 and 500 IPC was filed by the respondent-complainant, the bar contained in Section 195 Cr.P.C. was not attracted nor was there any illegality in the order passed by the Magistrate summoning the appellants to face trial. The instant appeals were filed challenging the order of the High Court.

Allowing the appeals, the Court

HELD: 1.1. A plain reading of Section 195, Cr.P.C. shows that there is a legal bar to any Court taking cognizance of offences punishable under Sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228 when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court except on a complaint in writing, of that Court or by such officer of the Court as may be authorised in that behalf, or by some other Court to which that Court is subordinate. That a complaint alleging commission of an offence punishable under Section 211 IPC, "in or in relation to any proceedings in any Court", is maintainable only at the instance of that Court or by an officer of that Court authorized in writing for that purpose or some other Court to which that Court is subordinate, is abundantly clear from the language employed in the provision. It is common ground that the offence in the present case is not alleged to have been committed "in any proceedings in any Court". [Para 7]

1.2. Upon the filing of the complaint by the appellants with the CAW Cell, the respondent-complainant had sought an order of anticipatory bail from the Sessions Judge and an order granting bail was indeed passed in favour of the respondent. On completion of the investigation into the case lodged by the appellants under Section 406 read with Sections 3 and 4 of Dowry Prohibition Act, a charge sheet under Section 173 Cr.P.C.

was filed before the court competent to try the said offences in which the respondents wer released on regular bail. The filing of the charge sheet, however, being an event subsequent to the taking of cognizance by the Magistrate on the complaint filed by the respondent-complainant, the same can have no relevance for determining whether cognizance was properly taken. The question all the same would be whether the grant of anticipatory bail to the respondent by the Sessions Judge would constitute judicial proceedings and, if so, whether the offence allegedly committed by the appellants could be said to have been committed in relation to any such proceedings. [Para 8]

1.3. The bail proceedings conducted by the Court of Sessions Judge in connection with the case which the appellants had lodged with CAW Cell were judicial proceedings and the offence punishable under Section 211 IPC alleged to have been committed by the appellants related to the said proceedings. Such being the case the bar contained in Section 195 of the Cr.P.C. was clearly attracted to the complaint filed by the respondent. The Magistrate and the High Court had both failed to notice the decision of this Court in ****Kamlapati Trivedi's*** *and* *****SK. Bannu's*** cases and thereby fallen in error in holding that the complaint filed by the respondent was maintainable. The High Court also failed to appreciate that the real question that fell for consideration before it was whether the bail proceedings were tantamount to judicial proceedings. That question was left open by this Court in ******M.L Sethi's*** case but was squarely answered in ****Kamalapati Trivedi's*** case. Once it is held that bail proceedings amounted to judicial proceedings the same being anterior in point of time to the taking of cognizance by the Metropolitan Magistrate, there is no escape from the conclusion that any offence punishable under Section 211 IPC could be taken cognizance of only at the instance of the Court in relation to whose proceedings the same was committed or who finally dealt with that case. A charge-sheet has already been filed against the respondent by the CAW Cell before the Competent Court. The respondent would, therefore, have a right to move the said Court for filing a complaint against the appellants for

an offence punishable under Section 211 IPC or any other offence committed in or in relation to the said proceedings at the appropriate stage. It goes without saying that if an application is indeed made by the respondent to the Court concerned, it is expected to pass appropriate orders on the same having regard to the provisions of Section 340 of the Code. So long as the said proceedings are pending before the competent Court it would neither be just nor proper nor even legally permissible to allow parallel proceedings for prosecution of the appellants for the alleged commission of offence punishable under Section 211 IPC. [Paras 14, 15]

**Kamlapati Trivedi v. State of West Bengal* 1980 (2) SCC 91: 1979 (2) SCR 717; ***State of Maharashtra v. SK. Bannu and Shankar* (1980) 4 SCC 286: 1981 (1) SCR 694; ****M.L. Sethi v. R.P. Kapur* AIR 1967 SC 528: 1967 SCR 520 – relied on.

2. Allowing the respondents to continue with the prosecution against the appellants for the offence punishable under Section 500 IPC would not subserve the ends of justice and may result in the appellants getting vexed twice on the same facts. Any complaint under Section 500 IPC may become time barred if the complaint already lodged is quashed. That is not an insurmountable difficulty and can be taken care of by moulding the relief suitably. It would be appropriate if the orders passed by the Metropolitan Magistrate and that passed by the High Court are set aside and the complaint filed by the respondent directed to be transferred to the Court dealing with the charge sheet filed against the respondent. The said court shall treat the complaint as an application for filing of a complaint under Section 211 of the IPC to be considered and disposed of at the final conclusion of the trial; having regard to the provisions of Section 340 of IPC and the finding regarding guilt or innocence of the respondent as the case may be recorded against him. The respondent shall also have the liberty to proceed with the complaint in so far as the same relates to commission of the offence punishable under Section 500 of the IPC depending upon whether there is any room for doing so in the light of the findings which the court may record at the conclusion of the trial against the respondent. [Para 16]

Badri v. State ILR (1963) 2 All 359 – referred to.

CASE LAW REFERENCE

1967 SCR 520	relied on	Paras 4, 9, 14
ILR (1963) 2 All 359	referred to	Para 9
1979 (2) SCR 717	relied on	Paras 11, 14
1981 (1) SCR 694	relied on	Paras 13, 14

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.2090-2093 OF 2011
(Arising out of SLP (Crl.) Nos.4161-4164 of 2008)

Abdul Rehman & Ors.
…Appellants

Versus

K.M. Anees-ul-Haq
…Respondent

J U D G E M E N T

T.S. THAKUR, J.

1. Leave granted.

2. The short question that arises for determination in these appeals is whether the complaint filed by the respondent-complainant against the appellants, alleging commission of offences punishable under Sections 211, 500, 109, and 114 read with Section 34 of Indian Penal Code, 1860 was barred by the provisions of Section 195 of the Code of