HARESH MOHANDAS RAJPUT
v.
STATE OF MAHARASHTRA
(Criminal Appeal Nos. 2030-2031 of 2009)

SEPTEMBER 20, 2011

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

Penal Code, 1860 – ss. 302 and 376 – Rape followed by murder of a minor girl by strangulation – Prosecution case based on circumstantial evidence – Conviction of accused-appellant under ss.302 and 376 IPC – Justification of – Held: Dead body of deceased was found inside the house of appellant-accused with blood stains under the cot – There were blood stains on the bed-sheet and on the floor underneath the cot – The appellant could not offer any explanation whatsoever as how the dead body of the victim girl could reach his house – More so, nothing on record to controvert the evidence of the doctor who conducted the post-mortem and opined that there had been sexual assault on the victim and she died of strangulation and there had been ligature marks on her neck –Appellant was present in his house when police arrived there – The alibi taken by the appellant that he had gone to a liquor shop for drinks leaving his house open remained unsubstantiated and was found to be false – In such a fact situation, conviction of appellant affirmed – However, the case does not fall within the "rarest of rare cases" – Punishment of death sentence awarded by the High Court set aside and the sentence of life imprisonment awarded by the Trial Court restored.

Evidence – Circumstantial Evidence – Appreciation of – Held: Though a conviction may be based solely on circumstantial evidence, however, the circumstances from which the conclusion of guilt is to be drawn should be fully established – The same should be of a conclusive nature and

exclude all possible hypothesis except the one to be proved – The facts so established must be consistent with the hypothesis of the guilt of the accused and the chain of evidence must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and must show that in all human probability, the act must have been done by the accused.

Sentence/ Sentencing – Death sentence – When warranted – Rarest of the rare case – Held: "Rarest of the rare case" comes when a convict would be a menace and threat to the harmonious and peaceful co-existence of the society – The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society – Where an accused does not act on any spur-of-the-moment provocation and indulges himself in a deliberately planned crime and meticulously executes it, the death sentence may be the most appropriate punishment – The death sentence may be warranted where the victims are innocent children and helpless women – In case the crime is committed in a most cruel and inhuman manner which is in an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where the act affects the entire moral fiber of the society, e.g. crime committed for power or political ambition or indulge in organized criminal activities, death sentence should be awarded – For awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances – As to whether death sentence should be awarded, would depend upon the factual scenario of the case in hand.

According to the prosecution, the appellant caused the death of a minor girl aged 10 years by strangulating her after committing rape on her. There was no eye-witness to the incident and the case was based on circumstantial evidence. The trial court convicted the

appellant and sentenced him to undergo life imprisonment under Section 302 IPC and 10 years imprisonment under Section 376 IPC. However, both the sentences were directed to run concurrently. Aggrieved, the State filed appeal for enhancement of sentence and appellant also filed an appeal against his conviction. The High Court upheld the conviction and enhanced the sentence to death penalty.

In the instant appeals, the question which arose for consideration was whether the prosecution case met the requirement of proof on circumstantial evidence and the facts of the case warranted the imposition of death sentence.

Disposing of the appeals, the Court

HELD:

CIRCUMSTANTIAL EVIDENCE:

1. Though a conviction may be based solely on circumstantial evidence, however, the circumstances from which the conclusion of guilt is to be drawn should be fully established. The same should be of a conclusive nature and exclude all possible hypothesis except the one to be proved. The facts so established must be consistent with the hypothesis of the guilt of the accused and the chain of evidence must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and must show that in all human probability, the act must have been done by the accused. The evidence produced by the prosecution should be of such a nature that it makes the conviction of the accused sustainable. [Paras 9, 10 and 11]

Krishnan v. State represented by Inspector of Police **(2008) 15 SCC 430;** *Sharad Birdhichand Sarda v. State of*

Maharashtra **AIR 1984 SC 1622 1985 (1) SCR 88;** *Paramjeet Singh @ Pamma v. State of Uttarakhand* **AIR 2011 SC 200: 2010 (11) SCR 1064;** ***Wakkar & Anr. v. State of Uttar Pradesh*** **(2011) 3 SCC 306;** Mohd. *Mannan @ Abdul Mannan v. State of Bihar* **(2011) 5 SCC 317;** *Inspector of Police, Tamil Nadu v. John David* **(2011) 5 SCC 509 and** ***S****K. Yusuf v. State of West Bengal* **AIR 2011 SC 2283 – relied on.**

DEATH SENTENCE - WHEN WARRANTED:

2.1. "Rarest of the rare case" comes when a convict would be a menace and threat to the harmonious and peaceful co-existence of the society. The crime may be heinous or brutal but may not be in the category of "rarest of the rare case". There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious co-existence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur-of-the-moment provocation and indulges himself in a deliberately planned crime and meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where the victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fiber of the society, e.g. crime committed for power or political ambition or indulge in

organized criminal activities, death sentence should be awarded. [Para 14]

2.2. For awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances. As to whether death sentence should be awarded, would depend upon the factual scenario of the case in hand. [Para 15]

C. Muniappan & Ors. v. State of Tamil Nadu **AIR 2010 SC 3718: 2010 (10) SCR 262;** *Rabindra Kumar Pal alias Dara Singh v. Republic of India* **(2011) 2 SCC 490: 2011 (1) SCR 929;** *Surendra Koli v. State of UP & Ors.* **(2011) 4 SCC 80: 2011 (2) SCR 939;** Mohd. *Mannan @ Abdul Mannan v. State of Bihar* **(2011) 5 SCC 317;** *Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra* **(2011) 7 SCC 125 – relied on.**

Bachan Singh v. State of Punjab **AIR 1980 SC 898 and** *Machhi Singh & Ors. v. State of Punjab* **AIR 1983 SC 957: 1983 (3) SCR 413 – referred to.**

CIRCUMSTANCES:

3.1. Indisputably, the dead body of the deceased was found inside the house of the appellant with blood stains under the cot. There had been blood stains on the bed-sheet and on the floor underneath the cot. The appellant could not offer any explanation whatsoever as how the dead body of the victim girl could reach his house. More so, there is nothing on record to controvert the evidence of the doctor who conducted the post-mortem and opined that there had been sexual assault on the victim and she died of strangulation and there had been ligature marks on her neck. Appellant was present in his house when police arrived there. The alibi taken by the appellant that he had gone to a liquor shop for drinks leaving his

house open remained unsubstantiated and was found to be false. [Para 6]

3.2. In such a fact-situation, there is no cogent reason to interfere with the well-reasoned judgments of the courts below so far as the conviction of the appellant is concerned, and his conviction under Sections 302 and 376 IPC is affirmed. [Para 30]

3.3. So far as the sentence part is concerned, the case does not fall within the "rarest of rare cases". The High Court was not justified in enhancing the punishment. Thus, in the facts and circumstances of the case, the punishment of death sentence awarded by the High Court is set aside and the sentence of life imprisonment awarded by the Trial Court is restored. [Para 30]

Case Law Reference:

(2008) 15 SCC 430	relied on	Para 9
1985 (1) SCR 88	relied on	Para 10
2010 (11) SCR 1064	relied on	Para 11
(2011) 3 SCC 306	relied on	Para 11
(2011) 5 SCC 317	relied on	Paras 11, 14
(2011) 5 SCC 509	relied on	Para 11
AIR 2011 SC 2283	relied on	Para 11
AIR 1980 SC 898	referred to	Para 12
1983 (3) SCR 413	referred to	Para 13
AIR 2010 SC 3718	relied on	Para 14
(2011) 2 SCC 490	relied on	Para 14
(2011) 4 SCC 80	relied on	Para 14

(2011) 7 SCC 125 relied on Para 14

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2030-2301 of 2009.

From the Judgment & Order dated 11.01.2008 of the High Court of Judicature at Bombay in Criminal Appeal Nos.1020 of 2001 and 401 of 2002.

D.N. Goburdhan, Prabel Bagchi, Karitka Sharma. Balendu Shekhar for the Appellant.

Arun R. Pednekar, Sanjay Kharde, Asha Gopalan Nair for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. These appeals have been preferred against the impugned judgment and order dated 11.1.2008 in Criminal Appeal Nos.1020/2001 and 401/2002 of the High Court of Bombay in which the High Court has confirmed the order of conviction dated 19.9.2001 passed by the Additional Sessions Judge, Pune in Sessions Case No.41 of 2000 for the offences of rape and murder, however, altered the sentence of life imprisonment awarded by the Trial Court to death sentence while allowing the criminal appeal of the State for enhancement of punishment.

2. **FACTS:**

A. On 24.10.1999, Pooja, deceased, aged 10 years was playing on the road between her house and the house of the appellant at about 4 p.m. along with her brother Nitesh (PW.3) and sister. She was found missing by Nitesh (PW.3) who searched for her but in vain. Smt. Tara (PW.1) mother of Pooja, deceased, who had been away for work, on being informed came back and looked around but Pooja could not be traced. Smt. Tara (PW.1) reached the police station at 9.30 p.m. to lodge the First Information Report (hereinafter called the "FIR").

While Smt. Tara (PW.1) was still in the police station, Khushal (PW.10) son of the appellant arrived at the police station and informed the police that the appellant, who was addicted to liquor, told him that he had killed Pooja, deceased and her dead body was lying under the cot in his house. The police acted on the information and reached the spot and found that a large number of persons had gathered there and the appellant was sitting outside his home.

B. The dead body of Pooja was recovered from the house of the appellant and panchnama was prepared. Appellant was arrested and after completing the investigation, the chargesheet was filed against him under Sections 302 and 376 of the India Penal Code, 1860 (hereinafter called "IPC") . During the trial, the prosecution examined a large number of witnesses in support of its case and after conclusion of the trial, the Trial Court vide judgment and order dated 19.9.2001 convicted the appellant and sentenced him to undergo life imprisonment under Section 302 IPC and 10 years imprisonment under Section 376 IPC. However, both the sentences were directed to run concurrently.

C. Being aggrieved, the State of Maharashtra preferred the appeal for enhancement of sentence and the appellant also filed an appeal against his conviction. The High Court vide impugned judgment and order dated 11.1.2008 upheld the conviction and enhanced the sentence to death penalty, while disposing of both the appeals.

Hence, these appeals.

RIVAL SUBMISSIONS:

3. Shri D.N. Goburdhan, learned counsel appearing for the appellant, has submitted that there is no evidence on record to connect the appellant with the crime. Circumstantial evidence was not to the effect that it would indicate towards the guilt of the appellant in exclusion of any hypothesis of innocence. There

are material inconsistencies in the statements of the witnesses which go to the root of the case. There is no sufficient evidence on record on the basis of which conviction of the appellant could be recorded. However, under no circumstance the High Court could be justified in enhancing the punishment from life imprisonment to death sentence. Thus, the appeals deserve to be allowed.

4. Per contra, Shri Arun R. Pednekar, learned counsel appearing for the State, has opposed the appeals contending that the courts below have taken into consideration a large number of circumstances which stood proved to establish the guilt of the appellant. The dead body of Pooja, deceased, was recovered from the house of the appellant. The medical report revealed that she had been killed by strangulation after being subjected to sexual assault. The inconsistencies in the statements of the witnesses, if any, are of trivial nature. The concurrent findings of facts recorded by the courts below on the basis of which the appellant has been convicted, do not require any interference. The appeals lack merit and are liable to be dismissed.

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

FACTS UNDISPUTED:

6. Indisputably, the dead body of Pooja was found inside the house of the appellant with blood stains under the cot. There had been blood stains on the bed-sheet and on the floor underneath the cot. Appellant could not offer any explanation whatsoever as how the dead body of the victim girl could reach his house. More so, there is nothing on record to controvert the evidence of the doctor who conducted the post-mortem and opined that there had been sexual assault on the victim and she died of strangulation and there had been ligature marks on her neck. Appellant was present in his house when police arrived there. The alibi taken by the appellant that he had gone to a

liquor shop for drinks leaving his house open remained unsubstantiated and was found to be false.

INJURIES:

7. Dr. P.D. Rokade, PW-7, conducted the post-mortem examination on 25.10.1999 on the body of Pooja and found the following injuries:

1. Contused abrasion over the labia majora from the junction behind the backwards size 1 x 0.25 cm/oblique.

2. Crescent marks on the labia majnora near the clitoris size 0.25 cm.

3. Abrasion with radial from the labia minora behind and backwards noted.

4. Four chit the torn radially and bruised.

5. Posterial commisure torn.

6. Hymen lacerated along 3 and 9 O'clock position.

Dr. P.D. Rokade (PW.7) found following injuries on external examination:

1. Contused abrasion left frontal eminence size 0.25 x 0.25 cms. Single.

2. Crescent abrasion right upper lip lateral aspect size 0.5 x 0.25 cm. horizontal.

3. Contusion right ala of nose 0.5 x 0.1 cms.

4. Contusion right orbital plate 2 cms below the outer canthus, size 1 x 0.25 cms. Oblique.

5. Crescent abrasion right angle of mouth 0.25 x 0.25 cm.

6. Contused abrasion right cheek 4 in No.1 below another with 1 cm. apart oblique in direction of size 1.5 x 0.5 cm.

7. Ligature mark around the neck over the thyroid cartilage extending from left sternclodomastoid upto the right posterior triangle of neck size 15 cm. x 1.5 cm. on left and 1 cm. on right side.

8. Ligature mark is 7 cm. below left ear 6.5 cm. below chin and 8 cm. below right ear and is more prominent on left side.

9. Contusion right anterior triangle of neck 2 cm. x 0.5 cm. irregular.

10. Crescent abrasion over right forearm and wrist 7 in No. of 0.1 to 0.25 cm. and 1-2 cm. apart.

11. Crescent abrasion left forearm and wrist externally 2 in number 4 cm. part size 0.1 to 0.2 cm.

12. Old unhealed seen over the left knee with recent scab removal (granulate on tissue seen) size 2 x 1 cm. and 3 x 2 cm.

All the injuries were ante-mortem.

The doctor also opined that injuries to genitals mentioned in column no. 151 may be possible due to sexual assault. There injuries as well as internal injuries mentioned in para no. 20, organs of generations may be possible due to rape by a fully developed person by full penetration.

The age of the injuries was 24 hours before post-mortem examination. Injuries caused by finger nails referred above may be caused in sexual assault. Injuries mentioned in column no. 3 may be possible due to resistance during sexual assault.

The witness further opined that Pooja was raped and then murdered on 24.10.1999 between 4.00 p.m. to 10.00 p.m.

8. The instant case is based on circumstantial evidence as there is no eye-witness of the incident and the High Court has awarded the death sentence to the appellant. Thus, we have to examine as to whether the prosecution case meets the requirement of proof on circumstantial evidence and the facts of the case warranted the imposition of death sentence.

CIRCUMSTANTIAL EVIDENCE:

9. In *Krishnan v. State* represented by Inspector of Police, (2008) 15 SCC 430, this Court after considering a large number of its earlier judgments observed that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that with all human probability the crime was committed by the accused and none else; and

(iv) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

Though a conviction may be based solely on circumstantial evidence, however, the court must bear in mind the aforesaid tests while deciding a case involving the commission of a serious offence in a gruesome manner.

10. In *Sharad Birdhichand Sarda v. State of Maharashtra,* AIR 1984 SC 1622, this Court observed that it is well settled that the *prosecution's case must stand or fall on its own legs and cannot derive any strength from the weakness of the defence* put up by the accused. *However, a false defence may be called into aid only to lend assurance to the court where various links in the chain of circumstantial evidence are in themselves complete.* The circumstances from which the conclusion of guilt is to be drawn should be fully established. The same should be of a conclusive nature and exclude all possible hypothesis except the one to be proved. The facts so established must be consistent with the hypothesis of the guilt of the accused and the chain of evidence must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and must show that in all human probability, the act must have been done by the accused. The Court also discussed the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone and held as under:

> "(a) The circumstances from which the conclusion of guilt is to be drawn should be fully established;
>
> (b) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
>
> (c) The circumstances should be of a conclusive nature and tendency;
>
> (d) They should exclude every possible hypothesis except the one to be proved; and
>
> (e) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must

> show that in all human probability the act must have been done by the accused."

11. A similar view has been reiterated by this Court persistently observing that the evidence produced by the prosecution should be of such a nature that it makes the conviction of the accused sustainable. (See: *Paramjeet Singh @ Pamma v. State of Uttarakhand,* AIR 2011 SC 200; *Wakkar & Anr. v. State of Uttar Pradesh,* (2011) 3 SCC 306; *Mohd. Mannan @ Abdul Mannan v. State of Bihar,* (2011) 5 SCC 317; *Inspector of Police, Tamil Nadu v. John David,* (2011) 5 SCC 509; and *SK. Yusuf v. State of West Bengal* AIR 2011 SC 2283).

DEATH SENTENCE - WHEN WARRANTED:

12. The guidelines laid down in *Bachan Singh v. State of Punjab,* AIR 1980 SC 898, may be culled out as under:

> "(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
>
> (ii) Before opting for the death penalty, the circumstances of the offender also require to be taken into consideration alongwith the circumstances of the crime.
>
> (iii) Life imprisonment is the rule and death sentence is an exception. In other words, death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
>
> (iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigating circumstances have to be accorded full

weightage and just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

13. In *Machhi Singh & Ors. v. State of Punjab,* AIR 1983 SC 957, this Court expanded the "rarest of rare" formulation beyond the aggravating factors listed in *Bachan Singh* to cases where the "collective conscience" of a community is so shocked that it will expect the holders of the judicial powers centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, such a penalty can be inflicted. But the Bench in this case underlined that full weightage must be accorded to the mitigating circumstances in a case and a just balance had to be struck between aggravating and mitigating circumstances.

14. "Rarest of the rare case" comes when a convict would be a menace and threat to the harmonious and peaceful co-existence of the society. The crime may be heinous or brutal but may not be in the category of "rarest of the rare case". There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious co-existence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur-of-the-moment provocation and indulges himself in a deliberately planned crime and meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where the victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects

the entire moral fiber of the society, e.g. crime committed for power or political ambition or indulge in organized criminal activities, death sentence should be awarded. (See: *C. Muniappan & Ors. v. State of Tamil Nadu,* AIR 2010 SC 3718; *Rabindra Kumar Pal alias Dara Singh v. Republic of India,* (2011) 2 SCC 490; *Surendra Koli v. State of UP & Ors.,* (2011) 4 SCC 80; *Mohd. Mannan* (supra); and *Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra,* (2011) 7 SCC 125).

15. Thus, it is evident that for awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances. As to whether death sentence should be awarded, would depend upon the factual scenario of the case in hand.

16. The instant appeals are required to be decided in the light of the aforesaid settled propositions of law.

CIRCUMSTANCES:

17. The following circumstances have been taken into consideration by the courts below while convicting the appellant:

(1) Incident occurred in the house of the appellant.

(2) Appellant was present at his house when the children were playing.

(3) Appellant had an opportunity to take Pooja inside the house.

(4) During play Pooja was found missing.

(5) Nitesh (PW.3) saw Pooja in the house of the appellant and asked him about it and he denied.

(6) Appellant admitted before his mother and son Khushal (PW.10) to have killed Pooja.

(7) Khushal (PW.10) had given information at the

Police Station that his father/appellant killed Pooja and put the dead body below the cot in his house.

(8) Police Head Constable G.R. More (PW.4), Ashok (PW.2) and Deepak Jawahar Agarwal (PW.8) went to the house of the appellant and recovered the dead body of Pooja. Explanation given by the appellant that he had gone to liquor shop for drinking leaving his house open was not found to be acceptable.

(9) Recovery of rope used in the crime at the instance of the appellant from his house.

(10) Person other than the appellant had no opportunity to commit the crime.

18. So far as the first circumstance is concerned, material on record reveals that:

I. Pooja's dead body was found in the house of the appellant.

II. Ashok (PW.2) who took out the dead body stated that the frock and knickers of the deceased were stained with blood.

III. Clothes of the deceased were seized under panchanama Ex.20. Panchanama also shows that the clothes were stained with blood. Ravindera Pawar, PSI who conducted this panchanama has also stated about this fact. Cloth pieces and bed sheet as well as the frock and knickers sent for chemical analysis.

IV. As per the Chemical Analysis Report, Ex.49, these articles were having human blood.

V. The medical evidence referred earlier as well as inquest panchanama, the admitted document, point out that Pooja was sexually assaulted before murder.

VI. Spot panchanama Ex.24 stood proved through panch witness Mohd. Sharif. This witness has stated that there was a bed sheet on the cot and it was having blood stains over it. The blood stains were also found below the cot on the floor.

VII. The bed sheet as well as two cloth pieces having blood stains were seized by the police.

19. There is no reason to disbelieve the above evidence/ factors. Moreover, this aspect has not been challenged by the appellant at any stage of the proceedings. The fact that blood was found on the bed sheet, on the cot as well as on the floor below the cot clearly indicates that the incident occurred there only. It is very unlikely that the culprit committed the heinous act elsewhere and then placed Pooja's dead body in appellant's house.

20. It has come on record that after finding Pooja missing, her brother Nitesh (PW.3) searched for her. On receiving the information that Pooja was missing her mother Smt. Tara (PW.1) came and searched for her. In such a fact-situation, where people came to know about the disappearance of Pooja within a very short span of time, the culprit could not have had any opportunity to transfer the body from any other place to the appellant's house. It was on the basis of the above that the courts below came to the conclusion that Pooja was raped and murdered in the house of the appellant. The appellant in his examination under Section 313 of Code of Criminal Procedure, 1973, (hereinafter called 'Cr.P.C.), while answering Question Nos. 27, 28 and 29 himself admitted that he was sitting outside his house when the police arrived. The police had searched his house and the dead body of Pooja lying below the cot in his house was recovered. We do not see any cogent reason to interfere with finding of facts recorded by the courts below on this count.

21. The second circumstance against the appellant had

been that he was present at the place of occurrence when the children were playing. Both the courts below have appreciated the evidence on record particularly deposition of Nitesh (PW.3) and held that appellant was present at the place of occurrence at the relevant time. Nothing could be brought to our notice to contradict the findings of the courts below. Of course, the Trial Court did not accept the evidence of Nitesh (PW.3), 12 years old child to the extent that the appellant had offered chocolates to him and Pooja, though Pooja had accepted it but Nitesh (PW.3) did not accept the same. The High Court while dealing with the evidence of Nitesh (PW.3) held that the children had been playing in front of his house and the appellant had called them and given them chocolates. Discrepancy remained regarding acceptance of chocolate by Nitesh (PW.3), which of course, is not relevant enough for the case taking into consideration the other circumstances.

22. So far as the third circumstance is concerned, admittedly, appellant had been living for a long long time in close vicinity of the house of Pooja, deceased and was very well acquainted with the victim as well as her family members. The admitted fact remained that appellant's mother and son, who were the other inmates of his house, had gone out to procure the medicines to cure his addiction and on the fateful day, appellant was alone in his house. The children had been busy in running here and there as they were playing hide and seek. Thus, it was not possible in such a fact-situation that every child could remain attentive on every moment about other children. Such circumstance gives an opportunity to a person having evil design. Thus, appellant had an opportunity to take the victim Pooja inside the house.

23. The fourth circumstance stood fully proved by the evidence on record, particularly by the depositions of Smt. Tara (PW.1) and Nitesh (PW.3). Nitesh (PW.3) deposed that as Pooja had disappeared he searched for her and as he could not find her out, he went to inform his mother Smt. Tara (PW.1),

who at that relevant time had been at Shagun Chowk. Smt. Tara (PW.1) came back and searched for Pooja. More so, this part of the prosecution case has never been challenged by the defence and it stands proved that Pooja disappeared while playing in front of the house of the appellant that evening.

24. The fifth circumstance had been that Nitesh (PW.3) saw Pooja in the house of the appellant and on being asked, the appellant denied her presence. Nitesh (PW.3) is a child witness as at the relevant time he was 12 years of age. When he noticed that Pooja was not seen at the place of play he searched for her and asked in the neighbourhood and when he could not trace her, only then he went to inform his mother Smt. Tara (PW.1) at Shagun Chowk and returned with her. They both searched for Pooja and as they failed to find her out, Smt. Tara (PW.1) went to the police and Nitesh (PW.3) stayed at home. Up to this extent, the prosecution case has not been challenged by the appellant. Nitesh (PW.3) has deposed that after his mother left for the police station, his friend came and told him that his sister was in the house of the appellant. So, Nitesh (PW.3) went there from the back side of the house and saw Pooja lying in the room. He went to one Semabai and told her about it. Semabai entered the house from the backside of the house of the appellant, however, could not see Pooja there. Nitesh (PW.3) asked the appellant about Pooja but he denied that she was there. The Trial Court after appreciating the entire evidence on the issue came to the conclusion that it was nothing but an imagination of Nitesh (PW.3) and this circumstance was not proved. We have examined the evidence of Nitesh (PW.3) on this issue and we are of the considered opinion that conclusion reached by the Trial Court on the issue is correct and does not require any interference.

25. Circumstance No.6 relates to an extra-judicial confession by the appellant before his mother and son Khushal (PW.10) to the extent that he had killed Pooja. According to the prosecution, Khushal (PW.10) alongwith his grandmother had

gone to Kalyan and returned in the night and found that the lights of the house were off and the appellant was present therein. The appellant became annoyed as Khushal (PW.10) put on the lights and so Khushal (PW.10) put the lights off. When he again put on the lights the appellant became very angry, on this the appellant's mother came in and at that time the appellant told them that he had committed the murder of Pooja and threatened them not to disclose to anybody. Khushal (PW.10) ran out of the house, went to the police station and revealed this fact. The prosecution examined Khushal (PW.10), however, he was declared hostile. Appellant's mother was not examined. Thus, the issue of extra-judicial confession was not proved. There is not enough evidence on record to prove this circumstance against the appellant.

26. So far as the other part of this issue that Khushal (PW.10) had informed the police that the dead body was lying below the cot in his house, the courts below appreciated his evidence with full care and caution, being a hostile witness, as Khushal (PW.10) denied that he had gone to the police station in the night and gave information. The Trial Court came to the conclusion that evidence of Smt. Tara (PW.1), Ashok (PW.2), Deepak Jawahar Agarwal (PW.8), and G.R. More (PW.4) were enough to establish that when police was recording the complaint of Smt. Tara (PW.1), Khushal (PW.10) reached the police station crying and told them that his father had killed Pooja and kept the dead body below the cot in his house. None of the aforesaid witnesses had any animosity with the appellant and thus, there could be no reason to enrope him falsely. The evidence on this point particularly, is nowhere shakened during their cross-examination. The information was given to the police in close vicinity at the time of commission of the crime, though exact time of death is not known. The courts below found the circumstance fully proved and we concur with the said finding.

27. So far as the eighth circumstance is concerned, it relates to the recovery of the dead body of Pooja from the house

of the appellant. It is admitted in view of the depositions of Ashok (PW.2), G.R. More (PW.4) and Deepak Jawahar Agarwal (PW.8) that the dead body of Pooja was recovered from the house of the appellant. According to Deepak Jawahar Agarwal (PW.8), he had gone to police station along with Smt. Tara (PW.1) and it was in his presence that Khushal (PW.10) has reached the police station and revealed that his father had killed Pooja and dead body was lying below the cot. He has further deposed that they came with the police to the house of the appellant and entered his house. During search, Ashok (PW.2) father of the deceased saw the dead body. It was taken out and put on a handcart. The appellant was standing in front of the house and the police caught him. In the suggestion put to him, he has denied that he was deposing falsely. Ashok (PW.2), father of Pooja, deceased has corroborated the evidence of Deepak Jawahar Agarwal (PW.8) fully to the extent that he was also at the police station when Khushal came and revealed the fact that his father had killed Pooja. He further deposed that he along with the policemen, entered the house of the appellant and recovered the dead body of his daughter, Pooja as it was lying below the cot in the house of the appellant. Similarly, G.R. More (PW.4), Head Constable had deposed in this regard that he entered the house of the appellant along with Ashok (PW.2) and Deepak Jawahar Agarwal (PW.8). They searched the house and saw that a girl was lying below the cot therein. Ashok (PW.2) had taken her out. She was motionless. She was kept on a handcart. Appellant has admitted the recovery of Pooja's body from his house while answering Question No.29 in his examination under Section 313 Cr.P.C. Thus, this circumstance to the extent that the dead body was recovered from the house of the appellant stood fully proved.

The explanation furnished by the appellant that he had gone to liquor shop for drinks leaving his house open, had to be proved by him in view of the provisions of Section 106 of Indian Evidence Act, 1872, which he miserably failed and the courts below have disbelieved him. Learned counsel for the

appellant could not point out any single evidence on the basis of which a contrary inference can be drawn.

28. The recovery of rope used in the crime has been disbelieved by the Trial Court on the ground that such ropes were easily available in the market. Rope so recovered did not contain any special mark for identification. The police had entered the house prior to Panchanama. Therefore, it could not be established that the same rope had been used while committing the crime. Death was caused by strangulation. Though the High Court has found sufficient material to believe the recovery of the rope but in view of the fact that there was nothing on record to show that same rope had been used for committing the crime, the finding so recorded by the High Court loses significance.

29. This brings us to the next circumstance as to whether any other person had an opportunity to commit the crime. The dead body was found from the house of the appellant. Any outsider may not know that the appellant's mother and son had gone out and they would not return till night. The outsider must not have an idea that house was lying open and no person was present inside. It is not probable that a person having no concern with such a house would dare to take a girl inside the house to fulfill lust and to kill her. The rape was committed on the cot that is why blood stains were found on it. No outsider could have committed rape so comfortably using the cot in someone else's house. The dead body was found below the cot that indicates that the accused attempted to conceal the body. Had any outsider done it, after committing the crime he would have run away leaving the dead body on the cot itself as he would have no reason to be afraid of search and trace of the dead body. In fact, such a fear exists in the mind of a person to whom the house belongs. The outsider would not make any attempt to conceal the dead body, as his prime concern remains to run away after commission of the crime.

The evidence led by the prosecution clearly establishes the aforesaid circumstances.

30. Out of the aforesaid circumstances, only a very few which are immaterial and are not vital to determine the case, stood fully proved against the appellant. In such a fact-situation, we do not find any cogent reason to interfere with the well-reasoned judgments of the courts below so far as the conviction of the appellant is concerned, and we affirm his conviction under Sections 302 and 376 IPC.

So far as the sentence part is concerned, in view of the law referred to hereinabove, we are of the considered opinion that the case does not fall within the "rarest of rare cases". The High Court was not justified in enhancing the punishment. Thus, in the facts and circumstances of the case, we set aside the punishment of death sentence awarded by the High Court and restore the sentence of life imprisonment awarded by the Trial Court.

With this modification, the appeals stand disposed of.

B.B.B. Appeals disposed of.

PANKAJ MAHAJAN
v.
DIMPLE @ KAJAL
(Civil Appeal No. 8402 of 2011)

SEPTEMBER 30, 2011

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

Hindu Marriage Act, 1955 – s.13 – Husband filed petition for dissolution of marriage by decree of divorce on grounds of (i) 'cruelty' and (ii) incurable 'unsound mind' of wife – Whether appellant-husband made out a case for divorce against the respondent-wife on grounds of 'cruelty' and 'unsound mind' – Held: The appellant established and proved both the grounds – From the side of appellant, various doctors and other witnesses were examined to prove that respondent was suffering from mental disorder – All the four doctors/ Psychiatrists who treated the respondent - PW-1, PW-2, PW-3 and PW-7, and prescribed medicines also expressed the view that it was "incurable" – Even respondent and her father themselves admitted in their cross-examination that respondent took treatment from the said Doctors for mental illness – It was proved beyond doubt that respondent was suffering from mental disorder/ Schizophrenia and the appellant was not reasonably expected to live with her – No doubt, after marriage, the couple was blessed with a female child and at present she is studying in a school, however, whenever the child was with respondent, the respondent was not taking appropriate care – Many a times the respondent casually threw the child facing opposite to her – PW-5, landlord of the parties, highlighted several instances when the respondent used to quarrel with appellant and he had to face humiliation in front of others because of her behavior – The appellant placed adequate materials to show that the respondent used to give repeated threats to commit suicide

and once even tried to commit suicide by jumping from the terrace – The acts and conduct of the respondent were such as to cause pain, agony and suffering to the appellant which amounted to cruelty in matrimonial law – Further, appellant and respondent were living separately for the last more than nine years and there is no possibility to unite them – Divorce petition filed by appellant accordingly allowed.

Hindu Marriage Act, 1955 – s.13 – Dissolution of marriage by decree of divorce on ground of 'unsound mind' – Held: The onus of proving that the other spouse is incurably of unsound mind or is suffering from mental disorder lies on the party alleging it – It must be proved by cogent and clear evidence.

Hindu Marriage Act, 1955 – s.13 – Dissolution of marriage by decree of divorce on ground of 'cruelty' – Repeated threats to commit suicide – Held: Cruelty postulates treatment of a spouse with such cruelty as to create reasonable apprehension in his mind that it would be harmful or injurious for him to live with the other party – Giving repeated threats to commit suicide amounts to cruelty.

The appellant-husband filed petition under Section 13 of the Hindu Marriage Act, 1955 for dissolution of marriage by a decree of divorce on grounds of (i) 'cruelty' and (ii) incurable 'unsound mind' of the respondent-wife. The District Court accepted the claim of cruelty and granted decree of divorce in favour of the appellant-husband. Aggrieved, the respondent-wife filed appeal before the High Court. The High Court completely rejected the claim of divorce even under unsound mind and set aside the judgment and decree passed by the trial court.

The question which arose for consideration in the instant appeal was whether the appellant-husband had

made out a case for divorce on grounds of 'cruelty' and 'unsound mind'.

Allowing the appeal, the Court

HELD:1.1. Section 13 of the Hindu Marriage Act, 1955 specifies the grounds on which a decree of divorce may be obtained by either party to the marriage. The onus of proving that the other spouse is incurably of unsound mind or is suffering from mental disorder lies on the party alleging it. It must be proved by cogent and clear evidence. [Para 6]

1.2. In the case on hand, since the appellant-husband approached the District Court for a decree of divorce, the onus was on him to prove the grounds put-forth by him. [Para 7]

2.1. From the materials placed on record, it is clear that the appellant-husband has brought cogent materials on record to show that the respondent-wife is suffering from mental disorder, i.e., Schizophrenia. From the side of the appellant-husband, various doctors and other witnesses were examined to prove that the respondent-wife was suffering from mental disorder. All the four doctors/Psychiatrists who treated the respondent-wife-PW-1, PW-2, PW-3 and PW-7–, prescribed medicines and also expressed the view that it is "incurable". Even the respondent-wife and her father themselves admitted in their cross-examination that the respondent had taken treatment from the said Doctors for mental illness. Thus, it is proved beyond doubt that the respondent-wife is suffering from mental disorder/ Schizophrenia and it is not reasonably expected to live with her and the appellant-husband has made out a case for a decree of divorce and the decree should have been granted in favour of the appellant-husband and against the respondent-wife. [Para 18]

2.2. The High Court negatived the plea of the appellant-husband under Section 13(1)(iii) of the Act on the ground that the appellant-husband has merely reproduced the wordings of the Section without applying the same to the facts of the case and that it was not pleaded that it was a case of continuous or intermittent disorder. The aforesaid reasoning of the High Court is completely erroneous and contrary to the material on record. [Para 19]

2.3. The appellant-husband had specifically pleaded before the High Court that the respondent-wife was suffering from Schizophrenia, which is a kind of mental disorder and he had pointed out specific incidents to show that the respondent-wife was not of sound mind. The averments made in the divorce petition filed by the appellant make it clear that the appellant-husband, after narrating specific incidents of abnormal behaviour of the respondent-wife had duly pleaded that she was suffering continuously/ intermittently from 'incurable' mental disorder of such a nature that he cannot be reasonably expected to live with her. It was also stated therein that due to her unsoundness, the respondent-wife was not able to lead a married life and thus the appellant-husband was entitled to a decree of divorce. Apart from this, the appellant-husband had brought cogent evidence on record to show that the respondent-wife was not in a fit state of mind whereas the respondent-wife could not lead any acceptable evidence to rebut the same. The respondent and her father admitted her mental illness and periodic treatment from the doctors. No doubt, it was pointed out that after the marriage, the couple was blessed with a female child and at present she is studying in a school and there is no dispute about the same, however, it is clear from the respondent's evidence that from the date of delivery of child, the child was periodically taken care of by her grand-parents. Also

whenever the child was with respondent-wife, she (the mother) was not taking appropriate care which is clear from the evidence of the appellant-husband (PW-4) and their landlord, PW-5. One incident which was referred to was that many a times the respondent-wife casually threw the child facing opposite to her. Under these circumstances, the High Court ought to have accepted the case of the appellant-husband. [Para 20]

3.1. The High Court rejected the plea of the appellant-husband regarding cruelty on the ground that apart from his statement, there is no evidence to prove the same and PW-5, being hearsay, his evidence was not reliable. As far as PW-5 is concerned, the High Court only referred to his cross-examination without even adverting to the examination-in-chief wherein he had categorically stated about cruelty meted out by respondent-wife to the appellant-husband. It is clear from the evidence of PW-5 that the respondent-wife was not of sound mind and she did not look after the household work rather she used to give threats to commit suicide. She did not even make food for the appellant-husband and he had to arrange the same from outside. Apart from this, she used to embarrass the appellant-husband before his landlord's family and because of her weird behaviour and threats to commit suicide, the appellant-husband was forced to leave the rented accommodation. The landlord, PW-5 also highlighted several instances when the respondent-wife used to quarrel with her husband and he had to face humiliation in front of others because of her behaviour. Inasmuch as PW-5 was living in the same house on the ground floor and the appellant-husband and the respondent-wife were living on the first floor, the said witness being the eye-witness to the cruelty meted out by the respondent-wife to the appellant-husband, as he had himself seen the behaviour and the activities of the respondent-wife including humiliation and threats of

committing suicide, cannot be thrown out. Under those circumstances, the observation of the High Court that the statement of PW-5 is only hearsay is liable to be rejected. [Para 21]

3.2. In addition to the evidence, the appellant-husband had categorically pleaded in his petition for divorce about the cruelty meted out to him. He narrated the incidents when she used to give threats to commit suicide and had even tried to commit suicide by jumping from the terrace and also pushed him from the staircase resulting in fracture in his right forearm. Due to her mental disorder, on various occasions, she even slapped him. She was also most disrespectful to his parents and she even forced him to live separately from them. His evidence in the form of an affidavit filed before the trial Court is available in the paper book wherein he narrated all the sufferings meted out by her. All the details in the form of assertion in the affidavit clearly show that the appellant-husband faced cruelty at the hands of the respondent on several occasions. [Para 22]

3.3. It is well settled that giving repeated threats to commit suicide amounts to cruelty. When such a thing is repeated in the form of sign or gesture, no spouse can live peacefully. In the case on hand, the appellant-husband placed adequate materials to show that the respondent-wife used to give repeated threats to commit suicide and once even tried to commit suicide by jumping from the terrace. Cruelty postulates treatment of a spouse with such cruelty as to create reasonable apprehension in his mind that it would be harmful or injurious for him to live with the other party. The acts of the respondent-wife are of such quality or magnitude and consequence as to cause pain, agony and suffering to the appellant-husband which amounted to cruelty in matrimonial law. From the pleadings and evidence, the

following instances of cruelty are specifically pleaded and stated. They are: i.) Giving repeated threats to commit suicide and even trying to commit suicide on one occasion by jumping from the terrace; ii) Pushing the appellant from the staircase resulting into fracture of his right forearm; iii). Slapping the appellant and assaulting him; iv) Misbehaving with the colleagues and relatives of the appellant causing humiliation and embarrassment to him; v) Not attending to household chores and not even making food for the appellant, leaving him to fend for himself; vi) Not taking care of the baby; vii) Insulting the parents of the appellant and misbehaving with them; viii) Forcing the appellant to live separately from his parents; ix) Causing nuisance to the landlord's family of the appellant, causing the said landlord to force the appellant to vacate the premises; x) Repeated fits of insanity, abnormal behaviour causing great mental tension to the appellant; xi) always quarreling with the appellant and abusing him; xii) Always behaving in an abnormal manner and doing weird acts causing great mental cruelty to the appellant. [Para 23]

3.4. The pleadings and evidence of both the parties clearly show the conduct of the respondent-wife towards the appellant-husband. It cannot be concluded that the appellant-husband has not made out a case of cruelty at the hands of the respondent-wife. The appellant-husband had placed ample evidence on record that the respondent-wife is suffering from "mental disorder" and due to her acts and conduct, she caused grave mental cruelty to him and it is not possible for the parties to live with each other, therefore, a decree of divorce deserves to be granted in favour of the appellant-husband. In addition to the same, both appellant-husband and the respondent-wife are living separately for the last more than nine years. There is no possibility to unite the chain

of marital life between the appellant-husband and the respondent-wife. [Para 24]

4. In the light of the facts and circumstances of the case, it is clear that the impugned order of the High Court resulted in grave miscarriage of justice to the appellant-husband, more particularly, the High Court failed to consider the relevant material aspects from the pleadings and the evidence, the ultimate conclusion cannot be sustained. The appellant-husband established and proved both grounds in terms of Section 13 of the Act. The divorce petition filed by the appellant-husband stands accepted and a decree of divorce is hereby passed dissolving the marriage of the appellant with the respondent. The appellant-husband is directed to pay an amount of Rs. 2 (Two) lakhs as alimony to the respondent-wife in two equal instalments within a period of three months and to deposit Rs. 3 (Three) lakhs in the name of his daughter in the shape of three FDRs in a nearest nationalised bank in three equal instalments commencing from January, 2012 ending with June, 2012. On attaining majority, the daughter is permitted to withdraw the amount. Till such period, the respondent-wife is permitted to withdraw accrued interest once in three months directly from the bank from the said deposit for the benefit and welfare of their daughter. [Para 25]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8402 of 2011.

From the Judgmen and Order dated 06.08.2009 of the High Court of Punjab and Haryana at Chandigarh in FAO No. 123-M of 2006.

Nidesh Gupta, Tarun Gupta, Janani for the Appellant.

B.K. Satija and H.D. Talwani for the Respondent.

The Judgment of the Court was delivered by

P.SATHASIVAM,J. 1. Leave granted.

2. This appeal is directed against the final judgment and order dated 06.08.2009 passed by the High Court of Punjab & Haryana at Chandigarh in FAO No. M-123 of 2006 whereby the High Court allowed the appeal filed by the respondent herein and set aside the judgment and decree dated 29.04.2006 passed by the Additional District Judge(Ad-hoc)-cum-Presiding Officer, Fast Track Court, Ropar filed under Section 13 of the Hindu Marriage Act, 1955 (in short 'the Act').

3. **Brief facts:**

(a) The marriage of Pankaj Mahajan-appellant husband and Dimple @ Kajal, respondent-wife, was solemnized on 02.10.2000 at Amritsar. After the marriage, the parties cohabited and resided together as husband and wife at Amritsar in the parents' house of the appellant-husband, but later on shifted to a rented house in Tilak Nagar, Shivala Road, Amritsar. On 11.07.2001, a female child was born, who is now in the custody of the respondent-wife.

(b) After the marriage, the appellant-husband found that the respondent-wife was acting in very abnormal manner, as she used to abruptly get very aggressive, hostile and suspicious in nature. In a fit of anger, she used to give threats that she would bring an end to her life by committing suicide and involve the appellant-husband and his family members in a criminal case, unless she was provided a separate residence. On one occasion, she attempted to commit suicide by jumping from the terrace but was saved because of timely intervention of the appellant-husband.

(c) Succumbing to the pressure of the respondent-wife, the appellant-husband shifted to a rented house on 28.11.2001 at a monthly rent of Rs.3,200/- and started living with her, but the behaviour of the respondent-wife became more aggressive and she repeated threats of suicide even in the rented house.

On enquiry, the appellant-husband came to know that the respondent-wife was suffering from acute mental depression coupled with schizophrenia even prior to the marriage and was taking treatment for the same. The appellant-husband hoping that the respondent-wife would become alright took her to various doctors, but her mental condition did not improve and she became more and more violent and aggressive. She insulted and humiliated the appellant-husband in front of his colleagues and relatives several times and even on one occasion she pushed the appellant-husband from the staircase causing fracture in his right forearm.

(d) On 23.03.2002, the appellant-husband wrote a letter to his mother-in-law stating therein that the respondent-wife was repeatedly threatening to commit suicide and even on 19.04.2002, he wrote a letter to the SSP, Amritsar regarding the factum of repeated threats to commit suicide given by the respondent-wife. On 24.05.2002, the appellant-husband filed a petition under Section 13 of the Act in the District Court at Amritsar for dissolution of marriage by a decree of divorce. By order dated 29.04.2006, the Additional District Judge, Ropar, granted a decree of divorce in favour of the appellant-husband.

(e) Being aggrieved by the above-said order, the respondent-wife filed FAO No. M-123 of 2006 before the High Court of Punjab & Haryana at Chandigarh. The High Court, by order dated 06.08.2009, allowed the appeal filed by the respondent-wife and set aside the judgment and decree dated 29.04.2006 passed by the Additional District Judge(Ad-hoc)-cum- Presiding Officer, Fast Track Court, Ropar. Aggrieved by the said decision, the appellant-husband has preferred this appeal before this Court by way of special leave petition.

4. Heard Mr. Nidhesh Gupta, learned senior counsel for the appellant-husband and Mr. B.K. Satija, learned counsel for the respondent-wife.

Discussion:

5. It is not in dispute that the petition for dissolution of marriage for granting a decree of divorce under Section 13 of the Act came to be filed by the appellant-husband before the District Court at Amritsar. The marriage was solemnized between the parties at Amritsar on 02.10.2000. Since the case of the appellant-husband as well as the respondent-wife has already been narrated, there is no need to traverse the same once again. The fact remains that it was the appellant-husband who approached the court for a decree of divorce on the grounds of 'cruelty' and 'unsound mind' of the respondent-wife which is incurable, hence we have to see whether the appellant-husband has made out a case for divorce on these grounds.

6. Section 13 of the Act, which is useful for our present purpose, reads as under:-

"**13. Divorce** (1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

(i) xxx

(i-a) has, after the solemnisation of the marriage, treated the petitioner with cruelty; or

(ib) xxx

(ii) xxx

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation .—In this clause,—

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;….."

Section 13 specifies the grounds on which a decree of divorce may be obtained by either party to the marriage. The onus of proving that the other spouse is incurably of unsound mind or is suffering from mental disorder lies on the party alleging it. It must be proved by cogent and clear evidence.

7. In the case on hand, since the appellant-husband has approached the District Court for a decree of divorce, the onus is on him to prove the grounds put-forth by him. As regards the ground alleged by the appellant-husband for a decree of divorce i.e. the respondent-wife is suffering from unsound mind/mental disorder/schizophrenia, apart from his own evidence as PW-4, various Doctors, who treated her and other witnesses were also examined. From the side of the appellant-husband, Dr. Paramjit Singh (PW-1), Dr. Ravinder Mohan Sharma (PW-2), Dr. Virendra Mohan (PW-3) and Dr. Gurpreet Inder Singh Miglani (PW-7), who had given treatment to the respondent-wife for mental disorder, were examined.

8. Dr. Paramjit Singh (PW-1), Professor and Head Psychiatry Department, Medical College, Amritsar in his evidence stated as follows:-

"The respondent remained admitted in my Department at Amritsar from 17.12.2001 to 28.12.2001. This disease is Bipolar Affective Disorder. I treated her during this period. She was admitted in Emergency because her disease was in quite serious stage. In this disease, the patient can commit suicide. When she came, she was aggressive and irritable. If the proper treatment is not given to the respondent then her aggressive nature can be prolonged. The respondent Kajal was treated by me by giving electric shock for four times during her stay in the ward M.R.I. i.e.

Magnetic Resonance Imaging. MRI has got no concern with the disease with which the respondent was suffering. This disease is treatable but not curable. I have seen the certificate issued by me which is Ex.P1. It bears my signatures and is correct Ex. P2 i.e. Discharge Certificate. I have brought the original record of the Department concerning the respondent both in-door as well as out-door. A certified copy of the same attested by me is Ex. P3. These are correct according to the original record brought by me today in the court. The respondent was brought to the Hospital for her admission and treatment by Sh. S.K. Mahajan son of later Sh. Gian Chand and Pankaj Mahajan. I have seen the receipts today in the court which relate to our hospital and the same are Ex. P4 to Ex. P7 and Ex. P8 is the receipt regarding room rent of our Hospital. On 08.10.2002, father of the respondent had brought her to our hospital and she was treated by me as well as other doctors of department of our hospital from 08.10.2002. After the discharge from the Hospital, the respondent was brought to our hospital for treatment by her father on 22.01.2002, 02.02.2002, 09.02.2002, 15.04.2002, 08.08.2002, 08.10.2002, 21.11.2002, 05.02.2003 and 20.06.2003."

(Emphasis supplied)

In cross-examination, he admitted that when the respondent-wife was discharged from the hospital, she was not perfectly alright, however, she was able to return home. He further admitted that in the original record of Ex. P3 some entries were made by him and some by junior doctors, who worked with him. All the entries made therein are correct. He also stated that during the treatment, he did not notice abnormal behaviour of the respondent-wife.

9. Dr. Ravinder Mohan Sharma (PW-2), Senior Medical Officer, Punjab Mental Hospital, Amritsar, stated as under:

"According to file No. 57914 the patient was examined in the out door by Dr. Charu Chawla, Senior Resident whose handwriting I identified as she has been working with me. After examining the patient and recording the history, she has diagnosed her to be a case of Bipolar Affective Disorder with which I agreed and advised her treatment in my own hand. There is another entry dated 16.01.2002 again in my own hand where I had advised her treatment. The second file No. 58803 is in the hand of Dr. Purnima Singh, who after examining presented the case to Dr. Manjit Singh who made a diagnosis of depressive episode and advised her medical treatment dated 21.02.2002. I identified the handwriting of Dr. Purnima Singh and Dr. Manjit Singh as I had been working with them. I have seen the original outdoor ticket of respondent and the same are Ex. P11 and Ex. P12. As per the history recorded in file No. 58803, there is a mention of suicide ideas and threats and it is recorded that she had attempted suicide once. As per the record, hers is a history of abusive and irritable behaviour. On 16.01.2002 she was advised injection by me because she was irritable and restless. It is not a simple yes or no answer to the question whether the disease is curable or not. It is an episodic illness which patient getting episodes of mental illness and with treatment in between she can remain normal. The intensity and frequency of these episodes is highly unpredictable and varies from patient to patient. Generally, the frequency increases with every episode. *The disease of the respondent is treatable but cannot be definitely say curable.* MRI has got nothing to do with this disease of respondent."

(Emphasis supplied)

In cross-examination, he reaffirmed what he had stated in examination-in-chief.

10. Dr. Virendra Mohan (PW-3), M.D. Psychiatry, Dharampur, District Solan, H.P. stated as follows:-

> "Patient Dimple, aged 23 years, female (single) d/o Shri Prem Kumar, village Shivaji Nagar, House No. 810/11 Ludhiana was admitted on 22.05.1998 and discharged on 06.06.1998. She was suffereing from mental disorder at that time. She was diagnosed as Chronic Paramoid Schizophrenia for the last four years. She got admitted by her father Shri Prem Kumar, and the history of the patient was described to me. I have recorded the history as told by her father. He told that she was having mental symptoms for the last 4 to 5 years. The sleep was less. She was having acute psychotic symptoms at the time of admission. I have mentioned the history of the patient in the register which I have brought today, and the attested true copy of the same is Ex.PW3/As she was admitted in-door because she showed acute mental symptoms. She had paranoid symptoms. She was suicidal and also she could harm herself and others. The patient was restless and she could harm and attack others as well, and could cause injury. It has been recorded in the history of the patient that her Nana had been suffering from the mental disease. There was no test for diagnosing this disease from which the respondent was suffering. Only the history tells about the earlier condition of the patient. I cannot say if the disease for which the respondent was suffering is definitely curable or not. This disease is known for relapses. There is no direct relationship in the stress or strain with the disease. This disease is not related to nose or throat. There can be no finding in MRI regarding this kind of disease. *There may be suicidal tendency of such type of person suffering from this disease. The respondent was admitted in the hospital due to abnormal behaviour. I had observed that she passed stool in her cloth, she has visual hallucination.* During her admission, she also stated that she wanted to marry her cousin and

> she was also laughing herself. She was admitted twice in my mental Hospital at Dharampur. I got signatures of father of the respondent in my register, whenever she got admitted by her father in my hospital and the register bears the signatures of her father. Second time, she was admitted by her father Prem Kumar on 28.09.1999 and was discharged on 05.10.1999. That time she was more excited and more elated and at that time the diagnosis was quarry mania. This time she did not have any paranoid symptoms. Her address was recorded this time 810/11 Shivaji Nagar, Ludhiana. Usually, if patient remains symptoms free for two years they can get married, but other partner should know the problem so that the treatment should be continued."

(Emphasis supplied)

In cross-examination, PW-3 stated that during the treatment in his hospital, the respondent-wife responded very well to the treatment. No suicidal action was taken by her during the treatment in his hospital for the second time. He also stated that if the patient remained symptoms free then she is manageable. According to him, as per the records, the respondent-wife was manageable.

11. Dr. Gurpreet Inder Singh Miglani (PW-7), Associate Professor and Incharge, Department of Psychiatry, Guru Ram Dass Medical Hospital, Amritsar stated as under:-

> "I remained posted in Guru Teg Bahadur Sahib Charitable Hospital at Ludhiana from 1995 to 1998. I was working there as Consultant for Psychiatry. I have seen the original file produced in the Court today relating to Dimple d/o Prem Kumar r/o Shastri Nagar, H.No. 257-A Ludhiana. Dimple was got admitted in our Hospital on 15.06.1996 at 06:50 a.m. by her father Prem Kumar in the Emergency Ward. *She was suffering from a very violent behaviour and she has to be given Electric Convulsive Therapy*

(ECT) on the same day in the operation theater. Subsequently also five ECTs were given as her violence was not being controlled along with other anti psychotic drugs. A diagnosis of F 2004 was made according to ICD 10 at the time of discharge on 15.07.1996. *She was labeled as suffering from Paranoid Schizophrenia with incomplete remission and discharged on stable condition.* Due consent for ECTs in operation theater under general anesthesia were taken from the father of the patient."

(Emphasis supplied)

In cross-examination, he has stated that he cannot say exactly about the disease of the respondent-wife whether it can be treatable or not at this stage. He further stated that the disease of the respondent can be cured or it can aggravate after a lapse of time.

12. It is relevant to point out that the documents produced from the side of the respondent-wife, particularly, medical report issued by Dr. Harjeet Singh, Consultant Psychiatrist, RW-4 shows as:

"Impression: Bipolar Affective (Mood) Disorder, currently in remission."

"Advice: marital therapy for the couple. Follow up as and when required."

The said Report has been marked as Annexure R10. A fair typed copy of relevant extract of Ex. P3 shows that "Mood according to patient is euthenics." The Annexure along with the counter affidavit of the respondent-wife filed in this Court, particularly, Certificate issued by the Doctor refers "suicide threats made by her on some occasions".

13. The appellant-husband was examined as PW-4. According to him, the marriage with respondent-wife was

solemnized on 02.10.2000 and it was an arranged marriage. After marriage, both of them went to Vaishno Devi, however, in the meanwhile he noticed some strange facial expressions and behaviour of his wife-Dimple. He subsequently came to know that she was suffering from some serious disease. She used to become annoyed and angry on petty issues, abuse and fight with him, flaunt her father's status and influence, comb her hair throughout the day, cry like children, apply brakes of a moving vehicle, call strangers in the house and offer them tea. Even once she called a washerman in the house and gave him Rs. 200/- unnecessarily and when he said 'thanks' she immediately snatched the money from his hands and slapped him for no reason and, thereafter, she abused him and pushed him out of the house. According to him, such things had become her everyday chores. She used to wake up very late in the morning. Whenever his mother and sister called her to join them, she started abusing and insulting them. She used to call his mother stupid and his sister as wretched. One day, when his friend Sumit came to their house, she insulted him when he was sitting in the drawing room on the ground floor and when the appellant-husband was coming down to join him, she pushed him from stairs and started laughing, as a result, he fell down and got fractured. She was in the habit of listening to phone calls of Madan Lal, the landlord (PW-5) and used to abuse his relatives over phone. One day, when the landlord (PW-5) told them that he is fed up with the appellant and his family and asked to leave the house immediately thereupon, the respondent-Dimple slapped him on his face for which he had to apologise him for her acts. Even, one day, she threw the infant child towards him.

14. In order to show that his marriage was an arranged one he explained that he knows the father of the respondent-wife prior to the marriage as he was his Boss in Life Insurance Corporation office, Amritsar Division. He worked under him for a period of 6-8 months. He further explained that the behaviour of the respondent-wife came to his notice after 1½ months'

after their marriage and he immediately disclosed this fact to her father. The treatment was given to the respondent-wife for the first time on 06.09.2001 for her abnormal behaviour.

15. Another important witness examined on the side of the appellant-husband is Madan Lal (PW-5), the landlord, who rented his house to them. In his evidence, PW-5 deposed that he is resident of H.No. 62, Tilak Nagar, Amritsar and his wife is also residing with him. He rented out a portion of the building to the appellant-husband and respondent-wife which was on the first floor. He and his wife were residing on the ground floor. According to PW-5, the respondent-wife usually remained sitting in the portion of his house during the day time where he is residing with his family unless and until the appellant-husband return home. She used to sit with his daughter and daughter-in-law and remained talking with them. She also quarrels with his wife and daughter due to the use of telephone. He explained that his daughter-in-law told him that the respondent-wife often threatens to commit suicide. The High Court, without looking into the evidence of Madan Lal (PW-5), erroneously concluded that his evidence was of no help. On the other hand, PW-5 has specifically narrated the behaviour of the respondent with his wife, daughter-in-law and the agony he himself had undergone and highlighted all those details in the Court.

16. Apart from the above oral evidence, the appellant-husband has also pressed into service a copy of an affidavit of the respondent-wife i.e. Annexure-R3. In the said affidavit, the respondent-wife has stated that she threatened to commit suicide so many times to her in-laws and she even tried to commit suicide by way of jumping from the roof of the house on the intervening night of 19-20.09.2001 but could not succeed due to timely intervention of her husband. She also stated that she realized that her attempt to commit suicide was at the instance of her parents and now she is repentant for her actions for threatening to commit suicide and apologise for the same with the assurance not to repeat such type of actions in future.

17. Though the trial Court accepted the claim of cruelty, the High Court reversed the said conclusion and completely rejected the claim of divorce even under unsound mind. In the impugned judgment, though the High Court has adverted to the evidence of four doctors, without proper appreciation, arrived at an erroneous conclusion that mere evidence of mental illness is not sufficient to seek decree for divorce. In spite of abundant materials, unfortunately, the High Court has erroneously concluded that only wordings of Section 13(1)(iii) of the Act were merely reproduced without adverting to the facts of the case. According to the High Court, necessary materials were not pleaded. We are unable to accept the said conclusion. Without proper discussion and adequate reasons, the High Court rejected the evidence of the appellant-husband as PW-4. A perusal of his evidence clearly show the agony and treatment meted out immediately after the marriage due to mental disorder/unsound mind of the respondent-wife.

18. From the materials placed on record, we are satisfied that the appellant-husband has brought cogent materials on record to show that the respondent-wife is suffering from mental disorder, i.e., Schizophrenia. From the side of the appellant-husband, various doctors and other witnesses were examined to prove that the respondent-wife was suffering from mental disorder. We have already extensively quoted the statements of Dr. Paramjit Singh (PW-1), Dr. Ravinder Mohan Sharma (PW-2), Dr. Virendra Mohan (PW-3) and Dr. Gurpreet Inder Singh Miglani (PW-7) – all the four doctors/Psychiatrists who treated the respondent-wife, prescribed medicines and also expressed the view that it is “incurable”. Even the respondent-wife and her father themselves admitted in their cross-examination that the respondent had taken treatment from the said Doctors for mental illness. Thus, it is proved beyond doubt that the respondent-wife is suffering from mental disorder/ Schizophrenia and it is not reasonably expected to live with her and the appellant-husband has made out a case for a decree

of divorce and the decree should have been granted in favour of the appellant-husband and against the respondent-wife.

19. The High Court, by impugned order, negatived the plea of the appellant-husband under Section 13(1)(iii) of the Act on the ground that the appellant-husband has merely reproduced the wordings of the Section without applying the same to the facts of the case and that it was not pleaded that it was a case of continuous or intermittent disorder. The aforesaid reasoning of the High Court is completely erroneous and contrary to the material on record which we have already demonstrated.

20. Coming to the pleadings before the High Court, the appellant-husband had specifically pleaded that the respondent-wife was suffering from Schizophrenia, which is a kind of mental disorder and he had pointed out specific incidents to show that the respondent-wife was not of sound mind. The relevant portion of the petition for divorce filed by the appellant is reproduced hereunder:

> "4. That the petitioner shortly after his marriage found the respondent to be acting in a very abnormal manner. She would abruptly get very aggressive, hostile and suspicious in nature, ought to hit any body available in her company and her suspicion would go to such an extent that she should not like to take food without some other member of the family consuming the same. The respondent would also in a fit of anger declare that she will bring an end to her life by committing suicide and would have the petitioner and all the family members involved in a false criminal case unless she was provided with separate place of residence…….Enquiries made in the meantime revealed that the respondent has been suffering from acute mental depression coupled with Schizophrenia, a mental disorder and illness at intervals with Psychopathic disorder since developed into mania, which prompted her to become more and more violent and aggressive and on one such occasion she repeated threat of suicide and attempted

> jumping from the house of her in-laws on 19/20.09.2001 but could not succeed in her attempt due to timely intervention of her husband, who is the petitioner……All the same hoping that treatment may cure the respondent she was got treated by the petitioner and her parents from various places in connection with her mental illness but such treatment provided to her including administering her electric shocks, did not improve the state of affairs. She was so treated as indoor and outdoor patient in Shri Guru Teg Bahadur Hospital, Amritsar in Psychiatric Department in Dr. Vidya Sagar Mental Health Institute and in Bhatti Neuro Psychiatric Hospital till the end of the year 2001 but all the intensive and costly treatment did not yield fruit and she could not be cured of her mental sickness. The respondent is, therefore, suffering from major mental disorder in which she has suicidal tendency and becomes aggressive and violent in her behaviour for which she was getting treatment, as referred above, before as well as after the marriage. She has been given anti-psychic treatment and even electric therapy at four occasions at least to the knowledge of the petitioner but the things did not improve therewith. The respondent has, therefore, been suffering incurably from unsoundness of mind and has been so suffering continuously or intermittently from mental disorder of such a kind and such an extent that the petitioner cannot reasonably be expected to live with the respondent.
>
> 5. That on one such occasion under the fit of insanity the respondent pushed the petitioner from the staircase leading to their residential portion causing the petitioner fracture of right hand for which he got treatment from, Dr. Hardas Singh Sandhu in the last week of November, 2001. Such aggressiveness was not first of its kind and in the past also the respondent under the fit of insanity ventured to slap the petitioner in his face in the presence of his parents….."

The above averments make it clear that the appellant-husband, after narrating specific incidents of abnormal behaviour of the respondent-wife had duly pleaded that she was suffering continuously/intermittently from 'incurable' mental disorder of such a nature that he cannot be reasonably expected to live with her. It was also stated therein that due to her unsoundness, the respondent-wife was not able to lead a married life and thus the appellant-husband was entitled to a decree of divorce. Apart from this, the appellant-husband had brought cogent evidence on record to show that the respondent-wife was not in a fit state of mind whereas the respondent-wife could not lead any acceptable evidence to rebut the same. We have already pointed out that the respondent and her father admitted her mental illness and periodic treatment from the doctors mentioned above. No doubt, it was pointed out that after the marriage, the couple was blessed with a female child and at present she is studying in a school and there is no dispute about the same. It is clear from the respondent's evidence that from the date of delivery of child, the child was periodically taken care of by her grand-parents. It is also relevant to note that whenever the child was with respondent-wife, she (the mother) was not taking appropriate care which is clear from the evidence of the appellant-husband (PW-4) and their landlord, Madan Lal (PW-5). One incident which was referred to was that many a times the respondent-wife casually threw the child facing opposite to her. Under these circumstances, the High Court ought to have accepted the case of the appellant-husband.

21. The High Court rejected the plea of the appellant-husband regarding cruelty on the ground that apart from his statement, there is no evidence to prove the same and Madan Lal (PW-5), being hearsay, his evidence was not reliable. As rightly pointed out by Mr. Nidhesh Gupta, learned senior counsel for the appellant-husband that as far as Madan Lal (PW-5) is concerned, the High Court has only referred to his cross-examination without even adverting to the examination-in-chief wherein he had categorically stated about cruelty meted out by

respondent-wife to the appellant-husband. The relevant portion of the evidence of PW-5 is as follows:

> "Thereafter Pankaj Mahajan, his wife Dimple alias Kajal and their infant child aged about 4-5 months started living on the upper portion of my house. They lived in my house on rent upto 30.11.2002. After some days of taking of the house on rent by them, I felt that the girl Dimple was not taking any interest in household affairs and she used to avoid doing household works…….
>
> …….She used to sit idle after Pankaj's going to office and was not breast-feeding the child even after child's uncontrollable crying. Not only this, she used to come down and sit in our bedroom for long hours unnecessarily and talking rubbish and repeating on the same thing again and again. Many times when I asked Dimple why she behaves like this and whether she is alright or not, then she did not reply back and kept mum and whenever she answered to my queries, she used to say that I want to die and my heart says that I should commit suicide. When I heard this from the mouth of Dimple, I become doubly sure that she is mentally unsound and due to her unsound behaviour even my family too become disturbed and started living in constant fear because it appeared from her behaviour that she will do something extreme one day and if she does so, then apart from her in-laws, all of us too will be unnecessarily implicated in the criminal case. Dimple used to come to our house during lunch time and demand food for herself and used to sit in our house for long hours and whenever Pankaj used to come back from his office, she used to tell him that we will go to our portion after taking meals from us. She used to repeat one thing many times. One day, she even went to the extent of saying that you are cooking food every day-then why don't you keep us as your paying guest because I cannot prepare food myself and I also cannot look after my child. Mostly Dimple used

to leave her child with my daughter-in-law and request my daughter-in-law that she should change clothes, bath the child and give her canned milk. My daughter-in-law did all this for 5-6 times, but one day my daughter-in-law clearly told Dimple that this is your duty and she herself should look after the child. On hearing all this, Dimple immediately turned red in anger and slapped my daughter-in-law and called her idiot."

It is clear from the above that the respondent-wife was not of sound mind and she did not look after the household work rather she used to give threats to commit suicide. She did not even make food for the appellant-husband and he had to arrange the same from outside. Apart from this, she used to embarrass the appellant-husband before his landlord's family and because of her weird behaviour and threats to commit suicide, the appellant-husband was forced to leave the rented accommodation. Madan Lal, the landlord, PW-5 has also highlighted several instances when the respondent-wife used to quarrel with her husband and he had to face humiliation in front of others because of her behaviour. Inasmuch as PW-5 was living in the same house on the ground floor and the appellant-husband and the respondent-wife were living on the first floor, the said witness being the eye-witness to the cruelty meted out by the respondent-wife to the appellant-husband, as he had himself seen the behaviour and the activities of the respondent-wife including humiliation and threats of committing suicide, cannot be thrown out. Under those circumstances, the observation of the High Court that the statement of PW-5 is only hearsay is liable to be rejected.

22. In addition to the evidence, the appellant-husband had categorically pleaded in his petition for divorce about the cruelty meted out to him. He narrated the incidents when she used to give threats to commit suicide and had even tried to commit suicide by jumping from the terrace and also pushed him from the staircase resulting in fracture in his right forearm. Due to

her mental disorder, on various occasions, she even slapped him. She was also most disrespectful to his parents and she even forced him to live separately from them. His evidence in the form of an affidavit filed before the trial Court is available in the paper book wherein he narrated all the sufferings meted out by her. It is useful to refer the relevant portion from the same:

"My wife Dimple used to become annoyed and angry on petty issues. She used to abuse and fight with me. She used to flaunt her father's status and influence. She used to comb her hair throughout the day. She used to cry like children. She used to apply brakes of a moving vehicle. She used to call strangers in the house and offer them tea. Once she even called a washerman in the house and gave him Rs. 200/- unnecessarily and when he said thanks she immediately snatched Rs. 200/- from his hands and slapped him for no rhyme or reason and thereafter she abused him and pushed him out of the house. In fact, such things had become her everyday chores. She used to tell me everything about sex lives and relationship of her maternal uncle and aunt. She was in the habit of not sleeping throughout night and also used to keep me awake throughout night and whenever I tried to sleep, she used to insist me to talk to her and whenever I told her to allow me to sleep, she used to press my neck. She used to wakeup the child from deep slumber and start slapping her for no reason. She was in the habit of wrapping the child in wrapper throughout continuously and due to which child used to weep continuously. She used to say that she is obsessed and hears outer world's voices and barking of dogs. She used to tell me that she is regularly seeing evil spirits. She used to go out for roaming at 2-3 a.m. in the night. Whenever I refused to listen or agree to her demands, she used to throw dirty clothes upon me. She was in the bad habit or keeping the door of toilet opened throughout the day even while she was bathing or refreshing herself. She used to doubt everything whenever she

started eating her food. She also used to doubt her mother and sister and used to say that both of them have immoral character. She was in the habit of opening and closing the central locking system of the car. She was in the habit of increasing the volume of TV to the maximum unnecessarily. Whenever I used to go to office, she used to stop me from going and when I told her that I have to go to office, she used to say that she will commit suicide. In fact she was in the habit of pressing and coaxing me for all her needs and desires. She used to say that I want to live with Happy and also used to say that she has no interest in living with me. She stressed that she will leave me and starts living with Happy. (Happy is the son of my wife's elder paternal uncle.)

She was in the habit of unnecessarily arguing with my parents and used to abuse them and whenever I stopped her from doing so, she used to threaten me that she will commit suicide. However, I used to request my parents to look after her in my absence. But she used to misbehave and insult them. She used to say that she will buy her own house and will start living in that house because this house is very small for her needs and she feels suffocated in this house. Although my house is in a very posh colony and it is a very spacious, airy, open and large house. I noticed that condition of Dimple is becoming worse every day. I became sure that she is actually mad and she is concealing her madness from me. I noticed that she used to keep some medicine in her purse and used to take that medicine often. She was actually sex-hungry and was not interested in doing any household works. She never showed any interest in keeping her bedroom and drawing clean and tidy. She was in the habit of wearing the clothes of 3-4 days regularly. She used to wake up very late in the morning. Whenever my mother and sister called her to join them, she was abusing and insulting them. She used to call my mother stupid and my sister as wretched. However,

I controlled myself and kept on tolerating her conduct, because all of us were in the fervent hope that one day God will cure her….

…..One day, my friend Sumit came to my house. Earlier also he used to come to my house as he is also working with me in the LIC. He wished Dimple and enquired about her and instead of welcoming him, Dimple insulted him by saying why are you coming to our house uncalled every day. He felt very insulted and sat in the drawing room on the ground floor and when I was also coming down to join him, Dimple pushed me from stairs and started laughing unnecessarily. As a result of aforesaid pushing, I fell down and bones of my right arm and wrist got fractured. Perchance, Ashok Kumar too had come to my house on that day and he was repeatedly asking for meals. But when he saw my condition, he immediately took me to the Hospital of Dr. Hardas where plaster was applied on my arm and wrist. When we came back, to my utter shock and surprise, Dimple did not even notice any change in me and did not remotely felt that I have received fractures in my arm and wrist and plaster has been applied on my arm. One day when we were sitting in the drawing room, I called Dimple and asked her to bring tea for me. At that time she was wearing very dirty clothes. So, I asked her to immediately go and change her dirty clothes and wear some good clothes. But instead of changing her clothes, she started abusing me and even slapped me on my face. Thereupon my mother asked her why she is behaving like this, upon which she rose her hands to slap my mother too, but my sister stopped her from doing so. We narrated all the above incidents of Dimple to her father. He expressed his shock and apologized on her behalf and advised us to start living separately and said that she will start behaving properly and nicely."

All the above details in the form of assertion in the affidavit

clearly show that the appellant-husband faced cruelty at the hands of the respondent on several occasions.

23. It is well settled that giving repeated threats to commit suicide amounts to cruelty. When such a thing is repeated in the form of sign or gesture, no spouse can live peacefully. In the case on hand, the appellant-husband has placed adequate materials to show that the respondent-wife used to give repeated threats to commit suicide and once even tried to commit suicide by jumping from the terrace. Cruelty postulates a treatment of a spouse with such cruelty as to create reasonable apprehension in his mind that it would be harmful or injurious for him to live with the other party. The acts of the respondent-wife are of such quality or magnitude and consequence as to cause pain, agony and suffering to the appellant-husband which amounted to cruelty in matrimonial law. From the pleadings and evidence, the following instances of cruelty are specifically pleaded and stated. They are:

i. Giving repeated threats to commit suicide and even trying to commit suicide on one occasion by jumping from the terrace.

ii. Pushing the appellant from the staircase resulting into fracture of his right forearm.

iii. Slapping the appellant and assaulting him.

iv. Misbehaving with the colleagues and relatives of the appellant causing humiliation and embarrassment to him.

v. Not attending to household chores and not even making food for the appellant, leaving him to fend for himself.

vi. Not taking care of the baby.

vii. Insulting the parents of the appellant and misbehaving with them.

viii. Forcing the appellant to live separately from his parents.

ix. Causing nuisance to the landlord's family of the appellant, causing the said landlord to force the appellant to vacate the premises.

x. Repeated fits of insanity, abnormal behaviour causing great mental tension to the appellant.

xi. Always quarreling with the appellant and abusing him.

xii. Always behaving in an abnormal manner and doing weird acts causing great mental cruelty to the appellant.

24. All these factual details culled out from the pleadings and evidence of both the parties clearly show the conduct of the respondent-wife towards the appellant-husband. With these acceptable facts and details, it cannot be concluded that the appellant-husband has not made out a case of cruelty at the hands of the respondent-wife. We are satisfied that the appellant-husband had placed ample evidence on record that the respondent-wife is suffering from "mental disorder" and due to her acts and conduct, she caused grave mental cruelty to him and it is not possible for the parties to live with each other, therefore, a decree of divorce deserves to be granted in favour of the appellant-husband. In addition to the same, it was also brought to our notice that because of the abovementioned reasons, both appellant-husband and the respondent-wife are living separately for the last more than nine years. There is no possibility to unite the chain of marital life between the appellant-husband and the respondent-wife.

25. In the light of the facts and circumstances as discussed

above, in our view, the impugned order of the High Court resulted in grave miscarriage of justice to the appellant-husband, more particularly, the High Court failed to consider the relevant material aspects from the pleadings and the evidence, the ultimate conclusion cannot be sustained. The appellant-husband established and proved both grounds in terms of Section 13 of the Act. In the result, the appeal stands allowed. The divorce petition filed by the appellant-husband stands accepted and a decree of divorce is hereby passed dissolving the marriage of the appellant with the respondent from today, i.e. 30.09.2011. The impugned order of the High Court dated 06.08.2009 in FAO No. M-123 of 2006 is set aside. The appellant-husband is directed to pay an amount of Rs. 2 (Two) lakhs as alimony to the respondent-wife in two equal instalments within a period of three months from today and to deposit Rs. 3 (Three) lakhs in the name of his daughter in the shape of three FDRs in a nearest nationalised bank in three equal instalments commencing from January, 2012 ending with June, 2012. On attaining majority, the daughter is permitted to withdraw the amount. Till such period, the respondent-wife is permitted to withdraw accrued interest once in three months directly from the bank from the said deposit for the benefit and welfare of their daughter.

B.B.B. Appeal allowed.

J & K HOUSING BOARD & ANR.
v.
KUNWAR SANJAY KRISHAN KAUL & ORS.
(Civil Appeal Nos.9353-54 of 2011)

NOVEMBER 4, 2011

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

Jammu and Kashmir Land Acquisition Act, 1990:

s.4(1)(a), (b), (c) – Compliance of – Held: Procedure provided in sub-Sections (a), (b) and (c) are mandatory and are to be strictly complied with.

ss.4(1), 5-A – Acquisition notification for development of housing colony – Challenged by respondents-land owners by filing writ petition before High Court – High Court allowed the writ petition with liberty to respondents to file objections within 15 days – On appeal, held: The conditions prescribed in s.4(1)(c) was not complied with – Notification was published in two daily newspapers but one of them was not a newspaper published in regional language which is the requirement of s.4(1)(c) – A corrigendum issued for enlarging the area of acquisition was also not published in any newspaper – The procedures provided in s.4(1)(a)(b) and (c) are to be strictly complied with – Merely because the land owners failed to submit their objections within 15 days after the publication of notification u/s.4(1), the authorities cannot claim that it need not be strictly resorted to – The object of publication in terms of s.4(1)(c) is to intimate the people who are likely to be affected by the notification – It is not in dispute that when the officers attempted to serve the notice by affixation or to persons in charge of the land, they were informed about the absence of the land owners due to disturbance in the area in question – Inspite of such information, the authorities did not send proper notice to the respondents or comply with the

provisions, particularly, s.4(1)(c) – In view of that order of High Court quashing the acquisition proceedings from the stage of s.5A of the Act is upheld – Land Acquisition.

Interpretation of statutes: Held: When any statutory provision provides a particular manner for doing a particular act, the said thing or act must be done in accordance with the manner prescribed therefor in the Act – Jammu and Kashmir Land Acquisition Act, 1990.

A land acquisition proceedings were initiated to acquire 181 kanals 19 marlas for public purpose for development of Housing Colony at Village Ferozpur. The Notification under Section 4 of the Jammu and Kashmir Land Acquisition Act, 1990 was published in newspapers. A notice under Sections 5 and 5-A was also issued to all land owners for hearing objections. On the day fixed for hearing objections none of the land owners came to the spot. A notification under Section 6 was issued to the effect that land was required for public purpose. An award was passed and a notification under Section 17-A was published in two newspaper mentioning names of the respondents. The respondents challenged the acquisition proceedings by filing a writ petition before the High Court. The High Court allowed the writ petition with liberty to the respondents to file their objections afresh within 15 days. The instant appeal was filed challenging the order of the High Court.

Dismissing the appeal, the Court

HELD: 1. As per Section 4 of the Jammu and Kashmir Land Acquisition Act, 1990, whenever land in any locality is needed for any public purpose, the Collector has to notify it in the manner provided in sub-sections (a), (b) and (c) of the said Section. There is no dispute that the public purpose mentioned in the notification issued under Section 4(1) of the Act refers to "development of

housing colony" by the Board at Village Ferozpur, Tehsil Tangmarg, District Baramulla. Undoubtedly, the said purpose is a public purpose in terms of Section 2(g) of the State Act. The opening part of Section 4 i.e. "whenever land in any locality is needed or is likely to be needed for any public purpose the Collector shall notify it" makes it clear that the procedure provided in sub-Sections (a), (b) and (c) are mandatory and the same has to be strictly complied with. As far as affixing of notice in the locality and information through beat of drum as well as through local Panchayats and Patwaries are concerned provided in sub-section (a), that have been complied with. The notification was duly published in the Government Gazette which satisfies sub-section (b) of Section 4. Sub-section(c) of that Section mandates that the Collector has to notify his intention to acquire the land/lands needed for public purpose in two daily newspapers having largest circulation in the said locality of which at least one shall be in the regional language. The conditions prescribed in Section 4(1)(a) and (b) had been complied with except Section 4(1)(c) which have not been followed. In the light of the language used in Section 4(1), namely, "the Collector shall notify it", the procedures/directions provided in Section 4(1)(a)(b) and (c) ought to be strictly complied with. There is no option left with anyone to give up or waive any of the mode and all such modes have to be strictly resorted to. It is settled law that when any statutory provision provides a particular manner for doing a particular act, the said thing or act must be done in accordance with the manner prescribed therefor in the Act. Merely because the parties concerned were aware of the acquisition proceedings or served with individual notices does not make the position alter when the statute makes it very clear that all the procedures/modes have to be strictly complied with in the manner provided therein. Merely because the land owners failed to submit their objections within 15 days

after the publication of notification under Section 4(1) of the State Act, the authorities cannot be permitted to claim that it need not be strictly resorted to. In the case on hand, admittedly, the notification was published in two daily newspapers i.e. in the Himalayan Mail and in the Greater Kashmir but one of them was not a newspaper published in regional language i.e. Kashmiri which is the requirement of Section 4(1)(c) of the Act. Though on 11.06.2003 a corrigendum was issued for enlarging the area of acquisition, admittedly, this corrigendum was not published in any newspaper. [Paras 9, 10, 22]

State of T.N. & Anr. vs. Mahalakshmi Ammal & Ors. **(1996) 7 SCC 269: 1995 (5) Suppl. SCR 451;** *May George vs. Special Tahsildar & Ors.* **(2010) 13 SCC 98: 2010 (7) SCR 204;** *Talson Real Estate (P) Ltd. vs. State of Maharashtra & Ors.* **(2007) 13 SCC 186;** *Ajay Krishan Shinghal & Ors. vs. Union of India & Ors.* **(1996) 10 SCC 721: 1996 (4) Suppl. SCR 319;** *Sulochana Chandrakant Galande vs. Pune Municipal Transport & Ors.* **(2010) 8 SCC 467: 2010 (9) SCR 476;** *Banda Development Authority, Banda vs. Moti Lal Agarwal & Ors.* **(2011) 5 SCC 394;** *Khub Chand & Ors. vs. State of Rajasthan & Ors.* **(1967) 1 SCR 120;** *Syed Hasan Rasul Numa & Ors. vs. Union of India & Ors.* **(1991) 1 SCC 401: 1990 (3) Suppl. SCR 165;** *Kunwar Pal Singh (dead) by L.Rs. vs. State of U.P. & Ors.*, **(2007) 5 SCC 85: 2007 (4) SCR 409 – referred to.**

2. It is true that the prescribed period of 15 days as mentioned in Section 5-A(1) of the Act for filing objections starts running from the date of publication of the notification under Section 4(1) of the Act in the manner provided in Clause (a), however, at the same time, the conditions as prescribed under Section 4(1) have not been fully complied with. It cannot be claimed that compliance of provisions of sub-Sections (a) to (c) of Section 4(1) are only directory. On the other hand, it is

not only mandatory but all the terms provided therein are to be complied with very strictly. This has been reiterated in Section 5-A of the Act also. By virtue of the provisions of the State Act, the valuable right/ownership of the land owners being taken away, hence, those provisions have to be strictly construed. The object of publication in terms of Section 4(1)(c) of the Act is to intimate the people who are likely to be affected by the notification. It is not in dispute that when the officers attempted to serve the notice by affixation or to persons in charge of the land, they were informed about the absence of the land owners due to disturbance in the area in question and it was also informed that they are residing in Delhi. In spite of such information, the authorities have not taken care of sending proper notice to the respondents or comply with the provisions, particularly, Section 4(1)(c) of the Act. In view of that the High Court was justified in quashing the acquisition proceedings from the stage of Section 5A of the State Act. The respondents are permitted to file their additional objections within 15 days from the date of receipt of this judgment. [Para 23]

Case Law Reference:

1995 (5) Suppl. SCR 451	**referred to**	**Para 12**
2010 (7) SCR 204	**referred to**	**Para 13**
(2007) 13 SCC 186	**referred to**	**Para 14**
1996 (4) Suppl. SCR 319	**referred to**	**Para 15**
2010 (9) SCR 476	**referred to**	**Para 16**
(2011) 5 SCC 394	**referred to**	**Para 17**
(1967) 1 SCR 120	**referred to**	**Paras 18, 19, 20**
1990 (3) Suppl. SCR 165	**referred to**	**Paras 18, 20**

2007 (4) SCR 409 referred to Paras 18, 21

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 9353-9354 of 2011.

From the Judgment & Order dated 21.5.2009 of the High Court of Jammu & Kashmir at Jammu in LPAOW No. 60 of 2007 and CMP No. 91 of 2007.

Rajiv Dhawan, Dinesh Kumar Garg, N.K. Choudhary, B.S. Billowria, Dhanjay Garg for the Appellant.

K.K. Venugopal, Dhruv Mehta, Jayashree Wad, Ashish Wad, Tamali Wad, Kanika Bhutani, Dipti B., Shekhar Srivastava, S. Krishna, J.S. Wad & Co. for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. These appeals are directed against the judgment and order dated 21.05.2009 passed by the High Court of Jammu and Kashmir at Jammu in LPAOW No. 60 of 2007 CMP No. 91 of 2007 whereby the High Court dismissed the said appeal filed by the J & K Housing Board - the appellants herein.

3. Brief facts:

(a) On 17.05.2003, the Collector, Land Acquisition (Land Management Estates Officer), Jammu and Kashmir Housing Board, Jammu (in short 'the Board') issued a Notification under Section 4 (1) of the Jammu & Kashmir Land Acquisition Act, 1990 (hereinafter referred to as 'the State Act') notifying the land measuring 181 kanals 19 marlas was needed for the public purpose by the Board, namely, for "development of Housing Colony" at Village Ferozpur, Tehsil Tangmarg, District Baramulla and calling for objections, if any, within 15 days from the date of publication of the said notification. The aforesaid notification was published in the Himalayan Mail newspaper on 21.05.2003 and in the Greater Kashmir newspaper on 22.05.2003 in the

State of Jammu and Kashmir. Again, on 04.06.2003, the said notification was published in two daily newspapers. On the very same day, notice under Sections 5 and 5-A of the State Act was issued to all land owners for hearing of objections vide Office Order No. HB/LMEO/83-85 directing them to remain present at the spot on 16.06.2003 at 12.30 p.m. On 09.06.2003, the Collector issued an Addendum vide office order No. HB/LMEO/87-96 for acquiring additional land of 3 kanals 15 marlas. On 11.06.2003, a corrigendum was issued with regard to the said Addendum stating therein that the measurement of land sought to be acquired was not correctly calculated and it may be read as 185 kanals 05 marlas instead of 185 kanals 14 marlas and objections, if any, may be filed within 15 days of the issuance of the said corrigendum.

(b) On 16.06.2003, none of the owners was present on the spot except some paid labourers/Chowkidars who were looking after the said land. On 24.06.2003, the Collector, LMEO submitted a letter to the Deputy Commissioner (District Collector), Baramulla vide office letter No. HB/LMEO/120-22 for recommending the case to higher authorities for issuance of declaration under Sections 6, 7 and 17 of the State Act. On 03.07.2003, the Deputy Commissioner directed the Collector to take action in accordance with the Revenue Department Circular No. 13/8-REV/(LAK)99/2000 dated 23.05.2000. On 16.07.2003, the respondents sent a telegram to the Tehsildar, Tangmarg, who in turn, forwarded the same to the office of the Collector on 19.07.2003. In accordance with the directions of the Deputy Commissioner (District Collector), the Collector, vide letter No. HB/LEO/158-60 dated 22.07.2003, requested the Financial Commissioner (Revenue) J & K Government to recommend the case to higher authorities for issuance of declaration under Sections 6 , 7 and 17 of the State Act.

(c) By Notification No. 199 RD/04 dated 15.01.2004, a declaration was made under Section 6 of the State Act to the effect that the land mentioned in the notification was needed for public purpose. Further, in pursuance of Section 17 of the

State Act, the Collector was directed to take possession of the aforesaid land subject to completion of all formalities including those under Sections 9(2) and 17-A of the State Act and Rule 63 of the Land Acquisition Rules (in short 'the Rules') and to finalize the proceedings immediately. By letter dated 17.01.2004, all the land owners were again informed by the Collector about the acquisition of the land under Sections 9 and 9-A of the State Act and requesting them to remain present on the spot on 06.02.2004 at 11 a.m.

(d) On 30.01.2004, a letter was received from the land owners requesting the Collector for fixing a fresh date after due notice to them. A draft award dated 28.07.2004 was passed by the office of the Collector assessing the total value of the land structure and the fruit trees at Rs.2,77,31,901/-. Notification No. HB/CLA/214-17 issued under Section 17-A of the Act was published in the Himalayan Mail Daily on 20.08.2004, in Greater Kashmir Daily on 23.08.2004 and in Greater 'Alsafa' Daily on 28.08.2004 mentioning the names of all the respondents.

(e) Challenging the notifications, on 30.08.2004, the respondents filed Original Writ Petition being OWP No. 941 of 2004 before the High Court of Jammu & Kashmir at Jammu. Learned single Judge of the High Court, vide order dated 03.09.2007, allowed the petition of the respondents herein with liberty to file their objections afresh within 15 days of the receipt of the copy of the said order. Since the respondents-land owners did not choose to receive the compensation and a reference under Sections 17-A and 32 of the State Act was filed on 03.09.2004 in the Court of District and Sessions Judge, Baramulla, a cheque bearing No. 0148568 dated 03.09.2004 amounting to Rs.2,34,71,151/- (80% of the total assessed compensation) was deposited with the District Judge, Baramulla with a request for disbursement of the said amount among the actual and real owners of the acquired land. On the very same day, i.e., on 03.09.2004, the possession of the land

was taken over by the representatives of Deputy General Manager, Housing Unit-II, Srinagar.

(f) Challenging the said order of the learned single Judge, the appellants herein filed LPAOW No. 60 of 2007 before the Division Bench of the High Court. The Division Bench, by impugned judgment dated 21.05.2009, dismissed the said appeal.

(g) Aggrieved by the said judgment, the appellants have filed these appeals by way of special leave before this Court.

4. Heard Mr. Rajiv Dhawan, learned senior counsel for the Board-appellants herein and Mr. K.K. Venugopal, learned senior counsel for the contesting respondents herein.

5. Mr. Rajiv Dhawan, learned senior counsel appearing for the Board, after taking us through the entire acquisition proceedings and the relevant provisions of the State Act submitted that inasmuch as all the procedures had been meticulously followed by the Board and possession was also taken before filing of the writ petition, the order passed by the learned single Judge quashing the acquisition proceedings from the stage of proceedings under Sections 5 and 5-A of the State Act and also subsequent proceedings as confirmed by the Division Bench are not sustainable and prayed for interference by this Court.

6. On the other hand, Mr. K.K. Venugopal, learned senior counsel appearing for the respondents/land owners, by drawing our attention to various mandatory provisions of the State Act and the J & K Housing Board Act, 1976, submitted that inasmuch as the appellants failed to follow the mandatory provisions of the State Act, the orders passed by the learned single Judge and the Division Bench are fully justified and no interference is called for by this Court.

7. We have carefully considered the rival contentions,

orders of the High Court and perused the relevant provisions and also various notifications/orders etc.

8. Before considering the rival contentions, it is useful to refer the relevant provisions of the State Act which are applicable to the State of Jammu & Kashmir. Part II of the State Act deals with Acquisition. The relevant provisions are as under :

"4. Publication of preliminary notification and powers of officers thereupon – Whenever land in any locality is needed or is likely to be needed for any public pupose the collector shall notify it –

(a) through a public notice to be affixed at convenient places in the said locality and shall also cause it to be known by beat of drum and through the local Panchayats and Patwaries;

(b) in the Government Gazette; and

(c) in two daily newspapers having largest circulation in the said locality of which at least one shall be in the regional language.

(2) ….."

"5. Payment for damage – The officers so authorized shall at the time of such entry pay or tender payment for all necessary damage to be done as aforesaid, and in case of dispute as to the sufficiency of the amount so paid or tendered, he shall at once refer the dispute to the Provincial Revenue authority within thirty days of its being pronounced, whereupon, the decision of that officer shall be final."

"5-A. Hearing of objections. - Any person interested in any land which has been notified under section 4, sub-

section (1), as being needed or likely to be needed for a public purpose may, within fifteen days after such land is notified in the manner prescribed in clause (a) of sub-section (1) of Section 4 as being needed or likely to be needed for a public purpose, subject to the acquisition of the land or of any land in the locality, as the case may be.

(2) Every objection under sub-section (1) shall be made to the Collector in writing, and the collector shall give the objector an opportunity of being heard either in person or by pleader or by a person authorized by him and shall, after hearing all such objections and after making such further inquiry, if any, as he thinks necessary, submit the case for the decision of the Government, together with the record of the proceedings held by him and a report containing his recommendations on the objections. The decision of the Government on the objections shall be final.

(3) For the purpose of this section, a person shall be deemed to be interested in land who would be entitled to claim an interest in compensation if the land were acquired under this Act."

6. Declaration that land is required for public purpose - (1) When the Government is satisfied after considering the report, if any, made under section 5-A, sub-section (2), that any particular land is needed for public purpose, a declaration shall be made to that effect under the signature of the Revenue Minister or of some officer duly authorized in this behalf:

Provided that no such declaration shall be made unless the compensation to be awarded for such property is to be paid wholly or partly out of the public revenues or some fund controlled or managed by a local authority.

(2) The declaration shall be published in official Gazette, and shall state the district or other territorial

division in which the land is situate, the purpose for which it is needed, its approximate areas, and where a plan shall have been made of the land, the place where such plan may be inspected.

(3) The said declaration shall be conclusive evidence that land is needed for a public purpose, and after making such declaration the Government may acquire the land in manner hereinafter appearing."

"9. Notice to persons interested – (1) The Collector shall then cause public notice to be given at convenient places on or near the land to be taken, stating that the Government intends to take possession of the land, and that the claims to compensation for all interests in such land may be made to him.

(2) Such notice shall state the particulars of the land so needed, and shall require all persons interested in the land to appear personally or by agent, before the Collector at a time and place therein mentioned (such time not being earlier than fifteen days after the date of publication of notice, and to state the nature of their respective interests in the land and the amount and particular of their claims to compensation for such interests and their objections (if any) to the measurements made under section 8. The Collector may, in any case, require such statements to be made in writing and signed by the party or his agent.

(3) The Collector shall also serve notice to the same effect on the occupier (if any) of such land and on all such persons known or believed to be interested therein, or to be entitled to act for persons so interested, as reside, or have agents authorized to receive service on their behalf, within the revenue district in which the land is situate.

(4) In case any person so interested resides elsewhere, and has no such agent, the notice shall be sent

to him by post in a letter addressed to him at his last known residence, address or place of business and registered in accordance with the Postal Rules in force for the time being in that behalf."

Section 11 speaks about enquiry into measurements, value, claims and award by the Collector. Section 12 makes it clear that the award passed by the Collector shall be final and conclusive evidence as between the Collector and the persons interested. Sub-section(2) of Section 12 mandates that the Collector shall give immediate notice of his award to such of the persons interested, as are not present personally or by their representatives when the award is made. Section 17 relates to special powers entrusted to the Collector in case of urgency. Section 18 speaks about the reference to Court to determine the objections as to the quantum of compensation or the measurement of land and procedure to be followed thereupon. In the last Part, i.e., Part VIII, which provides miscellaneous provisions, Section 43 speaks about the service of notice and makes it clear that how notice under this Act shall be made etc.

9. According to Mr. Rajiv Dhawan, learned senior counsel for the appellants, the requirement, particularly under Section 4, had duly been complied with and because of the fact that the respondents failed to submit their objections within the prescribed period under Section 5-A(1), the stand of the respondents/land owners has to be rejected. As per Section 4, whenever land in any locality is needed for any public purpose, the Collector has to notify it in the manner provided in sub-sections (a), (b) and (c) of the said Section. Public purpose has been defined in Section 3(g) of the State Act. There is no dispute that the public purpose mentioned in the notification issued under Section 4(1) of the Act refers to "development of housing colony" by the Board at Village Ferozpur, Tehsil Tangmarg, District Baramulla. Undoubtedly, the said purpose is a public purpose in terms of Section 2(g) of the State Act. However, the main question before us is whether

the Collector has fully complied with the mandates and procedures provided in sub-sections (a), (b) and (c) of Section 4. The opening part of Section 4 i.e. "whenever land in any locality is needed or is likely to be needed for any public purpose the Collector *shall notify it" makes it clear that the procedure provided in sub-Sections (a), (b) and (c) are mandatory and the same has to be strictly complied with.* (Emphasis supplied).

10. As far as affixing of notice in the locality and information through beat of drum as well as through local Panchayats and Patwaries are concerned provided in sub-section (a), that have been complied with. The notification was duly published in the Government Gazette which satisfies sub-section (b) of Section 4. Sub-section(c) of that Section mandates that the Collector has to notify his intention to acquire the land/lands needed for public purpose in two daily newspapers having largest circulation in the said locality of which at least one shall be in the *regional language.* (Emphasis supplied).

11. Before elaborating the compliance of sub-section (c) of Section 4 in terms of mandates provided therein, since Mr. Rajiv Dhawan, learned senior counsel has claimed that there is substantial compliance of provisions required above and no flaw is to be found in the acquisition proceedings, let us consider various decisions relied on by him.

12. In *State of T.N. & Anr. vs. Mahalakshmi Ammal & Ors.,* (1996) 7 SCC 269, paragraph nos. 8 and 9 were pressed into service. On going through those paragraphs, we are able to see that the land owners filed their objections to the notice issued under Section 5-A and Rule 3 of the Rules framed by the State Government. Except the above factual information, nothing is available on record in support of the stand taken by the appellants.

13. The next decision relied on by *Mr. Rajiv Dhawan is May George vs. Special Tahsildar & Ors.,* (2010) 13 SCC 98

wherein he very much pressed into service paragraph 25 of the said judgment which reads as under:

> "25**.** The law on this issue can be summarised to the effect that in order to declare a provision mandatory, the test to be applied is as to whether non-compliance with the provision could render the entire proceedings invalid or not. Whether the provision is mandatory or directory, depends upon the intent of the legislature and not upon the language for which the intent is clothed. The issue is to be examined having regard to the context, subject-matter and object of the statutory provisions in question. The Court may find out as to what would be the consequence which would flow from construing it in one way or the other and as to whether the statute provides for a contingency of the non-compliance with the provisions and as to whether the non-compliance is visited by small penalty or serious consequence would flow therefrom and as to whether a particular interpretation would defeat or frustrate the legislation and if the provision is mandatory, the act done in breach thereof will be invalid."

In the above paragraph, one of us, Dr. B.S. Chauhan, J. has summarized the law as to declare a provision mandatory or not and the test to be applied whether non-compliance with the provision could render the entire proceedings invalid or not. Except the above proposition of law with which we are in entire agreement, the said decision is also not supporting the stand of the appellants.

14. The judgment in *Talson Real Estate (P) Ltd. vs. State of Maharashtra & Ors.,* (2007) 13 SCC 186, relied on by Mr. Rajiv Dhawan, makes it clear that the provisions of Section 5-A of the Land Acquisition Act, 1894 (hereinafter referred to as "the Central Act") are attracted only when a person interested in any land which has been notified under Section 4(1) makes objection in writing to the Collector within 30 days from the date of the publication of the notification. It further makes it clear that

the period of 30 days will have to be counted from the last day of the publication of the notification under Section 4 of the Act after noting the date of publication in the Official Gazette and in two daily newspapers and notifying the substance of such notification on the site, this Court concluded that the appellants therein did not choose to file their objections within the time prescribed under Section 5-A of the Act.

15. In *Ajay Krishan Shinghal & Ors. vs. Union of India & Ors.,* (1996) 10 SCC 721, Mr. Rajiv Dhawan, pressed into service paragraph 8 which speaks about the compliance of mandatory requirements under Section 4(1). On going through the factual details available on the files produced before it, this Court concluded that the provisions of Section 4(1) of the Central Act have been fully complied with.

16. In *Sulochana Chandrakant Galande vs. Pune Municipal Transport & Ors.,* (2010) 8 SCC 467, which is a judgment rendered by us under the Urban Land (Ceiling and Regulation) Act, 1976, Mr. Rajiv Dhawan relied on paragraph 22. In that paragraph, this Court has held that once the land is acquired, it vests in the State free from all encumbrances. It further shows that it is not the concern of the landowner how his land is used and whether the land is being used for the purpose for which it was acquired or for any other purpose. It was further held that the land owner becomes persona non grata once the land vests in the State and he has a right to get compensation only for the same. The said decision is not helpful to the issue raised in the case on hand.

17. The last decision relied on by *Mr. Rajiv Dhawan is in Banda Development Authority, Banda vs. Moti Lal Agarwal & Ors.,* (2011) 5 SCC 394. He relied on paragraph 37 which speaks about principles and how the possession has to be taken under the Central Act. The said decision is also not helpful to the case on hand.

18. On the other hand, Mr. K.K. Venugopal, learned senior

counsel appearing for the respondents heavily relied on the principles laid down in the following decisions:

(i) *Khub Chand & Ors. vs. State of Rajasthan & Ors.,* AIR 1967 SC 1074 = (1967) 1 SCR 120.

(ii) *Syed Hasan Rasul Numa & Ors. vs. Union of India & Ors.,* (1991) 1 SCC 401 and

(iii) *Kunwar Pal Singh (dead) by L.Rs. vs. State of U.P. & Ors.,* (2007) 5 SCC 85.

19. In *Khub Chand* (supra), Subba Rao, C.J. after considering similar rival contentions and quoting Sections 4, 5 and 5-A of the Central Act answered several aspects including the mandatory nature of publication provided under Section 4 of the Act. The following discussion and conclusion are relevant:

> "6. …..The learned Advocate-General argued that a combined reading of Sections 4, 5 and 5-A indicates that the direction in the second part of Section 4 that the Collector shall cause public notice of the substance of the notification to be given at convenient places in the said locality was only directory. He pointed out that Section 4 contemplated only a notification in general terms and that under Section 5(2) after the Collector ascertained the necessary particulars, the Government had to issue a fresh notification giving sufficient description of the land intended to be acquired along with a plan, if one had been made, and also to cause a public notice to be given of the substance of the said notification at convenient places on or near the land to be acquired. As two notices were contemplated by the Act — one in general terms and another with specifications — and as both the notices should be published and their substance should be notified at convenient places, the argument proceeded, that the direction to cause a public notice of the substance of the notification to be given at convenient places in the said

locality under Section 4 was only directory, for the party would get under the later notification better particulars and thus he would not in any case be prejudiced.

7. This argument was not accepted by the High Court, and in our view rightly. The provisions of a statute conferring power on the Government to compulsorily acquire lands shall be strictly construed. Section 4 in clear terms says that the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality. The provision is mandatory in terms. Doubtless, under certain circumstances, the expression "shall" is construed as "may". The term "shall" in its ordinary significance is mandatory and the court shall ordinarily give that interpretation to that term unless such an interpretation leads to some absurd or inconvenient consequence or be at variance with the intent of the legislature, to be collected from other parts of the Act. The construction of the said expression depends on the provisions of a particular Act, the setting in which the expression appears, the object for which the direction is given, the consequences that would flow from the infringement of the direction and such other considerations. The object underlying the said direction in Section 4 is obvious. Under sub-section (2) of Section 4 of the Act, after such a notice was given, the officer authorised by the Government in that behalf could enter the land and interfere with the possession of the owner in the manner prescribed thereunder. The legislature thought that it was absolutely necessary that before such officer can enter the land of another, the owner thereof should have a clear notice of the intended entry. The fact that the owner may have notice of the particulars of the intended acquisition under Section 5(2) does not serve the purpose of Section 4, for such a notice shall be given after the appropriate officer or officers enter the land and submit the particulars mentioned in Section 4. The objects of the two sections are different:

the object of one section is to give intimation to the person whose land is sought to be acquired, of the intention of the officer to enter his land before he does so and that of the other is to enable him to know the particulars of the land which is sought to be acquired. In the Land Acquisition Act, 1894 (Central Act 1 of 1894) there is no section corresponding to Section 5(2) of the Act. Indeed sub-section (2) of Section 5 of the Act was omitted by Act 15 of 1960 and Section 5-A was suitably amended to bring the said provision in conformity with those of Central Act 1 of 1894. Whatever may be said on the question of construction after the said amendment — on which we do not express any opinion — before the amendment, Sections 4 and 5(2) were intended to serve different purposes.

8. Indeed, the wording of Section 4(2) of the Act leads to the same conclusion. It says, "thereupon it shall be lawful for any officer, generally or specially authorised by the Government in this behalf, and for his servants and workmen to enter upon and survey and take levels of any land in such locality...." The expressions "thereupon" and "shall be lawful" indicate that unless such a public notice is given, the officer or his servants cannot enter the land. It is a necessary condition for the exercise of the power of entry. The non-compliance with the said condition makes the entry of the officer or his servants unlawful. On the express terms of sub-section (2), the officer or his servants can enter the land to be acquired only if that condition is complied with. If it is not complied with, he or his servants cannot exercise the power of entry under Section 4(2), with the result that if the expression "shall" is construed as "may", the object of the sub-section itself will be defeated. The statutory intention is, therefore clear, namely, that the giving of public notice is mandatory. If so, the notification issued under Section 4 without complying with the said

mandatory direction would be void and the land acquisition proceedings taken pursuant thereto would be equally void."

20. In *Syed Hasan Rasul Numa* (supra), this Court considered the dictum laid down by Subba Rao, C.J., in *Khub Chand* (supra). The following conclusion is relevant:

"13. There is a broad basis for the view that we have taken from the decisions of this Court although on the provisions of other enactment. Section 4(1) of the Land Acquisition Act, 1894 provides for publication of the notification in the official Gazette and in two daily newspapers circulating in that locality where the land is situated of which at least one shall be in the regional language. Section 4(1) further provides that the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality. In Khub Chand v. State of Rajasthan Subba Rao, C.J., while construing the object and scope of Section 4(1) expressed the view that provisions of the section requiring public notice are mandatory and the legislature thought that it was absolutely necessary that the owner of the land should have a clear notice of the proposed acquisition. It was said that the fact that the owner may have notice of the particulars of the intended acquisition by any other means does not serve the purpose of Section 4 and does not absolve the obligation to follow the method of publication of the notification. It was also observed that the notification issued under Section 4(1) without complying with the mandatory direction would be void and the land acquisition proceedings taken pursuant thereto would also be void. This view has been reiterated in a number of subsequent decisions of this Court. In Collector (District Magistrate), Allahabad v. Raja Ram Jaiswal most of the earlier decisions have been referred to and the view taken in Khub Chand case has been reiterated.

14. In the instant case, the notice has been published only in the local newspapers, namely, the Daily Pratap, the Hindustan Times, the Statesman, the Indian Express and the Navbharat Times. This is only one of the three means of publication provided under Section 44 and it apparently falls short of the mandatory requirements of the section. Since the provisions of the Section 44 have not been complied with, the notice in question has no validity and the action taken pursuant thereto has also no validity."

21. In *Kunwar Pal Singh* (supra), this Court while construing three modes of publication, namely, (i) publication in the Official Gazette, (ii) in two daily newspapers circulating in the locality and, (iii) causing public notice of the substance in the locality where the land situate, provided under the Central Act, held as under:-

"16. Section 6(2), on a plain reading, deals with the various modes of publication and they are: (a) publication in the Official Gazette, (b) publication in two daily newspapers circulating in the locality in which the land is situate of which at least one shall be in the regional language, and (c) causing public notice of the substance of such declaration to be given at convenient places in the said locality. There is no option left with anyone to give up or waive any mode and all such modes have to be strictly resorted to. The principle is well settled that where any statutory provision provides a particular manner for doing a particular act, then, that thing or act must be done in accordance with the manner prescribed therefor in the Act".

22. Though all the above decisions arose under the Central Act, it is not in dispute that similar provisions have been incorporated in the State Act. We have already extracted Sections 4, 5, 5-A and 6 of the State Act which are similar to the provisions of the Central Act. From the materials placed before us, we are satisfied that the conditions prescribed in

Section 4(1)(a) and (b) had been complied with except Section 4(1)(c) which have not been followed. In the light of the language used in Section 4(1), namely, "the Collector shall notify it", the procedures/directions provided in Section 4(1)(a)(b) and (c) ought to be strictly complied with. There is no option left with anyone to give up or waive any of the mode and all such modes have to be strictly resorted to. It is settled law that when any statutory provision provides a particular manner for doing a particular act, the said thing or act must be done in accordance with the manner prescribed therefor in the Act. Merely because the parties concerned were aware of the acquisition proceedings or served with individual notices does not make the position alter when the statute makes it very clear that all the procedures/modes have to be strictly complied with in the manner provided therein. Merely because the land owners failed to submit their objections within 15 days after the publication of notification under Section 4(1) of the State Act, the authorities cannot be permitted to claim that it need not be strictly resorted to. In the case on hand, admittedly, the notification was published in two daily newspapers i.e. in the Himalayan Mail and in the Greater Kashmir but one of them was not a newspaper published in regional language i.e. Kashmiri which is the requirement of Section 4(1)(c) of the Act. We have already held that all the requirements provided in Section 4(1)(a)(b) and (c) are mandatory and have to be strictly adhered to. In addition to the same, though on 11.06.2003 a corrigendum was issued for enlarging the area of acquisition, admittedly, this corrigendum was not published in any newspaper.

23. As pointed out above, it is true that the prescribed period of 15 days as mentioned in Section 5-A(1) of the Act for filing objections starts running from the date of publication of the notification under Section 4(1) of the Act in the manner provided in Clause (a), however, at the same time, the conditions as prescribed under Section 4(1) have not been fully complied with. It cannot be claimed that compliance of

provisions of sub-Sections (a) to (c) of Section 4(1) are only directory. On the other hand, it is not only mandatory but all the terms provided therein are to be complied with very strictly. This has been reiterated in Section 5-A of the Act also. By virtue of the provisions of the State Act, the valuable right/ownership of the land owners being taken away, hence, those provisions have to be strictly construed. The object of publication in terms of Section 4(1)(c) of the Act is to intimate the people who are likely to be affected by the notification. It is not in dispute that when the officers attempted to serve the notice by affixation or to persons in charge of the land, they were informed about the absence of the land owners due to disturbance in the area in question and it was also informed that they are residing in Delhi. In spite of such information, the authorities have not taken care of sending proper notice to the respondents or comply with the provisions, particularly, Section 4(1)(c) of the Act. In view of the above discussion, we agree with the reasoning and ultimate conclusion of the learned single Judge quashing the acquisition proceedings from the stage of Section 5A of the State Act and the decision of the Division Bench affirming the decision of the learned single Judge.

24. Apart from the above infirmities, Mr. Venugopal, learned senior counsel for the respondents after taking us through the provisions of the J&K Housing Board Act, 1976, particularly, framing of housing schemes and acquisition and disposal of land contended that in the absence of any approved Scheme by the Board, it is not permitted to proceed further. In respect of the above argument, he highlighted Sections 14, 15, 17, 19 and 26(1)(2) of the Housing Board Act, 1976. Inasmuch as we accept the reasonings and the conclusion of the learned single Judge quashing the acquisition proceedings from the stage of Section 5-A and further direction to file their objections afresh within 15 days of the receipt of copy of his order, we are not inclined to go into the said contention. However, the contesting respondents are free to raise the said objection and it is for the authority concerned/government to take a decision

one way or other if the same is acceptable for which we are not expressing any opinion.

25. In the light of the above discussion, we are unable to accept the stand taken by the Board-appellants herein, on the other hand, we are in entire agreement with the decision of the learned single Judge as affirmed by the Division Bench. Consequently, the appeals fail and the same are dismissed with no order as to costs. In view of the dismissal of the appeals of the Board and in the light of the various objections raised, the respondents/land owners are permitted to file their additional objections, if they so desire, within 15 days from the date of receipt of this judgment. On receipt of those fresh objections, the Collector of the Board will consider both the original and additional objections and also afford personal hearing to them at the Housing Board Office situated at Green Belt Park, Gandhi Nagar, Jammu and proceed further in accordance with law.

D.G. Appeal 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

1. (1994) 1 SCC 131.
2. (1973) 2 SCC 629.

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

3. (2008) 12 SCC 84.

4. (1981) 1 SCC 80 at page 96.

5. 1990 (Supp) SCC 727.

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

6. (2006) 2 SCC 385 at para 67-72.

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]*.*

7. (2006) 6 SCC 581.
8. (1986) 4 SCC 566.
9. (1979) 3 SCC 489.
10. (2011) 3 SCC 218.
11. (1891) A.C. 173
12. (2003) 7 SCC 219.

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

13. (1997) 10 SCC 488.

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,*[14] 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

14. (1969) 2 SCC 262.

15. (1981) 1 SCC 664.

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**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 2090-2093 of 2011.

From the Judgment & Order dated 26.2.2008 of the High Court of Delhi in Crl. M.C. No. 4183-86 of 2006.

Chandra Shekhar, Saurabh Upadhyay, Meghna De, S.K. Verma for the Appellant.

T.S. Doabia, Sdhna Sandhu, Priyanka Mathur Sardana, Anil Katiyar, P.D. Sharma, Dr. Alok K. Sharma for the Respondents.

The Judgment of the Court was delivered by

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 Criminal Procedure, 1973. The High Court of Delhi has, while dismissing the petition under Section 482 of the Cr.P.C. filed by the appellants held that the complaint in question is not barred and that the Metropolitan Magistrate, Delhi, committed no error of law or jurisdiction in taking cognizance of the offence punishable under Sections 211 and 500 IPC. The appellants who happen to be the accused persons in the complaint

aforementioned have assailed the said finding in the present appeal by special leave. The appellants contend that the bar contained in Section 195 Cr.P.C. 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-complainant had approached, for the grant of bail and in which the court concerned had granted the bail prayed for by him. What is the true purport of the expression "in relation to any proceedings in any Court" appearing in Section 195(1)(b)(i) of the Code of Criminal Procedure, 1973 and in particular whether the grant of bail to the respondent in connection with the FIR registered against him would attract the bar contained in Section 195 Cr.P.C is all that falls for determination. Before we advert to the provisions of Section 195 of the Cr.P.C., we may briefly set out the facts in the backdrop.

3. Appellant-Abdul Rehman lodged a complaint with the Crime against Women (CAW) Cell, Nanakpura, Moti Bagh, New Delhi, accusing the Respondent-K.M. Anees-Ul-Haq and four others of commission of an offence punishable under Section 406 read with Section 34 IPC and Sections 3 and 4 of the Dowry Prohibition Act. The complainant's case is that the accusations made by the appellant in the report lodged with the Women Cell were totally false and fabricated. In particular, allegations regarding demand of dowry as a condition precedent for performance of *Nikah* between the complainant's nephew and Ms Aliya-appellant No.3 in this appeal were also false and unfounded. It was on that premise that 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.

4. The Metropolitan Magistrate entertained the complaint,

recorded statements of three witnesses produced by the respondent and came to the conclusion that there was sufficient material to show commission of offences punishable under Sections 211 and 500 IPC. While doing so, the Magistrate placed reliance upon a decision of this Court in *M.L. Sethi v. R.P. Kapur* [AIR 1967 SC 528] to hold that a complaint for commission of an offence punishable under Section 211 IPC is maintainable even at the stage of investigation into a First Information Report.

5. Aggrieved by the order passed by the Metropolitan Magistrate, the appellant preferred a Criminal Revision before the Additional Sessions Judge, New Delhi, who dismissed the same as barred by limitation. The appellant then preferred a petition under Section 482 Cr.P.C. before the High Court of Delhi for quashing complaint No.180/1 of 2002 pending before the Metropolitan Magistrate and all proceedings consequent thereto. The High Court has, as mentioned above, 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 Metropolitan Magistrate summoning the appellants to face trial.

6. We have heard learned counsel for the parties at considerable length and perused the order under challenge. Section 195 of the Cr.P.C. to the extent the same is relevant for our purposes may be extracted at this stage:

> **"195.** *Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.* – (1) No Court shall take cognizance –
>
> xxx xxx xxx
>
> xxx xxx xxx

(b)(i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, 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, or

xxx xxx xxx

xxx xxx xxx"

7. A plain reading of the above would show 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". That being so, the question is whether the offence alleged against the appellants can be said to have been committed "in relation to any proceedings in any Court".

8. It is not in dispute that 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 Additional Sessions Judge, Karkardooma, Delhi, nor is it disputed that an order granting bail was indeed passed in favour of the respondent. It is also not in dispute that 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. has already been filed before the Court competent to try the said offences in which the respondents have been released on regular bail on a sum of rupees ten thousand with one surety of the like amount. The filing of the charge sheet, however, being an event subsequent to the taking of cognizance by the Metropolitan 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 Additional Sessions Judge, Karkardooma Court, Delhi, 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.

9. The question whether grant of bail would attract the bar contained in Section 195(1)(b)(i) Cr.P.C. is no longer *res integra*. In *Badri v. State* [ILR (1963) 2 All 359] an offence punishable under Section 211 IPC was alleged to have been committed by the person making a false report against the complainant and others to the police. It was held that the said offence was committed in relation to the remand proceedings and the bail proceedings which were subsequently taken before the Magistrate in connection with that report to the police and, therefore, the case was governed by Section 195(1)(b) Cr.P.C. and no cognizance could be taken except on a complaint by the Magistrate under Section 195 read with Section 340 of the Cr.P.C. The said decision came up for consideration before a three-Judge Bench of this Court in *M.L. Sethi v. R.P. Kapur* [AIR 1967 SC 528], but this Court left open the question whether remand and bail proceedings before a Magistrate would constitute proceedings in a Court. This Court observed:

"We do not consider it necessary to express any opinion whether the remand and bail proceedings before the Magistrate could be held to be proceedings in a Court, nor

need we consider the question whether the charge of making of the false report could be rightly held to be in relation to those proceedings. That aspect need not detain us, because, in the case before us, the facts are different."

10. The legal position regarding maintainability of a complaint under Section 211 IPC by reference to a false complaint lodged before the police was nevertheless stated in the following words:

"Consequently, until some occasion arises for a Magistrate to make a judicial order in connection with an investigation of a cognizable offence by the police no question can arise of the Magistrate having the power of filing a complaint under Section 195(1)(b), Cr.P.C. In such circumstances, if a private person, aggrieved by the information given to the police, files a complaint for commission of an offence under Section 211, IPC, at any stage before a judicial order has been made by a Magistrate, there can be no question, on the date on which cognizance of that complaint is taken by the Court, of the provisions of Section 195(1)(b) being attracted, because, on that date, there would be no proceeding in any Court in existence in relation to which Section 211, IPC can be said to have been committed. The mere fact that on a report being made to the police of a cognizable offence, the proceedings must, at some later stage, and in a judicial order by a Magistrate, cannot therefore, stand in the way of a private complaint being filed and of cognizance being taken by the Court on its basis."

11. The question regarding bail proceedings before the Court being proceedings in a Court within the meaning of Section 195(1)(b)(i) once again fell for consideration before this Court in *Kamlapati Trivedi v. State of West Bengal* [1980 (2) SCC 91]. Kamlapati Trivedi had in that case filed a complaint under Sections 147, 448 and 379 IPC against six persons including one Satya Narayan Pathak. Warrants were issued for

the arrest of the accused, all of whom surrendered before the Court of Sub-Divisional Judicial Magistrate, Howrah, who passed an order releasing them on bail. In due course the police completed the investigation and submitted a final report under Section 173 Cr.P.C. stating that the complaint filed by Shri Trivedi was false. The Magistrate agreed with the report and passed an order discharging the accused. Sometime after the discharge order made by the Magistrate, Mr. Pathak, who was one of the accused persons of committing the offence, filed a complaint before the SDJM accusing Kamalapati Trivedi of the commission of offences punishable under Sections 211 and 182 IPC by reasons of the latter having lodged with the police a false complaint. Trivedi filed a petition before the High Court praying for quashing of the proceedings before the Magistrate in view of the bar contained in Section 195(1)(b)(i) of the Code. That prayer was declined by the High Court who took the view that criminal proceedings before the Court became a criminal proceeding only when cognizance was taken and not before and since no proceeding was pending before the Court, the provisions of Section 195(1)(b)(i) were not attracted. In appeal, this Court formulated the following two questions:

"33. The points requiring determination therefore are:

"(a) Whether the SDJM acted as a Court when he passed the orders dated May 6, 1970 and July 31, 1970 or any of them?

(b) If the answer to question (a) is in the affirmative, whether the offence under Section 211 of the Indian Penal Code attributed to Trivedi could be regarded as having been committed in relation to the proceedings culminating in either or both of the said orders?"

12. Answering the questions in the affirmative this Court observed:

"60. As the order releasing Trivedi on bail and the one

ultimately discharging him of the offence complained of amount to proceedings before a Court, all that remains to be seen is whether the offence under Section 211 of the Indian Penal Code which is the subject-matter of the complaint against Trivedi can be said to have been committed "in relation to" those proceedings. Both the orders resulted directly from the information lodged by Trivedi with the police against Pathak and in this situation there is no getting out of the conclusion that the said offence must be regarded as one committed in relation to those proceedings. This requirement of clause (b) aforementioned is also therefore fully satisfied.

61. For the reasons stated, I hold that the complaint against Trivedi is in respect of an offence alleged to have been committed in relation to a proceeding in Court and that in taking cognizance of it the SDJM acted in contravention of the bar contained in the said clause (b), as there was no complaint in writing either of the SDJM or of a superior Court. In the result, therefore, I accept the appeal and, setting aside the order of the High Court, quash the proceedings taken by the SDJM against Trivedi."

13. The above view was reiterated by this Court in *State of Maharashtra v. SK. Bannu and Shankar [*(1980) 4 SCC 286]. The question in that case was whether prosecution for an offence punishable under Section 476 IPC could be lodged at the instance of a transferee Court in a case where the offence was committed in the other Court which was earlier dealing with a different stage of the said proceedings. Answering the question in the affirmative this Court held that the two proceedings namely one in which the offence was committed and the other in which the final order is made are, in substance, different stages of the same integrated judicial process and that the offence committed in the earlier of the said proceedings can be said to be an offence committed in relation to the proceedings before the Court to whom the case was

subsequently transferred or the Court which finally tried the case. It was further held that bail proceedings before the Magistrate were judicial proceedings even though such proceedings had taken place at a stage when the offence against the accused, who were bailed out, was under police investigation. This Court observed:-

"16.....This being the real position, the bail proceedings before Shri Deshpande, and the subsequent proceedings before Shri Karandikar commencing with the presentation of the challan by the police for the prosecution of Deolal Kishan, could not be viewed as distinct and different proceedings but as stages in and parts of the same judicial process. Neither the time-lag between the order of bail and the challan, nor the fact that on presentation of the challan, the case was not marked to Shri Deshpande but was transferred under Section 192 of the Code, to Shri Karandikar, would make any difference to the earlier and subsequent proceedings being parts or stages of the same integral whole. Indeed, the commission of the offences under Sections 205, 419, 465, 467 and 471 of the Penal Code, came to light only when Shri Karandikar, on the basis of the forged surety bond in question, attempted to procure the attendance of the accused. If the earlier proceedings before Shri Deshpande and the subsequent proceedings before Shri Karandikar were stages in or parts of the one and the same process — as we hold they were — then it logically follows that the aforesaid offences could be said to have been committed "in or in relation to" the proceedings in the Court of Shri Karandikar, also, for the purpose of taking action under Section 476 of the Code.

21. In the instant case, it cannot be disputed that the bail proceedings before Shri Deshpande were judicial proceedings before a court, although such proceedings took place at a stage when the offence against the accused, who was bailed out, was

under police investigation. Thus, the facts in *Nirmaljit Singh* case (1973) 3 SCC 753 were materially different. The ratio of that decision, therefore, has no application to the case before us.

14. Applying the above principles to the case at hand, there is no gainsaying that the bail proceedings conducted by the Court of Additional Sessions Judge, Karkardooma, Delhi, 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 Metropolitan Magistrate and the High Court had both failed to notice the decision of this Court in *Kamlapati Trivedi's and SK. Bannu's* cases (supra) and thereby fallen in error in holding that the complaint filed by the respondent was maintainable. The High Court appears to have 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 had been left open by this Court in *M.L Sethi's* case (supra) but was squarely answered in *Kamalapati Trivedi's* case (supra). 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.

15. As noticed above, 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.

16. It was next argued by learned counsel for the respondent that while an offence under Section 211 IPC cannot be taken cognizance of, there was no room for interfering with the proceedings in so far as the same related to the commission of an offence punishable under Section 500, since the bar of Section 195 Cr.P.C. was not attracted to the proceedings under Section 500 IPC. The argument though attractive does not stand closer scrutiny. The substance of the case set up by the respondent is that the allegations made in the complaint lodged with CAW Cell accusing him of an offence punishable under Section 406 and Sections 3 and 4 of the Dowry Prohibition Act were false which according to the respondent tantamounts to commission of an offence punishable under Section 211 IPC apart from an offence punishable under Section 500 IPC. The factual matrix for both the offences is however one and the same. Allowing the respondents to continue with the prosecution against the appellants for the offence punishable under Section 500 IPC would not, in our opinion, subserve the ends of justice and may result in the appellants getting vexed twice on the same facts. We are doubtless conscious of the fact that any complaint under Section 500 IPC may become time barred if the complaint already lodged is quashed. That is not an insurmountable difficult; and can be taken care of by moulding the relief suitably. It would, in our opinion, 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.

17. In the result, these appeals are allowed, and order dated 3rd February, 2003 passed by the Metropolitan Magistrate and that passed by the High Court dated 26th February, 2008 are quashed. Crl. complaint No.180/1 of 2002 filed by the respondent shall stand transferred to the Court of competent jurisdiction seized of the charge-sheet filed against the respondents, for such orders as the Court may deem fit at the conclusion of the trial of the respondent having regard to the observations made above.

D.G. Appeals allowed.

CITICORP. MARUTI FINANCE LTD.
v.
S. VIJAYALAXMI
(Civil Appeal No.9711 of 2011)

NOVEMEBR 14, 2011

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

HIRE PURCHASE AGREEMENT: Recovery process – Forcible Possession of vehicles – Held: Even in case of mortgaged goods subject to Hire-Purchase Agreements, recovery process has to be in accordance with law – Till the time the ownership is not transferred to the purchaser, the hirer normally continues to be the owner of the goods, but that does not entitle him on the strength of the agreement to take back possession of the vehicle by use of force – The guidelines laid down by the Reserve Bank of India support and make a virtue of such conduct – If any action is taken for recovery in violation of such guidelines or the principles as laid down by the Supreme Court, such action cannot but be struck down.

CONSUMER PROTECTION ACT, 1986: Hire-Purchase Agreement in respect of a Maruti Omni Car – On failure of hirer to pay hire charges in terms of repayment schedule, appellant (owner-bank) took possession of financed vehicle and sold it in auction – Complaint by hirer before Consumer District Forum alleging deficiency in service – Allowed by District Forum directing owner to pay a sum of Rs.1,50,000 – State Commission, affirmed order of District Forum and directed payment of a further sum of Rs.50,000/- on account of punitive damages – National Commission while dismissing revision petition modified order of State Commission by setting aside punitive damages – Instead, it directed appellant-bank to pay a sum of Rs.10,000/- to hirer by way of cost – On appeal, held: After vehicle was seized, it was also

sold and third party rights had accrued over the vehicle – Appellant-bank had complied with the directions of the District Forum notwithstanding the pendency of the case – Since appellant Bank had already accepted decision of District Forum and had paid the amounts as directed, no relief could be granted to appellant.

A Hire-Purchase Agreement was entered into between the parties whereby the appellant hired to the respondent a maruti van for a sum of Rs.1,82,396/-, repayable, along with interest, in 60 equal monthly hire charges of Rs.4,604/- each. As per the agreement timely payment of the hire charges was the essence of the Agreement. The respondent failed to pay the hire charges in terms of the repayment schedule. Thereafter, in keeping with the terms and conditions of the Hire-Purchase Agreement, the Appellant took possession of the financed vehicle. A one time offer made by the appellant to pay Rs.60,000 for liquidating the outstanding dues was made but the respondent failed to pay the amount. Thereafter, the appellant sold the vehicle in auction.

The respondent filed the complaint before the Consumer Disputes Redressal Forum, against the appellant alleging deficiency in service. The District Forum directed the apellant to pay a sum of Rs.1,50,000/-, along with interest at the rate of 9% per annum, from the date of filing of the complaint till the date of payment, together with a further sum of Rs.5,000/- towards harassment and cost of litigation. The State Commission affirmed the order of the District Forum and directed payment of a further sum of Rs.50,000/- on account of punitive damages. The National Commission, while dismissing the revision petition filed by the appellant modified the order of the State Commission by setting aside the direction to pay Rs.50,000/- on account of

punitive damages. Instead, the Commission directed the appellant to pay a sum of Rs.10,000/- to the respondent by way of cost. The instant appeal was filed challenging the order of the High Court.

Disposing of the appeal, the Court

HELD: 1.1. Since during the pendency of the Special Leave Petitions before this Court, the appellant had complied with the orders of the District Forum and the National Commission had already set aside the punitive damages imposed by the State Commission, the reliefs prayed for on behalf of the appellant had been rendered ineffective and the submissions were, therefore, channeled towards the question of whether the fora below were right in holding that the vehicles had been illegally and/or wrongfully recovered by use of force from the loanees. The said question has since been settled by several decisions of this Court and in particular in the decision rendered in **ICICI Bank Ltd.* **case. [Para 21]**

****ICICI Bank Ltd. v. Prakash Kaur*** **(2007) 2 SCC 711: 2007 (3) SCR 253 – relied on.**

1.2. Even in case of mortgaged goods subject to Hire-Purchase Agreements, the recovery process has to be in accordance with law and the recovery process referred to in the Agreements also contemplates such recovery to be effected in due process of law and not by use of force. Till such time as the ownership is not transferred to the purchaser, the hirer normally continues to be the owner of the goods, but that does not entitle him on the strength of the agreement to take back possession of the vehicle by use of force. The guidelines which had been laid down by the Reserve Bank of India as well as the appellant Bank itself, in fact, support and make a virtue of such conduct. If any action is taken for recovery in violation of such guidelines or the principles

as laid down by this Court, such an action cannot but be struck down. In the instant case, the situation is a little different, since after the vehicle had been seized, the same was also sold and third party rights have accrued over the vehicle. It is possibly on such account that the appellant Bank chose to comply with the directions of the District Forum notwithstanding the pendency of this case. Since the appellant Bank has already accepted the decision of the District Forum and has paid the amounts as directed, no relief can be granted to the appellant. [Paras 21-23]

Bharathi Knitting Company v. DHL Worldwide Express Courier **(1996) 4 SCC 704: 1996 (2) Suppl. SCR 653;** *Sundram Finance Ltd. v. State of Kerala* **AIR 1966 SC 1178: 1966 SCR 828 – referred to.**

Case Law Reference:

1996 (2) Suppl. SCR 653	**referred to**	**Para 16**
2007 (3) SCR 253	**relied on**	**Para 17**
1966 SCR 828	**referred to**	**Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9711 of 2011.

From the Judgment & Order dated 27.7.2007 of the National Consumer Disputes Redressal Commission, New Delhi in Revision Petition No. 737 of 2005.

WITH

C.A. Nos. 9712, 9713, 9714, 9716 & 9715 of 2011.

Ashok Desai, R.S. Suri, Atul Nanda, Rahul Malhotra, K.S. Prasad, Chanchal Kumar Ganguli, Prashant Kumar, Triveni Potekar, Chander Shekhar Ashri, Amit Singh, Amarjit Singh Bedi, Rameeza Hakeem, Amol N. Suryawanshi (for Law

Associates & Co.), J.K. Mittal, Vishnu Sharma, Brajesh Pandey, Anupam Sharma, Vibha Narang (for Respondent-In-Person) for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. SLP(C)No.19314 of 2007, which is being heard along with SLP(C)No.3119 of 2008, SLP(C)Nos.9550, 10544, 11696 and 10547 of 2009, is directed against the judgment and order dated 27th July, 2007, passed by the National Consumer Disputes Redressal Commission, hereinafter referred to as the "National Commission". By the said order, the National Commission dismissed Revision Petition No.737 of 2005, filed by the appellant herein against the judgment and order dated 10th March, 2005, passed by the State Commission, Delhi. By its order dated 27th July, 2007, the National Commission modified the order of the State Commission and set aside the part of the order directing the Appellant to pay Rs.50,000/- on account of punitive damages and further directed the appellant to pay Rs.10,000/- as cost to the complainant Respondent.

3. From the materials on record, it appears that on 4th April, 2000, at the initiative of the Respondent, a Hire-Purchase Agreement was entered into between the Appellant and the Respondent herein, to enable the Respondent to avail the benefit of hire-purchase in respect of a Maruti Omni Car. In accordance with the terms and conditions of the Agreement, the Appellant granted a hire-purchase facility to the Respondent for a sum of Rs.1,82,396/-, which was repayable, along with interest, in 60 equal monthly hire charges of Rs.4,604/- each. Clause 2.1 of the Hire-Purchase Agreement provides for payment of the hire charges in the manner stipulated in the Schedule to the Agreement and it also indicates that timely payment of the hire charges was the essence of the Agreement.

4. On the failure of the Respondent to pay the hire charges in terms of the repayment schedule, the Appellant sent a legal notice to the Respondent on 10th October, 2002, recalling the entire hire-purchase facility. It further appears that as many as 26 cheques issued by the Respondent towards payment of the hire-charges were dishonoured on presentation. By the said legal notice, the Respondent was informed that she had failed to repay the hire charges according to the payment schedule and had defaulted in honouring her commitments towards repayment. She was requested to make payment of the total amount of Rs.1,31,299.44p. within 3 days from the date of receipt of the notice.

5. It appears that subsequently, pursuant to a request made by the Respondent, the Appellant, by its letter dated 10th May, 2003, made a one-time offer of settlement for liquidating the outstanding dues of Rs.1,26,564.84p. for Rs.60,000/-, subject to the payment being made by the Respondent by 16th May, 2003, in cash. It was also specifically mentioned in the offer that in the event the Respondent delayed in making payment of the said sum of Rs.60,000/- for whatever reason, the offer would stand voided and the Appellant would be entitled to claim from the Respondent the total dues as on date.

6. Thereafter, in keeping with the terms and conditions of the Hire-Purchase Agreement, the Appellant took possession of the financed vehicle and informed the concerned Police Station before and after taking possession thereof from the residence of the Respondent. According to the Appellant, an inventory sheet was also prepared, which was duly countersigned by the husband of the Respondent. It is the Appellant's case that at the time of taking possession of the vehicle, six monthly instalments were overdue. On the same day, the Respondent's husband wrote to the Appellant to extend the time for paying the amount which had been settled at Rs.60,000/- by way of a One-Time Settlement. It is also the Appellant's case that subsequent thereto, the date of the

settlement offer was extended as a special case, but despite the same, the Respondent failed to pay the amount even within the extended period. It is on account of such default that the Appellant was constrained to sell the vehicle after having the same valued by approved valuers and inviting bids from interested parties.

7. On 31st May, 2003, the Appellant entered into an Agreement for sale of the vehicle with M/s Chin Chin Motors which was the highest bidder, for a sum of Rs.70,000/-.

8. Appearing for the Appellant Citicorp. Maruti Finance Ltd., Mr. Ashok Desai, learned Senior Advocate, submitted that the sale process followed by the Appellant after taking possession of the vehicle was not in violation of the Regulations issued by the Reserve Bank of India. After the vehicle was sold, the Appellant sent a post-sale letter to the Respondent on 9th June, 2003, informing her that the vehicle had been sold for Rs.70,000/- and that the said amount had been adjusted towards the total outstanding dues amounting to Rs.1,21,920.48p. The Respondent was also asked to pay the balance amount of Rs.51,920.48p. which still remained due after adjustment of the sale price of the vehicle.

9. In June, 2003, the Respondent filed Consumer Complaint No.280 of 2003 before the Consumer Disputes Redressal Forum, Sheikh Sarai, against the Appellant alleging deficiency in service on their part. The Appellant filed its reply to the said complaint before the aforesaid Forum in August, 2003. Thereafter, the Respondent filed an application to amend Consumer Complaint No.283 of 2003. The same was allowed and the amended complaint was taken up for consideration. By its order dated 22nd December, 2003, the District Forum-VII, Sheikh Sarai, directed the Appellant to pay a sum of Rs.1,50,000/-, along with interest at the rate of 9% per annum, from the date of filing of the complaint (16.6.2003) till the date of payment, together with a further sum of Rs.5,000/- towards harassment and cost of litigation.

10. Aggrieved by the said order, the Appellant preferred Appeal No.65 of 2004 before the State Commission, Delhi, on 30th January, 2004. By its order dated 10th March, 2005, the State Commission, Delhi, affirmed the order of the District Forum and directed payment of a further sum of Rs.50,000/- on account of punitive damages.

11. Aggrieved by the said order of the State Commission, Delhi, the Appellant filed Revision Petition No.737 of 2005 before the National Commission in March, 2005, in which the stand taken before the lower Fora was reiterated. It was also indicated that the Appellants had followed the letter and spirit of the Hire-Purchase Agreement and had re-possessed the vehicle in terms of the default clause in the Agreement. On 27th July, 2007, the National Commission, while dismissing the Revision Petition modified the order of the State Commission by setting aside that part of the judgment directing the Appellant to pay Rs.50,000/- on account of punitive damages. Instead, the Commission directed the Appellant to pay a sum of Rs.10,000/- to the Complainant/Respondent by way of cost.

12. Appearing in support of the Appeal, Mr. Ashok Desai, learned Senior Advocate, began his submissions by posing a question as to whether the High Court was justified in coming to a finding in observing that the hire-purchase system or leasing system was contrary to the interest of the society. Referring to Clause 25 of the Hire-Purchase Agreement dealing with events of default, Mr. Desai submitted that Sub-Clause 25.1.1 provides that non-payment of any monthly hire charges on the due date as per terms of the Agreement, would amount to an event of default and the consequences thereof were set out in Clause 26 dealing with the Owner's Rights On Default By Hirer. Since the said clause is relevant to a decision in this case, the same in its entirety is extracted hereinbelow :-

"26. OWNER'S RIGHTS ON DEFAULT OF HIRER

26.1 The occurrence of any/all of the aforesaid events shall

entitled the Owner to terminate this Agreement. On such termination, the entire sum of money (inclusive of hire charges and all other sums and charges of whatsoever nature, including but not limited to, interests on account of default of insurance premia and on account of other taxes) which would have been payable by the Hirer if the agreement had run to its full terms, shall become due and payable forthwith.

26.2 The owner, through its authorized representatives, servants, agents, shall have unrestricted right of entry in the aforesaid events and shall not be entitled to retake possession of the vehicle(s). The Hirer shall be bound to return the vehicle(s) to the owner at such location, as the Owner may designate, in the same condition in which it was originally delivered to the Hirer (ordinary wear and tear excepted). For the said purpose it shall be lawful for the Owner forthwith or at any time and without notice to the Hirer to enter upon the premises, or garage, or godown, where the vehicle(s) shall be lying or kept and to take possession or recover and receive the same and if necessary to break open any such place. The Owner will be well within his rights to use tow-van to carry away the vehicle(s). The Hirer shall not prevent or obstruct the Owner from taking the possession of the vehicle and shall be liable to pay any towing charges or other expenses incurred in this regard.

26.3 The Owner shall be in the aforesaid events be entitled to sell/transfer/assign the vehicle(s) either by public action or by private treaty or otherwise. However, the Owner shall however, be liable to pay for any deficiencies after the said appropriation. In case there is any surplus after adjusting the dues of the Owner, the same shall be paid to the Hirer.

26.4 The Hirer shall not be entitled to raise any objections regarding the regularity of the sale and/or actions taken by the Owner nor shall the Owner be liable/responsible for any

loss that may be occasioned from the exercise of such power and/or may arise from any act or default on the part of any broker or auctioneer or other person or body employed by the Owner for the said purpose.

26.5 The Owner shall be entitled to recover from the Hirer all expenses (including legal costs on full indemnity basis) incurred by or on behalf of the Owner in ascertaining the whereabouts, of taking possession, insuring, transporting and selling the vehicle and of any legal proceedings that may be filed by or on behalf of the Owner to enforce the provisions of this agreement. It is expressly clarified that the remedies referred to hereinabove shall be in addition to and without prejudice to any other remedy available to the Owner either under this agreement or under any other Agreement or in law.

26.6 Without prejudice to the generality of the foregoing words, the Hirer hereby consents to the Owner disseminating to and sharing with third parties (including banks, financing entities, credit bureaus of which the Owner is a member or any statutory body or regulatory authority) all information within the knowledge of the Owner and pertaining to Hirer (including credit history and credit status of the Hirer) at any time as the Owner may consider necessary or be requested or directed to do."

13. Mr. Desai contended that in order to act in accordance with the aforesaid clause, the Appellant had framed its own Code of Conduct, wherein, the guidelines as to how recovery of dues is to be effected, has been laid down in great detail, with the emphasis on politeness and treating the customer with dignity. Mr. Desai submitted that it had also been provided in the guidelines that any breach of the conditions by the collecting agency would attract punitive action.

14. Mr. Desai contended that the concept of hire-purchase is just another form of bailment, where the goods are held by

the hirer in bailment till such time as the ownership thereof is made over to him. Mr. Desai also urged that the jurisdiction of the Consumer Forum was to ensure that the Agreement between the parties was duly executed, but it had no jurisdiction to rewrite the terms of the Agreement. In this regard, Mr. Desai submitted that the Consumer Forum had gone beyond its jurisdiction in settling and deciding the question regarding the validity of the Hire-Purchase Agreement itself. Learned counsel submitted that the Reserve Bank of India had issued guidelines on 24th April, 2008 to all Scheduled Commercial Banks, regarding the policy to be adopted by Banks in engaging Recovery Agents for recovering their dues. On the issue relating to the engagement of Recovery Agents, the Banks were directed to take note of the specific conditions set out in the guidelines in that behalf. Clause 2(ii) makes it very clear that Banks should have a due diligence process in place for engagement of Recovery Agents, which should be so structured to cover, among others, individuals involved in the recovery process. Clause 2(ix) relates to the method to be followed by Recovery Agents and the Banks were advised to strictly adhere to the guidelines/Code during the loan recovery process. The said guidelines also provided for the manner in which the possession of mortgaged/hypothecated property is to be taken and it was clearly indicated that the recovery of loans or seizure of vehicles should be done through legal process.

15. Mr. Desai also referred to a RBI Circular dated 24th April, 2009, on re-possession, clarifying the manner in which vehicles financed by Non-Banking Finance Companies (NBFCs) were to be recovered. Mr. Desai pointed out that in the said guidelines, it was indicated that NBFCs must have a built-in re-possession clause in the contract/loan Agreement with the borrower, which must be legally enforceable. In order to ensure transparency, the terms and conditions of the contract/loan Agreement should also contain provisions regarding notice period before taking possession; circumstances under which the notice could be waived; the procedure for taking

possession of the security and provision providing for a final chance to be given to the borrower for repayment of the loan, before proceeding with the sale or auction of the property. Mr. Desai submitted that the said guidelines had been duly embodied in the Hire-Purchase Agreement and that the Appellant was, in fact, taking steps, in accordance with such provisions, to recover the hypothecated properties in case of default.

16. Mr. Desai lastly contended that the Tribunal was not entitled to modify the terms of the Agreement which had been arrived at between the parties and that when there was an acute dispute relating to facts, the Tribunal, in this case the National Commission, ought not to have gone behind the terms of the Contract and should have instead referred the parties to the Civil Court. It was also observed that only in an appropriate case was the Tribunal entitled to enter into the validity of the terms of the contract. In support of his submissions, Mr. Desai referred to the decision of this Court in *Bharathi Knitting Company Vs. DHL Worldwide Express Courier* [(1996) 4 SCC 704], where the aforesaid principal has been considered and explained. Mr. Desai submitted that the order of the National Commission was erroneous and is liable to be set aside.

17. Appearing for the Finance Industry Development Council (FIDC), Ms. Haripriya Padmanabhan, learned Advocate, submitted that the Council is a self-regulatory organization registered with the Reserve Bank of India and is governed by the guidelines issued by the Reserve Bank of India from time to time. Ms. Padmanabhan submitted that on 26th October, 2007, this Court had in the present proceedings expressed concern over the manner in which loans by financial institutions were being recovered. Learned counsel submitted that this Court was particularly concerned with the procedure adopted for recovery of such loan amounts by financial institutions by alleged use of force, despite the directions given by this Court in *ICICI Bank Ltd. Vs. Prakash Kaur* [(2007) 2 SCC 711]. It was submitted that the Reserve Bank of India had

formulated operational guidelines for adoption by all commercial banks. Pursuant to the guidelines of July, 2009, relating to Debt Collections Standards in India, the Citibank had updated its Code for collection of dues and re-possession of security. It was submitted that the said guidelines were detailed and expansive and attempted to cover all the shortcomings in the earlier guidelines in order to ensure that no force was used for the purpose of effecting recovery of the dues.

18. Mr. Prashant Kumar, learned Advocate, appearing for the Appellants in the four Special Leave Petitions filed by Mahindra & Mahindra Financial Services Ltd., adopted the submissions of Mr. Ashok Desai and Ms. Padmanabhan. He added that from the month of September, 2009, the financial institutions were following the process of arbitration in order to recover its dues. Mr. Prashant Kumar submitted that the matters in which he was appearing do not contemplate the financial institutions as the owner of the goods and the transaction was a loan simplicitor. Consequently, the said matters could not be treated on the same footing as those which involved Hire-Purchase Agreements. It was urged that although the provisions of the SARFAESI Act, 2002, could be applied in similar cases, the same would not apply as far as the present cases were concerned, since they constituted loan agreements in respect of which either the normal civil or the arbitration law would have application. It was further submitted that if a loan had been taken against a mortgage, the remedy on account of recovery would be with the Civil Court in regard to the mortgaged properties. In this regard, reliance was placed on the decision of this Court in *Sundram Finance Ltd. Vs. State of Kerala* [AIR 1966 SC 1178]. Reliance was also placed on a decision of this Court in Civil Appeal No.5993 of 2007 (*Commissioner of Central Excise Vs. Bajaj Auto Finance Ltd.*), where similar views have been expressed.

19. Reference was also made to Section 51 of the Motor Vehicles Act, 1988, which makes special provision in regard

to motor vehicle which was subject to a Hire-Purchase Agreement in cases covered under a Hire-Purchase Agreement. In cases covered under Hire-Purchase Agreements, provision has been made for the Registering Authority to make an entry in the Certificate of Registration regarding the existence of such agreement. Clause (b) of Section 51 provides for cancellation of such an endorsement on proof of termination of the agreement by the parties.

20. The last person to address us was Shri Dharampal Yadav, Respondent No.1 in Special Leave Petition (Civil) No.9550 of 2009 and Special Leave Petition (Civil) No.10544 of 2009, who appeared in person. He submitted that in most cases, the various guidelines framed by the Reserve Bank of India and the Bank themselves, were not followed and more often than not the hypothecated goods, mostly vehicles were forcibly taken possession of by Recovery Agents hired by the financiers. Mr. Dharampal Yadav submitted that the methodologies adopted by the Recovery Agents were contrary to the guidelines laid down by the Banks themselves and in the decisions of this Court in several other matters, where it has been uniformly indicated that recovery would have to be effected in due process of law and not by the use of muscle power.

21. Since during the pendency of the Special Leave Petitions before this Court, the Appellant had complied with the orders of the District Forum and the National Commission had already set aside the punitive damages imposed by the State Commission, the reliefs prayed for on behalf of the Appellant had been rendered ineffective and the submissions were, therefore, channeled towards the question of whether the fora below were right in holding that the vehicles had been illegally and/or wrongfully recovered by use of force from the loanees. The aforesaid question has since been settled by several decisions of this Court and in particular in the decision rendered in *ICICI Bank Ltd. Vs. Prakash Kaur* (supra). It is, not, therefore, necessary for us to go into the said question all over

again and we reiterate the earlier view taken that even in case of mortgaged goods subject to Hire-Purchase Agreements, the recovery process has to be in accordance with law and the recovery process referred to in the Agreements also contemplates such recovery to be effected in due process of law and not by use of force. Till such time as the ownership is not transferred to the purchaser, the hirer normally continues to be the owner of the goods, but that does not entitle him on the strength of the agreement to take back possession of the vehicle by use of force. The guidelines which had been laid down by the Reserve Bank of India as well as the Appellant Bank itself, in fact, support and make a virtue of such conduct. If any action is taken for recovery in violation of such guidelines or the principles as laid down by this Court, such an action cannot but be struck down.

22. In the instant case, the situation is a little different, since after the vehicle had been seized, the same was also sold and third party rights have accrued over the vehicle. It is possibly on such account that the Appellant Bank chose to comply with the directions of the District Forum notwithstanding the pendency of this case.

23. Since the Appellant Bank has already accepted the decision of the District Forum and has paid the amounts as directed, no relief can be granted to the Appellant and the Appeals are disposed of in the light of the observations made hereinabove.

24. The application filed in Special Leave Petition (Civil) No.10547 of 2009 on 26th August, 2011, for bringing on record the legal heirs of the sole respondent Shiv Nath Sareen is no longer relevant on account of the aforesaid decision and the same is, therefore, dismissed. The Appeals are also disposed of in terms of the observations made hereinabove.

25. There shall, however, be no order as to costs.

D.G. Appeal disposed of.

PARMENDER KUMAR & ORS.
v.
STATE OF HARYANA & ORS.
(Civil Appeal No. 9717 of 2011)

NOVEMBER 14, 2011

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

Education/Educational Institutions – Admission in the Post-Graduate or Diploma Courses in medicine – Conditions relating to admission as indicated in the prospectus – Modification in the conditions by the State Government after declaration of result and preparation of select list – Power of – Held: If such Government Orders were already in force when the prospectus was published, they would certainly have a bearing on the admission process – However, once the results had been declared and a select list had been prepared, it was not open to the State Government to alter the terms and conditions just a day before counselling was to begin, so as to deny the candidates, who had already been selected, an opportunity of admission in the aforesaid courses – Benefits of admission in the reserved category is the result of the policy adopted by the State Government to provide for candidates from the reserved category – Appellants having been selected on the basis of merit, in keeping with the results of the written examination, the submission that such admissions in the reserved category will have to be made keeping in mind the necessity of upholding the standard of education in the institution, cannot be accepted.

Appellants-members of the State Civil Medical Services, are candidates for admission to the Post-Graduate Courses conducted by respondent No.2

University against the Haryana Civil Medical Services (HCMS) reserved quota. As per the prospectus, a common entrance examination was held for candidates who applied for admissions against seats reserved for the HCMS quota as also seats under open merit category, the results were declared and counselling was held. The clause 5 and 6 of the prospectus provided that HCMS doctors who wanted to join the PG-courses against the HCMS reserved quota, required NOC in terms of Government of Haryana instructions dated 5th December, 2008; and three years regular service with successful completion of probation period. On basis thereof, the appellants were allowed to participate in the selection process, their names were published in the merit list dated 3rd March, 2011 and were admitted. However, on 31st March, 2011, the Government of Haryana issued an instruction that changed the eligibility conditions whereby three years regular service was changed to five years and applied the same to the process of admission which had already been set in motion on the basis of the previous Government instructions, and that too just one day before the date of counseling. Aggrieved, the appellants filed a writ petition. The Single Judge of the High Court passed an interim order to the effect that in the meantime the appellants would be permitted to take part in the counselling as against the HCMS quota candidates, subject to their own risk and responsibility; and that the said order would not confer any equitable right in favour of the appellants. The Division Bench upheld the order of the Single Judge of the High Court.

The question which arose for consideration in these appeals is whether the State Government had any jurisdiction and/or authority to alter the conditions relating to admission in the Post-Graduate or Diploma Courses in the different disciplines in medicine which had earlier been indicated in the prospectus, once the

examination for such admission had been conducted and the results had been declared and a select list had also been prepared on the basis thereof.

Disposing of the appeals, the Court

HELD: 1.1. The appellants contended that once the process of selection of candidates for admission to the Post-Graduate and Diploma Courses had been commenced on the basis of the prospectus, no change could, thereafter, be effected by Government Orders to alter the provisions contained in the prospectus. If such Government Orders were already in force when the prospectus was published, they would certainly have a bearing on the admission process, but once the results had been declared and a select list had been prepared, it was not open to the State Government to alter the terms and conditions just a day before counselling was to begin, so as to deny the candidates, who had already been selected, an opportunity of admission in the aforesaid courses. The benefits of admission in the reserved category are many, but the same is the result of the policy adopted by the State Government to provide for candidates from the reserved category and since the appellants had been selected on the basis of merit, in keeping with the results of the written examination, the submission that such admissions in the reserved category will have to be made keeping in mind the necessity of upholding the standard of education in the institution, cannot be accepted. The appellants have shown their competence by being selected on the basis of their results in the written examination. The submission that the NOCs had been given to the appellants from the open category, also does not appeal to this Court, since the appellants were candidates in respect of the reserved category of the HCMS. [Para 23]

State of Orissa & Anr. Vs. Mamata Mohanty **(2011) 3 SCC 436 : 2011 (2) SCR 704 – distinguished.**

1.2 The judgment and order of the Division Bench of the High Court is set aside. However, the counselling process in these appeals was to be conducted on 6th April, 2011 and the academic session was to commence on 10th May, 2011. In other words, the appellants have already lost about six months of the courses in question. As was observed in *Dr. Vinay Rampal's* **case, the sands of time had run out which is inevitable in judicial process. Following the same reasoning, as adopted in** *Dr. Vinay Rampal's* **case, it is directed that the appellants shall be admitted in the Post-Graduate or Diploma Courses, for which they have been selected, for the new academic year without any further test or selection. [Para 24]**

Vinay Rampal (Dr.) Vs. State of J & K & Ors. **(1984) 1 SCC 160 – relied on.**

State of Punjab & Anr. Vs. Dr. Viney Kumar Khullar & Ors. **(2010) 13 SCC 481: 2010 (13) SCR 733;** *Rajiv Kapoor & Ors. Vs. State of Haryana & Ors.* **(2000) 9 SCC 115: 2000 (2) SCR 629;** *Union of Public Service Commission Vs. Gaurav Dwivedi & Ors.* **(1999) 5 SCC 180 : 1999 (3) SCR 649;** *Amardeep Singh Sahota Vs. State of Punjab* **(1993) 4 SLR 673 (FB)**

Case Law Reference:

2010 (13) SCR 733	**Referred to.**	**Para 11, 13**
(1984) 1 SCC 160	**Referred to.**	**Para 13**
2000 (2) SCR 629	**Referred to.**	**Para 14**
1999 (3) SCR 649	**Referred to.**	**Para 16**
2011 (2) SCR 704	**Distinguished.**	**Para 23**

(1993) 4 SLR 673 (FB) Referred to. Para 21

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9717 of 2011.

From the Judgment & Order dated 2.6.2011 of the High Court of Punjab & Haryana at Chandigarh in LPA No. 983 of 2011.

WITH

C.A. Nos. 9718, 9719, 9720, 9721 & 9722 of 2011.

Altaf Ahmad, P.S. Patwalia, Vikas Singh, K.K. Tyagi, Iftekhar Ahmad, P. Narasimhan, Dr. Kailash Chand, Jagjit Singh Chhabra, R.K. Gupta, S.K. Gupta, Mukesh Singh, Shekhar Kumar, Dr. Monika Gusain, Dharam Raj Ohlan, Atishi Dipankar for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Six Special Leave Petitions, being SLP(C)No.15974/2011, SLP(C)No.16075/2011, SLP(C)No. 16346/2011, SLP(C)Nos.16228-30/2011, have been taken up together for hearing, as they involve common questions of fact and law relating to the eligibility of the Special Leave Petitioners, who are members of the Haryana Civil Medical Services, to be admitted to the Post-Graduate Courses conducted by the Pt. B.D. Sharma University of Health Sciences, Rohtak, Respondent No.2 herein, against the reserved quota for such candidates.

2. Leave granted.

3. Before proceeding further, I.A.Nos.4 and 5 of 2011, filed by Dr. Rajeev Kumar and 10 others in SLP(C)No.15974 of 2011, for impleadment in these proceedings as respondents, are allowed.

4. For the sake of convenience, we shall refer to the facts

from SLP(C)No.15974/2011, filed by Dr. Parmender Kumar and others. As indicated hereinabove, the Appellants in all these appeals are candidates for admission to the Post-Graduate Courses conducted by the Respondent No.2 University against the Haryana Civil Medical Services (HCMS) reserved quota. As provided for by the prospectus dated 6th January, 2011, a common entrance examination was held for candidates who applied for admissions against seats reserved for the HCMS quota, as also seats under open merit category. The prospectus sets out the total number of seats in each course and the seats earmarked for the HCMS reserved category and also in respect of open merit. According to the prospectus, seats available for the Post-Graduate Course in the different disciplines indicate a total number of 145 seats available, of which 73 seats were reserved for the All India quota, 29 seats were reserved for the HCMS reserved quota and 43 seats were reserved for the open merit category. As per the prospectus, the last date of receipt of application was 24th January, 2011 within 5 p.m. The common entrance examination was held as per schedule on 2nd March, 2011 and results were declared on 3rd March, 2011. Counselling was scheduled for 6th April, 2011 and the academic session was due to commence on 10th May, 2011.

5. The eligibility criteria laid down in the prospectus for candidates appearing in the entrance examination in respect of the HCMS reserved quota was included in Clause 5 of the prospectus, which reads as follows :

> "5. HCMS doctors sponsored by the State Govt. will be eligible to appear in the entrance examination against the reserved seats for this category, provided they submit the application through their employer or submit their applications for getting NOCs to the department/State Government well in time and the Department/State Govt. will ensure that the NOCs where ever eligible, are issued before the date of 1st Counselling i.e. 06.04.2011."

6. What is of importance is the method of selection and admission which was made a part of the prospectus, wherein, in Clause 6 relating to determination of merit, in Sub-Clause (iii), it was indicated as follows :

> "6.(iii) The conditions for NOCs fixed by the Govt. of Haryana vide letter No.2/123/05/I-HB-I dated 5.12.2008 for HCMS doctors who want to join PG-courses are given at Annexure-D. (However, latest Govt. instructions issued from time to time will be followed)."

7. For, as per the aforesaid Sub-Clause, HCMS doctors who wanted to join the PG-courses against the HCMS reserved quota, required NOC in terms of Government of Haryana instructions dated 5th December, 2008. As per the said instructions, one of the eligibility conditions was contained in Clause 3, which is extracted hereinbelow :

> "3. The basic condition for eligibility is three years regular service with successful completion of probation period out of which two years service is essential in rural areas for both reserved and open seats in the case of HCMS doctors. However, the condition of rural service will not be applicable in the case of a member of the HMES."

8. The Appellants were allowed to participate in the selection process on the basis of the above criterion and as per the cases made out in the several appeals, their names were published in the merit list dated 3rd March, 2011. From the said list it will appear that out of the total number of 38 candidates in the HCMS quota in the M.D./M.S./P.G. Diploma course and 3 candidates in the MDs course, all the Appellants in the various appeals stood admitted along with similar candidates.

9. However, on 31st March, 2011, the Government of Haryana issued an instruction, which was circulated on its website on 5th April, 2011, that changed the eligibility

conditions and applied the same to the process of admission which had already been set in motion on the basis of the Government instructions dated 5th December, 2008, and that too just one day before the date of counselling, i.e., 6th April, 2011. The amended provision is extracted hereinbelow :

> "MBBS doctors will be eligible for doing Post-Graduate Course, both degree as well as Diploma after completion of 5 years of regular satisfactory service including 2 years of probation, out of which 3 years service should be in one of the District Hospital or a Sub-Divisional Hospital and 2 years in rural area institutions. Only the persons fulfilling this condition will be eligible for sponsorship against reserved seat in PGIMS Rohtak or other Government institution and against the open seats in the Government Colleges of Haryana or similar Government institutions anywhere else in the country."

10. It is the changed conditions relating to admission in the Post-Graduate Courses which resulted in the filing of CWP No.6168 of 2011, by Dr. Parmender Kumar and others and other writ petitions were filed by the other Appellants in the Punjab and Haryana High Court. Upon consideration of the original conditions relating to eligibility for admission in the Post-Graduate Course and the changes effected by the Government instruction dated 31st March, 2011, the learned Single Judge of the High Court by order dated 6th April, 2011, while listing the matter on 13th May, 2011, passed an interim order to the effect that in the meantime the Appellants would be permitted to take part in the counselling as against the HCMS quota candidates, subject to their own risk and responsibility. It was made clear that the said order would not confer any equitable right in favour of the Appellants. It was further directed that the result of the counselling of the Appellants should be kept in a sealed cover and would be subject to the outcome of the writ petition.

11.Aggrieved by the interim order passed by the learned

Single Judge, Dr. Parmender Kumar and others filed Letters Patent Appeal Nos.983 and 995 of 2011, before the Division Bench of the Punjab and Haryana High Court. The appeals were disposed of by the Division Bench by its order dated 2nd June, 2011, upholding the order of the learned Single Judge rejecting the challenge to the new policy relating to grant of NOC, on the ground that it was evident that the State had every right to prescribe a policy for the grant of NOC, especially when it was dealing with the cases of sponsorship of in-service candidates for higher studies. The logic behind the same is that the State was committed to bear the expenses for the selected HCMS candidates, as such incumbents were entitled to full pay and the period spent by them in pursuing these courses was to be treated as having been spent on duty. The Division Bench also noted that the underlying principle in accepting the prospectus as correct is that the State does not indulge in nepotism, nor has any allegation of mala fide being made, nor are they even visible. The Division Bench observed that the Appellants had not been excluded from the zone of consideration, but they had been denied consideration in HCMS category. The Division Bench also took note of the fact that in the prospectus it had been made clear that NOC was to be issued by the State as per its policy applicable from time to time and as a result even if the Appellants passed the test for admission to the Post-Graduate Courses, no vested right accrued to them to either get the NOC from the State of Haryana or to get full salary during the period of Post-Graduate studies. The Division Bench distinguished the decision of this Court in *State of Punjab & Anr. Vs. Dr. Viney Kumar Khullar & Ors.* [(2010) 13 SCC 481], by observing that provisional NOC had already been issued before the policy was revised, which was the distinguishing feature of the judgment in its applicability to the present case.

12. Appearing for the Appellants, Mr. Altaf Ahmad, learned Senior Advocate, as also Mr. K.K. Tyagi, learned Advocate, questioned the decision of the learned Single Judge, as well

as the Division Bench of the High Court, on the ground that once a criterion had been laid down in the prospectus, the Respondents concerned had no authority to alter the same once the process under the said prospectus had already commenced and a select list of candidates had also been published. Change of such conditions, one day prior to counselling as to the discipline to be pursued, was to the prejudice of the candidates who had been selected, as they had been selected on the basis of the unamended prospectus. Mr. Ahmad submitted that one could possibly have accepted the change in the criterion for admission, if it had been made before the prospectus was acted upon, but once the prospectus was acted upon, the entire process of admission to the Post-Graduate or Diploma Courses would be governed by the said prospectus and any change and/or alteration of the conditions of the prospectus thereafter, would seriously prejudice the candidates who had already been selected.

13. In this regard, reliance was placed on the decision of this Court in Dr. *Viney Kumar Khullar's* case (supra), wherein, while dealing with almost a similar case altering the terms and conditions for selection, this Court held that besides the earlier circulars, the Amendment Circular ought to have been mentioned in the prospectus. It was observed that nothing prevented the Government from stating that the NOC should be subject to the conditions mentioned in the Circular dated 13th May, 1996, as amended by Circular dated 30th July, 2007, which was issued after the 2007 admissions and was sought to be made applicable for the first time in respect of 2008 admissions. Consequently, the candidates for the 2008 admissions would have no knowledge about the Amendment Circular dated 30th July, 2007, unless it was mentioned in the prospectus. This Court further held that the candidates would have bona fide proceeded on the basis of eligibility for the NOC, in terms of the Government Circular dated 13th May, 1996. Learned counsel submitted that a similar view had been taken by this Court in *Vinay Rampal (Dr.) Vs. State of J & K*

& Ors. [(1984) 1 SCC 160], wherein this Court had held that since no reference had been made in the advertisement about the subsequent Government Order dated 23rd March, 1979, it was the requirement set out in the advertisement which should have provided the basis for selection and eligibility for admission of the petitioner therein.

14. Mr. Altaf Ahmad pointed out that in yet another case, namely, *Rajiv Kapoor & Ors. Vs. State of Haryana & Ors.* [(2000) 9 SCC 115], this Court had observed that the mess that had occurred leading to the litigation seemed to be more on account of the inept drafting and publication of the prospectus by the University and not properly carrying out the binding orders of the Government and of too many orders passed from time to time, being allowed to stand piecemeal independently. In fact, it was also observed that the Government would do well in future to publish at the beginning of every academic year, even before inviting applications, a compendium of the entire scheme and basis for selection carrying out amendments up to date and the prospectus also, specifically adopting them as part of the prospectus, to avoid confusion in the matter of selection, every year.

15. Mr. Ahmad submitted that since the subsequent alteration of the criterion for admission to the Post-Graduate and Diploma Courses in the various disciplines had not been included in the prospectus for admissions to the current year, no reliance can be placed on the same and the submissions made on that behalf are liable to be rejected.

16. Mr. P.S. Patwalia, learned Senior Advocate, appearing for the added respondent Nos.2 to 11, on the other hand, submitted that the object of directing NOC to be obtained by the candidate before he could be allowed to join a new session was that the choice had to be made extremely carefully before such candidates would get full salary for the period during which they were to pursue Post-Graduate studies and they would also be deemed to be in service during the entire

period. Mr. Patwalia submitted that prior to the amendment in the prospectus, Clause 3 thereof provided that the basic conditions for eligibility would be 3 years' regular service, with successful completion of probation period, out of which 2 years' service was essential in the rural areas. An exception was made in the case of a candidate who was a member of HCMS. The said criteria was altered by the Government Instruction dated 5th December, 2008, whereby it was indicated that MBBS members would be eligible for doing the Post-Graduate and Diploma Courses after completion of 5 years of regular service in place of 3 years, as stipulated earlier, including 2 years of probation, out of which 3 years of service would have to be one of the District Hospitals or the Sub-Divisional Hospital and 2 years in a rural area institution. Mr. Patwalia submitted that the said change was not a change in regard to the criterion of eligibility for admission, but it was a change of conditions of service as the Government always has the power to make such changes. In this regard, reliance has been placed by Mr. Patwalia on two decisions of this Court in i) *Union of Public Service Commission Vs. Gaurav Dwivedi & Ors.* [(1999) 5 SCC 180] and (ii) *State of Orissa & Anr. Vs. Mamata Mohanty* [(2011) 3 SCC 436], in which it was emphasized that the necessity of possession of prescribed qualification by teachers, was extremely crucial for an educational institution, since excellence of instruction provided by an educational institution mainly depends directly on excellence of teaching staff. Hence, unless teachers themselves possess a good academic record, the standard of education can neither be maintained nor enhanced.

17. Mr. Patwalia also referred to the decision of this Court in *Rajiv Kapoor's* case (supra), in which the question of the right of in-service candidates to be admitted from the reserved category of Post-Graduate Courses was under consideration. It was held that in regard to the method and procedure to be followed in selection from amongst HCMS candidates, the Government Orders providing procedure other than those

contained in the prospectus were quite valid, since it had power to issue such orders and the prospectus could not prevail in exclusion of the Government Orders. The learned Judges observed that both should be so construed that inter se merits of the in-service candidates were assessed on the basis of their credentials and performance in service. It was categorically held that even if the latest Government Order was issued after declaration of results of the entrance examination, the earlier Order would still be required to be complied with.

18. Mr. Patwalia submitted that in view of the aforesaid decision, the appeals were liable to be dismissed.

19. On behalf of the State of Haryana, Mr. Vikas Singh, learned Senior Advocate, pointed out that the NOCs, which were given by the Government on 4th April, 2011, had been given to the candidates from the reserved HCMS category for 5 years, while NOC was given for 3 years to the candidates from the open category. As far as the Appellants are concerned, they were given NOCs for the open category and not for the reserved category and, hence, their claim for being considered for admission in the reserved HCMS category was without any basis and was liable to be rejected.

20. From the facts as disclosed, the only question which emerges for decision in these appeals is whether the State Government had any jurisdiction and/or authority to alter the conditions relating to admission in the Post-Graduate or Diploma Courses in the different disciplines in medicine which had earlier been indicated in the prospectus, once the examination for such admission had been conducted and the results had been declared and a select list had also been prepared on the basis thereof. In other words, once the process of selection had started on the basis of the terms and conditions included in the prospectus, was it within the competence of the State Government to effect changes in the criterion relating to eligibility for admission, when not only had the process in terms of the prospectus been started, but also

when counselling was to be held on the very next day, which had the effect of eliminating many of the candidates from getting an opportunity of pursuing the Post-Graduate or Diploma Courses in the reserved HCMS category.

21. Although, Mr. Patwalia had placed a good deal of reliance on the decision of this Court in *Rajiv Kapoor's* case (supra), wherein, the facts were almost similar to the facts of this case, there is a singular distinction between the two. It has, no doubt, been held by this Court in *Rajiv Kapoor's* case (supra), that the High Court fell into serious error in sustaining the claim of the petitioners before the High Court that selection and admissions for the course in question had to be only in terms of the stipulations contained in Chapter V of the prospectus issued by the University. It was further held that such an error had been committed by assuming that the Government had no authority to issue any directions laying down any criteria other than the one contained in the prospectus and that the marks obtained in the written entrance examination alone constituted proper assessment of the merit performance of the candidates applying for selection and admission. This Court also observed that the High Court in allowing the writ petitions had purported to follow an earlier judgment of the Full Bench of the same High Court reported in *Amardeep Singh Sahota Vs. State of Punjab* [(1993) 4 SLR 673 (FB)], which, in fact, did not doubt the competency or authority of the Government to stipulate procedure for admission relating to courses in professional colleges, particularly, in respect of reserved category of seats. This Court also observed that ultimately the Full Bench had directed in the case decided by it that selections for admission should be finalised in the light of the criteria specified in the Government Orders already in force and the prospectus, after ignoring the offending notification introducing a change at a later stage.

22. If the aforesaid decision of this Court is to be relied upon, it, in fact, favours the case of the Appellants, since, while observing that selections or admissions for the Courses in

question will have to be effected only in terms of the stipulation contained in the prospectus issued by the University, the orders issued by the Government from time to time would also have to be taken into consideration. An exception was, however, made by this Court in relation to orders which came to be issued after the declaration of results of the written entrance examination. In that context, it was observed as follows :

> "……The further error seems to be in omitting to notice the fact that the orders dated 21-5-1997, which came to be issued after the declaration of results of written entrance examination, even if eschewed from consideration the orders dated 20-3-1996 and 21-2-1997 passed in continuation of the orders of the earlier years, continued to hold the field, since the orders dated 21-5-1997 were only in continuation thereof."

23. As has also been pointed out hereinbefore, this Court took notice of the fact that the Full Bench, on whose decision the High Court had relied, ultimately directed that the selections for admission should be finalised in the light of the criteria specified in the Government Orders already in force and the prospectus, "**after ignoring the offending notification introducing a change at a later stage**." In fact, this is what has been contended on behalf of the Appellants that once the process of selection of candidates for admission to the Post-Graduate and Diploma Courses had been commenced on the basis of the prospectus, no change could, thereafter, be effected by Government Orders to alter the provisions contained in the prospectus. If such Government Orders were already in force when the prospectus was published, they would certainly have a bearing on the admission process, but once the results had been declared and a select list had been prepared, it was not open to the State Government to alter the terms and conditions just a day before counselling was to begin, so as to deny the candidates, who had already been selected, an opportunity of admission in the aforesaid courses. It is no doubt

true that the benefits of admission in the reserved category are many, but the same is the result of the policy adopted by the State Government to provide for candidates from the reserved category and since the Appellants had been selected on the basis of merit, in keeping with the results of the written examination, the submission made by Mr. Patwalia that such admissions in the reserved category will have to be made keeping in mind the necessity of upholding the standard of education in the institution, as was observed in *Mamata Mohanty's* case (supra), is not applicable in the facts of this case. The Appellants have shown their competence by being selected on the basis of their results in the written examination. The submission made by Mr. Vikas Singh for the State, that the NOCs had been given to the Appellants from the open category, also does not appeal to us, since the Appellants were candidates in respect of the reserved category of the HCMS.

24. We, accordingly, have no hesitation in allowing the appeals and setting aside the judgment and order of the Division Bench of the Punjab and Haryana High Court. However, we appear to be facing the same problem, as was faced by this Court in *Dr. Vinay Rampal's* case (supra). The counselling process in these appeals was to be conducted on 6th April, 2011 and the academic session was to commence on 10th May, 2011. In other words, the Appellants have already lost about six months of the courses in question. As was observed in *Dr. Vinay Rampal's* case (supra), the sands of time had run out which is inevitable in judicial process. Following the same reasoning, as was adopted in the aforesaid case, we direct that the Appellants shall be admitted in the Post-Graduate or Diploma Courses, for which they have been selected, for the new academic year without any further test or selection.

25. The Appeals are disposed of accordingly. There will be no order as to costs.

N.J. Appeals disposed of.

S. LOGANATHAN

v.

UNION OF INDIA AND ORS.

(Civil Appeal No. 9829 of 2011)

NOVEMBER 16, 2011

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

Service Law – Disciplinary proceedings – Central Civil Services (Classification, Control and Appeal) Rules, 1965 – Rule 14 – Departmental Inquiry against appellant, a Junior Clerk in the Subordinate Court – Appellant filed response by way of defence, but after some time, did not participate in the inquiry – Departmental inquiry continued ex-parte – Subsequently, on objection of appellant that he had not been provided adequate opportunity, ex-parte departmental inquiry was re-called and the inquiry started de novo – After full participation by the appellant thereafter in the departmental inquiry, some of the charges were found fully proved while some were held partially proved by the Inquiry Officer – The Chief Judge on consideration of the report submitted by the Inquiry Officer, awarded to the appellant penalty of dismissal from the service – Appellant challenged that order before the High Court by filing a Writ Petition – Writ Petition was dismissed – Two fold contentions raised by appellant- 1) that the findings of Inquiry Officer were vitiated inasmuch as the Inquiry Officer took into consideration the evidence recorded in the ex-parte proceedings and 2) that the Chief Judge was an appellate authority and, therefore, he could not have imposed the order of punishment as that resulted in depriving the appellant of his valuable right of departmental appeal against the order of punishment – Held: The first contention is mis-placed – The Inquiry Officer did not base his findings on the evidence recorded ex-parte but referred to that only for purposes of appreciation of the evidence of the witnesses

examined by the department in de novo inquiry wherein the appellant fully participated – The findings were based on evidence recorded subsequently in presence of the appellant – The consideration of the evidence recorded in the course of the inquiry by the Inquiry Officer in the presence of the appellant and the findings recorded by him did not suffer from any legal infirmity justifying any interference by Supreme Court – As regards the first contention, ordinarily in a case of infliction of punishment by the higher authority acting as a disciplinary authority, if delinquent is denied his right of departmental appeal or right of review, such order of punishment may be rendered bad in law but much would depend on the relevant rules – In the instant case, the Chief Judge was the appointing authority of the appellant – In that event, the argument of the appellant that the appellate authority inflicted punishment upon him is devoid of any substance – The challenge to the competence of the Chief Judge in passing the order of punishment was rightly rejected by the High Court – By virtue of the second proviso in the Notification dated November 17, 1982, the appellant's right of departmental appeal was not taken away and he could have challenged that order in the departmental appeal to the higher authority – The appellant did not avail of that opportunity and instead challenged the order in a Writ Petition before the High Court – The appellant's right of appeal not affected by the order passed by the Chief Judge.

Surjit Ghose v. Chairman & Managing Director, United Commercial Bank and Ors. **(1995) 2 SCC 474 and** *Electronics Corporation of India v. G. Muralidhar* **(2001) 10 SCC 43 – distinguished.**

Case Law Reference:

(1995) 2 SCC 474	**distinguished**	**Para 5**
(2001) 10 SCC 43	**distinguished**	**Para 5**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9829 of 2011.

From the Judgment & Order dated 11.06.2007 of the High Court of Judicature at Madras in W.P. No. 3141 of 2002.

V. Kanagaraj. Promila, S. Thananjayan for the Appellant.

R. Venkataramani, Pragasam, S.J. Aristotle, Praburamasubramanian for the Respondents.

The following Order of the Court was delivered by

O R D E R

1. Leave granted.

2. The appellant, who was working as a Junior Clerk in the Subordinate Court at Yanam (Pondicherry), was dismissed from the service on conclusion of disciplinary proceedings by the Chief Judge, Pondicherry (for short "Chief Judge") vide order dated November 8, 2000. The appellant challenged that order before the High Court of judicature at Madras by filing a Writ Petition. His Writ Petition came to be dismissed on June 11, 2007. It is from this order that the present appeal, by special leave, arises.

3. On April 28, 1999, the appellant was issued a Charge Memo setting out therein that he was liable to be proceeded with the disciplinary action under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (for short "CCS Rules"). Along with the Charge-Memo, Article of Charges was sent to the appellant. The Article of Charges contained ten articles. An Inquiry Officer was appointed and inquiry proceeded against the appellant. The appellant filed his response by way of defence to the Charge Memo and Article of Charges and denied the allegations levelled against him. The appellant, after some time, did not participate in the departmental inquiry. As a result of which, the departmental

inquiry continued ex-parte. Subsequently, on his objection that he had not been provided adequate opportunity, ex-parte departmental inquiry was re-called and the inquiry started de novo. After full participation by the appellant thereafter in the departmental inquiry, some of the charges were found fully proved while some were held partially proved by the Inquiry Officer. The Disciplinary Authority (Chief Judge), on consideration of the report submitted by the Inquiry Officer, agreed with the findings recorded in the inquiry report and awarded to the appellant penalty of dismissal from the service.

4. The dismissal order dated November 8, 2000, as noted above, was challenged by the appellant before the High Court of Madras by way of filing a Writ Petition but without any success.

5. Mr. V. Kanagaraj, learned senior counsel for the appellant raised two-fold contention before us. Firstly, he contended that the Chief Judge was an appellate authority and, therefore, he could not have imposed the order of punishment as that has resulted in depriving the appellant of his valuable right of departmental appeal against the order of punishment. In support of this contention, Mr. Kangaraj placed reliance on the two decisions of this court; (i) *Surjit Ghose vs. Chairman & Managing Director, United Commercial Bank and others*[1] and (ii) *Electronics Corporation of India vs. G. Muralidhar*[2].

6. The second contention of Mr. Kangaraj is that the findings of the Inquiry Officer are vitiated inasmuch as the Inquiry Officer had taken into consideration the evidence that was recorded in the ex-parte proceedings.

7. Insofar as the second contention is concerned, it may be stated immediately that the said contention is mis-placed. The Inquiry Officer has not based his findings on the evidence that was recorded ex-parte but has referred to that only for the

1. (1995) 2 SCC 474.
2. (2010) 10 SCC 43.

purposes of appreciation of the evidence of the witnesses examined by the department in de novo inquiry wherein the appellant fully participated. The findings are based on the evidence that was recorded subsequently in the presence of the appellant. It is true that the witnesses PW2 to PW11 examined by the department did not support the department fully but besides the evidence of PW2 to PW11, there is a evidence of PW1. The Inquiry Officer considered his evidence and relied upon the same.

8. In our considered view, the consideration of the evidence recorded in the course of the inquiry by the Inquiry Officer in the presence of the appellant and the findings recorded by him do not suffer from any legal infirmity justifying any interference by us.

9. Coming to the first contention raised by Mr. Kanagaraj, suffice it to say that ordinarily in a case of infliction of punishment by the higher authority acting as a disciplinary authority, if delinquent is denied his right of departmental appeal or right of review, such order of punishment may be rendered bad in law but much would depend on the relevant rules. In the case of Surjit Singh1, while considering the provisions of United Commercial Bank Officers (Discipline and Appeals) Regulations, 1976, this Court held thus:

> "It is true that when an authority higher than the disciplinary authority itself imposes the punishment, the order of punishment suffers from no illegality when no appeal is provided to such authority. However, when an appeal is provided to the higher authority concerned against the order of the disciplinary authority or of a lower authority and the higher authority passes an order of punishment, the employee concerned is deprived of the remedy of appeal which is a substantive right given to him by the Rules/ Regulations. An employee cannot be deprived of his substantive right. What is further, when there is a provision of appeal against the order of the disciplinary authority

> and when the appellate or the higher authority against whose order there is no appeal, exercises the powers of the disciplinary authority in a given case, it results in discrimination against the employee concerned. This is particularly so when there are no guidelines in the Rules/ Regulations as to when the higher authority or the appellate authority should exercise the powers of the disciplinary authority. The higher or appellate authority may choose to exercise the power of the disciplinary authority in some cases while not doing so in other cases. In such cases, the right of the employee depends upon the choice of the higher/appellate authority which patently results in discrimination between an employee and employee. Surely, such a situation cannot savour of legality."

10. The above legal position has been reiterated by this Court in Electronics Corporation of India2. However, the present case is little different. Vide Notification dated November 17, 1982 issued by the Government of Pondicherry, a provision has been made that the appointing authority is competent to impose all the penalties in Rule 11 of the CCS Rules and the appellate authority has to exercise the powers and perform the functions of other authorities in respect of Group 'C' and Group 'D' posts in the offices mentioned against each other in column (5) of the Table appended thereto. Second proviso that follows the first proviso and the main body of the Notification provides that where the appointment of a delinquent has been made by an authority higher than that specified in Column (2), then that authority will constitute the disciplinary authority under Column (3) of the Table in respect of major penalties and any appeal against the orders of such authority will lie to the next higher authority not below the rank of a Secretary to Government and where the appeal is against the orders of the Lieutenant Governor as the disciplinary authority, the appeal shall lie to the President.

The relevant portion of the Table is as follows:

SL. No.	Appointing Authority	Authority competent to impose all penalties specified in Rule 11.	Appellate Authority	Office/ officers relating to which the powers are to be exercised.
1	2	3	4	5
xxx	xxxxx	xxxxxx	xxxxx	xxxxx

JUDICIAL DEPARTMENT

Special Officer, Judicial Department	Special Officer, Judicial Department	Chief Judge, Pondicherry	District Court, including the Labour Court, Sales Tax Appellate Tribunal and Office of the Special Officer.

11. The Chief Judge has recorded in his order dated November 8, 2000 that in the case of the appellant, he was the appointing authority. This fact has not been disputed by showing any material otherwise. We, therefore, have to accept the position that the Chief Judge was the appointing authority of the appellant. In that event, the argument advanced on behalf of the appellant that the appellate authority has inflicted punishment on him is devoid of any substance.

12. As a matter of fact, the second proviso in the Notification dated November 17, 1992 takes care of such situation. It provides that in cases where the appointment has been made by an authority higher than that specified in Column (2), then that authority will constitute the disciplinary authority under Column (3) of the said Table in respect of major penalties.

13. The challenge to the competence of the Chief Judge in passing the order of punishment is not meritorious and has, rightly been rejected by the High Court. By virtue of the second proviso in the Notification dated November 17, 1982, the appellant's right of departmental appeal was not taken away and he could have challenged that order in the departmental appeal to the higher authority. The appellant did not avail of that opportunity and instead challenged the order in a Writ Petition before the High Court.

14. Be that as it may, the appellant's right of appeal has not been affected by the Chief Judge in passing the order dated November 8, 2000.

15. The appeal has no merit and is dismissed accordingly with no order as to costs.

B.B.B. Appeal dismissed.

THE DIVISIONAL CONTROLLER, KSRTC

v.

M.G. VITTAL RAO

(Civil Appeal No. 9933 of 2011)

NOVEMBER 18, 2011

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

Labour laws:

Dismissal from service – Theft committed by the respondent-workman – Domestic enquiry found the workman guilty – Labour Court held that the enquiry was conducted strictly in accordance with law in a fair manner and charges were rightly proved against the workman and imposed punishment of dismissal – Workman filed writ petition praying that he stood acquitted in the criminal case and, therefore, he was entitled for all reliefs including re-instatement and back wages – Single Judge of High Court modified the order of the dismissal into an order of termination and directed the employer to pay the terminal benefits – Writ appeal by workman – Division Bench of the High Court quashed the award of the Labour Court and held that the respondent was entitled to reinstatement into service with all consequential benefits – On appeal, held: The Single Judge as well as the Division Bench simply decided the case taking into consideration the acquittal of delinquent employee and nothing else – There was no finding by the High Court that the charges leveled in the domestic enquiry had been the same which were in the criminal trial – Single Judge had granted relief to the respondent-workman which was not challenged by the employer by filing writ appeal – The workman shall be entitled only to the relief granted by the writ court and the judgment and order of the court in writ appeal is set aside.

Dismissal from service – Workman found guilty of theft and imposed punishment of dismissal – However in the criminal case he was acquitted of all the charges – Plea of reinstatement – Held: The question of considering reinstatement after the decision of acquittal or discharge by a competent Criminal Court would arise only and only if the dismissal from services was based on conviction by the criminal court in view of the provisions of Article 311(2)(b) of the Constitution of India or analogous provisions in the statutory rules applicable in a case – In a case where enquiry has been held independently of the criminal proceedings, acquittal in a criminal court is of no help – Constitution of India, 1950 – Article 311(2)(b).

Misconduct – Theft – Loss of confidence – Plea of reinstatement – Held: Once the employer has lost confidence in the employee and the bona fide loss of confidence is affirmed, the order of punishment must be considered to be immune from challenge, for the reason that discharging the office of trust and confidence requires absolute integrity, and in a case of loss of confidence, reinstatement cannot be directed – In case of theft, the quantum of theft is not important and what is important is the loss of confidence of employer in employee.

Departmental proceedings vis-à-vis criminal proceedings – Standard of proof – Held: While in departmental proceedings, the standard of proof is one of preponderance of probabilities, in a criminal case, the charge has to be proved by the prosecution beyond reasonable doubt – As the standard of proof in both the proceedings is quite different, and termination is not based on mere conviction of an employee in a criminal case, the acquittal of the employee in criminal case cannot be the basis of taking away the effect of departmental proceedings – Nor can such an action of the department be termed as double jeopardy – Facts, charges

and nature of evidence etc. involved in an individual case would determine as to whether decision of acquittal would have any bearing on the findings recorded in the domestic enquiry – Evidence.

The case of the appellant-employer company was that the respondent-employee was caught red handed while he was committing theft from cash chest of the appellant company. The Inquiry Officer found that charges against the respondent were proved. The Disciplinary Authority concurred with the findings recorded by the Inquiry Officer and imposed the punishment of dismissal of the respondent w.e.f. 14.2.1997. On reference, the Labour Court held that the departmental enquiry was fair and proper and charges were rightly held to be proved against the respondent.

While the respondent-workman was facing disciplinary proceedings, he was also facing the criminal trial for the offences punishable under Sections 457, 381 read with Section 34, IPC. He was ultimately acquitted in the criminal case.

The respondent filed a writ petition before the High Court challenging the award of the Labour Court. The Single Judge of the High Court modified the order of the dismissal into an order of termination and the appellant company was directed to pay the terminal benefits. However respondent was held to be not entitled to any wages or other monitory benefits till the date of his termination. On appeal, the Division Bench of the High Court quashed the award of the Labour Court and held that the respondent was entitled to be reinstated into service with all consequential benefits, however, since the respondent had retired from service, he was entitled to 50% of the back wages. The instant appeal was filed challenging the order of the High Court.

Disposing of the appeal, the Court

HELD: 1.1. The question of considering reinstatement after the decision of acquittal or discharge by a competent Criminal Court would arise only and only if the dismissal from services was based on conviction by the Criminal Court in view of the provisions of Article 311 (2) (b) of the Constitution of India, 1950, or analogous provisions in the statutory rules applicable in a case. In a case where enquiry has been held independently of the criminal proceedings, acquittal in a Criminal Court is of no help. The law is otherwise. Even if a person stood acquitted by a criminal Court, domestic enquiry can be held, the reason being that the standard of proof required in a domestic enquiry and that in a criminal case are altogether different. In a criminal case, standard of proof required is beyond reasonable doubt while in a domestic enquiry, it is the preponderance of probabilities that constitutes the test to be applied. [Para 8]

Nelson Motis v. Union of India & Anr. **AIR 1992 SC 1981: 1992 (1)Suppl. SCR 325;** *State of Karnataka & Anr. v. T. Venkataramanappa* **(1996) 6 SCC 455: 1996 (6) Suppl. SCR 607;** *State of Andhra Pradesh v. K. Allabaksh* **(2000) 10 SCC 177;** *Ajit Kumar Nag v. General Manager (PJ) Indian Oil Corporation Ltd.* **(2005) 7 SCC 764: 2005 (3) Suppl. SCR 314;** *State of Rajasthan v. B.K. Meena & Ors.* **AIR 1997 SC 13: 1996 (7) Suppl. SCR 68;** *Capt. M. Paul Anthony v. Bharat Gold Mines Ltd.* **AIR 1999 SC 1416;** *Delhi Cloth and General Mills Ltd. v. Kushal Bhan* **AIR 1960 SC 806;** *Tata Oil Mills Co. Ltd. v. The Workmen* **AIR 1965 SC 155: 1964 SCR 555;** *Jang Bahadur Singh v. Baij Nath Tiwari* **AIR 1969 SC 30: 1969 SCR 134;** *Kusheshwar Dubey v. M/s. Bharat Coking CoalLtd. & Ors.* **AIR 1988 SC 2118: 1988 (2) Suppl. SCR 579 – relied on.**

1.2. In departmental proceedings, factors prevailing in the mind of the disciplinary authority may be many,

such as enforcement of discipline or to investigate level of integrity of delinquent or other staff. While in departmental proceedings, the standard of proof is one of preponderance of probabilities, in a criminal case, the charge has to be proved by the prosecution beyond reasonable doubt. Where the charge against the delinquent employee is of a grave nature which involves complicated questions of law and fact, it is desirable to stay the departmental proceedings till conclusion of the criminal case. In case the criminal case does not proceed expeditiously, the departmental proceedings cannot be kept in abeyance forever and may be resumed and proceeded with so as to conclude the same at an early date. The purpose is that if the employee is found not guilty his cause may be vindicated, and in case he is found guilty, administration may get rid of him at the earliest. As the standard of proof in both the proceedings is quite different, and the termination is not based on mere conviction of an employee in a criminal case, the acquittal of the employee in criminal case cannot be the basis of taking away the effect of departmental proceedings. Nor can such an action of the department be termed as double jeopardy. Facts, charges and nature of evidence etc. involved in an individual case would determine as to whether decision of acquittal would have any bearing on the findings recorded in the domestic enquiry. [Paras 13, 19]

State Bank of India & Ors. v. R.B. Sharma **AIR 2004 SC 4144;** *Depot Manager, Andhra Pradesh State Road Transport Corporation v. Mohd Yousuf Miya & Ors.* **AIR 1997 SC 2232: 1996 (8) Suppl. SCR 941;** *Senior Superintendent of Post Offices v. A. Gopalan* **AIR 1999 SC 1514: 1997 (11) SCC 239;** *Kendriya Vidyalaya Sangathan & Ors. v. T. Srinivas* **AIR 2004 SC 4127;** *Krishnakali Tea Estate v. Akhil Bhartiya Chah Mazdoor Sangh & Anr.* **(2004) 8 SCC 200;** *Commissioner of Police Delhi v. Narendra Singh* **AIR 2006 SC 1800: 2006 (3)**

SCR 872; *South Bengal State Transport Corporation v. Span Kumar Mitra & Ors.* **(2006) 2 SCC 584: 2006 (2) SCR 30;** *Punjab Water Supply & Sewerage Board v. Ram Sajivan* **(2007) 9 SCC 86: 2007 (5) SCR 684** *Union of India & Ors. v. Naman Singh Shekhawat* **(2008) 4 SCC 1: 2008 (5) SCR 137** *Pandiyan Roadways Corpn. Ltd. v. N. Balakrishnan* **(2007) 9 SCC 755: 2007 (6) SCR 873;** *Ram Tawekya Sharma v. State of Bihar & Ors.* **(2008) 8 SCC 261: 2008 (12) SCR 452;** *Roop Singh Negi v. Punjab National Bank & Ors.* **(2009) 2 SCC 570: 2008 (17) SCR 1476 – relied on.**

2. <u>LOSS OF CONFIDENCE</u>

Once the employer has lost the confidence in the employee and the *bona fide* loss of confidence is affirmed, the order of punishment must be considered to be immune from challenge, for the reason that discharging the office of trust and confidence requires absolute integrity, and in a case of loss of confidence, reinstatement cannot be directed. In case of theft, the quantum of theft is not important and what is important is the loss of confidence of employer in employee. The instant case is examined in the light of the said settled legal proposition and keeping in view that judicial review is concerned primarily with the decision making process and not the decision itself. More so, it is a settled legal proposition that in a case of misconduct of grave nature like corruption, theft, no punishment other than the dismissal may be appropriate. [Paras 20, 21, 23]

Air India Corporation Bombay v. V.A. Ravellow **AIR 1972 SC 1343: 1972 (3) SCR 606;** *Francis Kalein & Co. Pvt. Ltd. v. Their Workmen* **AIR 1971 SC 2414;** *Bharat Heavy Electricals Ltd. v. M. Chandrashekhar Reddy & Ors.* **AIR 2005 SC 2769: 2005 (2) SCC 481;** *Kanhaiyalal Agrawal & Ors. v. Factory Manager, Gwaliar Sugar Co. Ltd.* **AIR 2001 SC 3645: 2001 (3) Suppl. SCR 8;** *Sudhir Vishnu Panvalkar v. Bank of India* **AIR 1997 SC 2249: 1997 (6) SCC 271;** *State Bank of*

India & Anr. v. Bela Bagchi & Ors. **AIR 2005 SC 3272: 2005 (2) Suppl. SCR 1084;** *Disciplinary Authority-cum-Regional Manager v. Nikunja Bihari Patnaik* **(1996) 9 SCC 69: 1996 (1) Suppl. SCR 314;** *Binny Ltd. v. Their Workmen & Anr.* **AIR 1972 SC1975: 1972 (3) SCR 518;** ***The Binny Ltd. v. Their Workmen*** **AIR 1973 SC 1403: 1974 (3) SCC 152;** *Anil Kumar Chakraborty & Anr. v. M/s. Saraswatipur Tea Company Ltd. & Ors.* **AIR 1982 SC 1062: 1982 (2) SCC 328;** *Chandu Lal v. The Management of M/s. Pan American World Airways Inc.* **AIR 1985 SC 1128: 1985 (2) SCC 727;** *Kamal Kishore Lakshman v. Management of M/s. Pan American World Airways Inc. & Ors.* **AIR 1987 SC 229: 1987 (1) SCC 146;** *M/s. Pearlite Liners Pvt. Ltd.v. Manorama Sirsi,* **AIR 2004 SC 1373: 2004 (1) SCR 266;** *Indian Airlines Ltd. v. Prabha D.Kanan* **AIR 2007 SC 548: 2006 (8) Suppl. SCR 1027;** *A.P. SRTC v. Raghuda Shiva Sankar Prasad* **AIR 2007 SC 152: 2006 (8) Suppl. SCR 625;** *U.P. State Road Transport Corporation v. Suresh Chand Sharma* **(2010) 6 SCC 555: 2010 (7) SCR 239 – relied on.**

3. The domestic enquiry found the respondent-workman guilty of all the charges. The Labour Court after reconsidering the whole case came to the conclusion that the enquiry was conducted strictly in accordance with law in a fair manner and charges were rightly proved against the delinquent employee. However, considering the difference in the standard of proof required in domestic enquiry, *vis-à-vis* that applicable to a criminal case, the Labour Court repelled the argument of respondent-workman that once he stood acquitted, he was entitled for all reliefs including re-instatement and back wages. The Single Judge as well as the Division Bench had simply decided the case taking into consideration the acquittal of delinquent employee and nothing else. There was no finding by the High Court that the charges leveled in the domestic enquiry had been the same which were in the criminal trial; the witnesses had

been the same; there were no additional or extra witnesses; and without considering the gravity of the charge, the award of the Labour Court did not warrant any interference. The Single Judge had granted relief to the respondent-workman which was not challenged by the present appellant by filing writ appeal. Therefore, the respondent-workman was entitled for the said relief. The respondent-workman shall be entitled only to the relief granted by the writ court and the judgment and order of the court in writ appeal is set aside. [Paras 24-26]

Case Law Reference:

1992 (1) Suppl. SCR 325	relied on	Para 8
1996 (6) Suppl. SCR 607	relied on	Para 9
(2000) 10 SCC 177	relied on	Para 10
2005 (3) Suppl. SCR 314	relied on	Para 11
1996 (7) Suppl. SCR 68	relied on	Para 12
AIR 1999 SC 1416	relied on	Para 13, 19
AIR 1960 SC 806	relied on	Para 13
1964 SCR 555	relied on	Para 13
1969 SCR 134	relied on	Para 13
1988 (2) Suppl. SCR 579	relied on	Para 13
AIR 2004 SC 4144	relied on	Para 14
1996 (8) Suppl. SCR 941	relied on	Para 15
1997 (11) SCC 239	relied on	Para 16
AIR 2004 SC 4127	relied on	Para 16
(2004) 8 SCC 200	relied on	Para 16
2006 (3) SCR 872	relied on	Para 16

2006 (2) SCR 30	**relied on**	**Para 16**
2007 (5) SCR 684	**relied on**	**Para 16**
2008 (5) SCR 137	**relied on**	**Para 17**
2007 (6) SCR 873	**relied on**	**Para 18**
2008 (12) SCR 452	**relied on**	**Para 18**
2008 (17) SCR 1476	**relied on**	**Para 18**
1972 (3) SCR 606	**relied on**	**Para 20**
AIR 1971 SC 2414	**relied on**	**Para 20**
2005 (2) SCC 481	**relied on**	**Para 20**
2001 (3) Suppl. SCR 8	**relied on**	**Para 20**
1997 (6) SCC 271	**relied on**	**Para 20**
2005 (2) Suppl. SCR 1084	**relied on**	**Para 21**
1996 (1) Suppl. SCR 314	**relied on**	**Para 21**
1972 (3) SCR 518	**relied on**	**Para 22**
1974 (3) SCC 152	**relied on**	**Para 22**
1982 (2) SCC 328	**relied on**	**Para 22**
1985 (2) SCC 727	**relied on**	**Para 22**
1987 (1) SCC 146	**relied on**	**Para 22**
2004 (1) SCR 266	**relied on**	**Para 22**
2006 (8) Suppl. SCR 1027	**relied on**	**Para 22**
2006 (8) Suppl. SCR 625	**relied on**	**Para 22**
2010 (7) SCR 239	**relied on**	**Para 23**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9933 of 2011.

From the Judgment & Order dated 27.10.2009 of the High Court of Karnataka at Bangalore in W.A.No. 702 of 2009 (L-KSRTC).

S.N. Bhat for the Appellant.

V.N. Raghupathy for the Respondent.

The Judgment of the Court was delivered by

Dr. B.S. CHAUHAN, J. 1. Leave granted.

2. This appeal has been preferred against the judgment and order dated 27.10.2009 passed by the High Court of Karnataka at Bangalore in Writ Appeal No.702 of 2009, by which it has dismissed the appeal preferred by the appellant against the judgment and order dated 27.1.2009 passed by the learned Single Judge allowing the writ petition No. 14354 of 2007 of the respondent-workman against the Award of the Labour Court dated 17.2.2005.

3. Facts and circumstances giving rise to this appeal are:-

(A) The respondent employee while working as helper in the appellant-Corporation in 1986 was subjected to disciplinary proceedings vide charge-sheet dated 4.2.1987 which contained the article of charges mainly on the allegations that on 3.10.1986 the respondent stayed away beyond his duty hours at his place of employment i.e., Divisional Workshop and opened the door of the blacksmith Section with the aid of a duplicate key and pulled the gas cylinder trolley and equipment from blacksmith Section to the cash room alongwith four other employees of the appellant-Corporation and opened the inner door of the cash room by cutting the padlock and used the gas cylinder equipment for committing the theft from cash chest.

(B) The Divisional Traffic Officer was appointed as the enquiry officer by the Disciplinary Authority vide order dated 11.11.1993 to enquire into the charges leveled against the respondent in the disciplinary proceedings. During the course of enquiry, the management witnesses clearly stated that the respondent was present at the place of incident. On the basis of the material produced on behalf of the management, the enquiry officer found the charges leveled against the respondent proved and accordingly the enquiry report was filed.

(C) The Disciplinary Authority after considering the material on record concurred with the findings recorded by the Inquiry Officer and after completing the legal formalities imposed the punishment of dismissal of the respondent from service w.e.f. 14.2.1997.

(D) The respondent raised the industrial dispute. Thus, the State Government made a Reference to the Principal Labour Court for adjudication of the dispute and the same came to be registered as Reference No.6 of 1999. On the basis of pleadings, the Labour Court framed various issues for its consideration, *inter-alia,* as to whether the departmental enquiry conducted against the respondent was fair and proper.

(E) The Labour Court by its order dated 20.11.2004 arrived at the conclusion that the departmental enquiry conducted against the respondent was fair and proper. By its award dated 17.2.2005, the Court answered the reference in negative holding that there was sufficient evidence before the enquiry officer to hold that the respondent with his colluders had actively involved in breaking and opening the door of the cash room and drilling the cash chest

to commit the theft. The respondent was caught red handed and hence the charges were rightly held to be proved.

(F) Being aggrieved by the said award of the Labour Court, the respondent filed W.P. No.14354 of 2007(LK) before the High Court which stood allowed by the learned Single Judge vide order dated 27.1.2009 to the extent that the order of the dismissal was modified into an order of termination. The management was directed to pay the terminal benefits since the respondent had retired from service. However, the learned Single Judge arrived at the conclusion that the respondent was not entitled to any wages or other monetary benefits till the date of his termination.

(G) Being aggrieved by the said order of the learned Single Judge, the respondent filed a Writ Appeal No.702 of 2009 (L-KSRTC) under Section 4 of the Karnataka High Court Act. The Division Bench vide impugned judgment and order dated 27.10.2009 allowed the appeal filed by the respondent quashing the award of the Labour Court and reversing the order of the learned Single Judge. The Division Bench proceeded to hold that the respondent was entitled to be reinstated into service with all consequential benefits. However, since the respondent had retired from service, he was entitled to 50% of the backwages for the periods from 14.2.1997 (i.e. the date of dismissal) till the date of his retirement (i.e. 31.7.2007). He was also entitled to consequential benefits of retirement.

Hence, this appeal.

4. Mr. S.N. Bhat, learned counsel appearing for the

appellant has submitted that the Labour Court rejected the contention on behalf of the respondent-workman that he was entitled for re-instatement and all other consequential reliefs in view of the fact that he stood acquitted by the Criminal Court. However, the learned Single Judge as well as the Division Bench in appeal have accepted his contention and granted the reliefs. The standard of proof in domestic enquiry and criminal proceedings are different and mere acquittal by the Criminal Court does not entitle the delinquent for exonerating in the disciplinary proceedings. Thus, the appeal deserves to be allowed.

5. On the contrary, Mr. V.N. Raghupathy, learned counsel appearing for the respondent-workman has made all attempts to defend the judgments of the learned Single Judge as well as the Division Bench contending that as the workman has been acquitted in the criminal proceedings, the order of dismissal as a consequence of domestic enquiry deserves to be set aside. In the facts and circumstances of the case, no interference is warranted.

6. We have considered the rival submissions advanced on behalf of the parties and perused the record.

7. It is evident from the record that when the respondent-workman was facing disciplinary proceedings at the same time he had also faced the criminal trial for the offences punishable under Sections 457 , 381 read with Section 34 of the Indian Penal Code, 1860 (hereinafter called as 'IPC'). The Metropolitan Magistrate convicted the delinquent employee holding him guilty of the said charges and sentenced him with a simple imprisonment for a period of six months and a fine of Rs. 500/-. The respondent-workman filed appeal against the said order of conviction. However, the appeal was also dismissed by the Appellate Court vide judgment and order dated 5.4.1994. The delinquent employee along with other co-accused preferred Criminal Revision No. 299 of 1994 before the High Court which was allowed vide judgment and order

dated 9.7.1997. Thus, the High Court acquitted the said delinquent employee of all the charges leveled against him.

Thus, the question does arise as to whether in this backdrop the respondent-employee is entitled for the relief granted by the High Court.

DEPARTMENTAL ENQUIRY AND ACQUITTAL IN CRIMINAL CASE

8. The question of considering reinstatement after decision of acquittal or discharge by a competent criminal Court arises only and only if the dismissal from services was based on conviction by the criminal Court in view of the provisions of Article 311 (2) (b) of the Constitution of India, 1950, or analogous provisions in the statutory rules applicable in a case. In a case where enquiry has been held independently of the criminal proceedings, acquittal in a criminal Court is of no help. The law is otherwise. Even if a person stood acquitted by a criminal Court, domestic enquiry can be held, the reason being that the standard of proof required in a domestic enquiry and that in a criminal case are altogether different. In a criminal case, standard of proof required is beyond reasonable doubt while in a domestic enquiry it is the preponderance of probabilities that constitutes the test to be applied. In *Nelson Motis v. Union of India & Anr.,* AIR 1992 SC 1981**,** this Court held :

> "The nature and scope of a criminal case are very different from those of a departmental disciplinary proceeding and an order of acquittal, therefore, cannot conclude the departmental proceeding."

9. In *State of Karnataka & Anr. v. T. Venkataramanappa,* (1996) 6 SCC 455, this Court held that acquittal in a criminal case cannot be held to be a bar to hold departmental enquiry for the same misconduct for the reason that in a criminal trial, standard of proof is different as the case is to be proved beyond

reasonable doubt but in the departmental proceeding, such a strict proof of misconduct is not required.

10. In *State of Andhra Pradesh v. K. Allabaksh,* (2000) 10 SCC 177, while dismissing the appeal against acquittal by the High Court, this Court observed as under:–

> "That acquittal of the respondent shall not be construed as a clear exoneration of the respondent, for the allegations call for departmental proceedings, if not already initiated, against him."

11. While dealing with a similar issue, a three-Judges Bench of this Court in *Ajit Kumar Nag v. General Manager (PJ) Indian Oil Corporation Ltd.,* (2005) 7 SCC 764, held as under:–

> "In our judgment, the law is fairly well settled. Acquittal by a criminal Court would not debar an employer from exercising power in accordance with the Rules and Regulations in force. The two proceedings, criminal and departmental, are entirely different. They operate in different fields and have different objectives. Whereas the object of criminal trial is to inflict appropriate punishment on the offender, the purpose of enquiry proceedings is to deal with the delinquent departmentally and to impose penalty in accordance with the service rules. In a criminal trial, incriminating statement made by the accused in certain circumstances or before certain officers is totally inadmissible in evidence. Such strict rules of evidence and procedure would not apply to departmental proceedings. The degree of proof which is necessary to order a conviction is different from the degree of proof necessary to record the commission of delinquency. The rule relating to appreciation of evidence in the two proceedings is also not similar. In criminal law, burden of proof is on the prosecution and unless the prosecution is able to prove

> the guilt of the accused "beyond reasonable doubt", he cannot be convicted by a Court of law. In a departmental enquiry, on the other hand, penalty can be imposed on the delinquent officer on a finding recorded on the basis of "preponderance of probability."

12. The issue as to whether disciplinary proceedings can be held at the time when the delinquent employee is facing the criminal trial, has also been considered from time to time. In *State of Rajasthan v. B.K. Meena & Ors.,* AIR 1997 SC 13, this Court while dealing with the issue observed as under:–

> "It would be evident from the above decisions that each of them starts with the indisputable proposition that there is no legal bar for both proceedings to go on *simultaneously* and then say that in certain situations, it may not be 'desirable', 'advisable' or 'appropriate' to proceed with the disciplinary enquiry when a criminal case is pending on identical charges.....The only ground suggested in the above decisions as constituting a valid ground for staying the disciplinary proceedings is that 'the defence of the employee in the criminal case may not be prejudiced'. This ground has, however, been hedged in by providing further that this may be done in cases of grave nature involving questions of fact and law. In our respectful opinion, it means that not only the charges must be grave but that the case must involve complicated questions of law and fact. Moreover, *'advisability', 'desirability' or 'propriety', as the case may be, has to be determined in each case taking into consideration all the facts and circumstances of the case.*.....One of the contending considerations is that the disciplinary enquiry cannot be – and should not be – delayed unduly. So far as criminal cases are concerned, it is well known that they drag on endlessly where high officials or persons holding high public offices are involved. They get bogged down on one or the other ground. They hardly ever reach a prompt conclusion.....If a criminal

case is unduly delayed that may itself be a good ground for going ahead with the disciplinary enquiry even where the disciplinary proceedings are held over at an earlier stage. The interests of administration and good government demand that these proceedings are concluded expeditiously. It must be remembered that interests of administration demand that undesirable elements are thrown out and any charge of misdemeanour is enquired into promptly. **The disciplinary proceedings are meant not really to punish the guilty but to keep the administrative machinery unsullied by getting rid of bad elements**. The interest of delinquent officer also lies in a prompt conclusion of the disciplinary proceedings. If he is not guilty of the charges, his honour should be vindicated at the earliest possible moment and if he is guilty, he should be dealt with promptly according to law. It is not also in the interest of administration that persons accused of serious misdemeanour should be continued in office indefinitely, i.e., for long periods awaiting the result of criminal proceedings. It is not in the interest of administration. It only serves the interest of the guilty and dishonest....." (Emphasis added)

13. In *Capt. M. Paul Anthony v. Bharat Gold Mines Ltd.,* AIR 1999 SC 1416, this Court held that there can be no bar for continuing both the proceedings simultaneously. The Court placed reliance upon a large number of its earlier judgments, including *Delhi Cloth and General Mills Ltd. v. Kushal Bhan,* AIR 1960 SC 806; *Tata Oil Mills Co. Ltd. v. The Workmen,* AIR 1965 SC 155; *Jang Bahadur Singh v. Baij Nath Tiwari,* AIR 1969 SC 30; *Kusheshwar Dubey v. M/s. Bharat Coking Coal Ltd. & Ors.,* AIR 1988 SC 2118; *Nelson Motis* (Supra); and *B.K. Meena* (Supra), and held that proceedings in a criminal case and departmental proceedings can go on simultaneously except where both the proceedings are based on the *same set of facts and the evidence in both the proceedings is common.* In departmental proceedings, factors

prevailing in the mind of the disciplinary authority may be many, such as **enforcement of discipline or to investigate level of integrity of delinquent or other staff.** The **standard of proof required in those proceedings is also different** from that required in a criminal case. While in departmental proceedings, the standard of proof is one of preponderance of probabilities, in a criminal case, the charge has to be proved by the prosecution beyond reasonable doubt. Where the charge against the delinquent employee is of a grave nature which involves complicated *questions of law and fact, it is desirable to stay the departmental proceedings till conclusion of the criminal case.* In case the criminal case does not proceed expeditiously, the departmental proceedings cannot be kept in abeyance for ever and may be resumed and proceeded with so as to conclude the same at an early date. The purpose is that if the employee is found not guilty his cause may be vindicated, and in case he is found guilty, administration may get rid of him at the earliest.

However, while deciding the case, taking into consideration the facts involved therein, the Court held:

"Since the facts and the evidence in both the proceedings, namely, the departmental proceedings and the criminal case were the same without there being any iota of difference, the distinction, which is usually drawn as between the departmental proceedings and the criminal case on the basis of approach and burden of proof, would not be applicable to the instant case."

14. In *State Bank of India & Ors. v. R.B. Sharma,* AIR 2004 SC 4144, same view has been reiterated observing that both proceedings can be held simultaneously, except where departmental proceedings in criminal case are based on same set of facts and evidence in both the proceedings is common. The Court observed as under:–

"The purpose of departmental inquiry and of prosecution

are to put a distinct aspect. Criminal prosecution is launched for an offence for violation of duty. The offender owes to the society, or for breach of which law has provided that the offender shall make satisfaction to the public. So crime is an act of commission in violation of law or of omission of a public duty. The departmental inquiry is to maintain discipline in the service and efficiency of public service."

15. While deciding the said case a very heavy reliance has been placed upon the earlier judgment of this Court in *Depot Manager, Andhra Pradesh State Road Transport Corporation v. Mohd Yousuf Miya & Ors.,* AIR 1997 SC 2232, wherein it has been held that both proceedings can be held simultaneously unless the gravity of the charges demand staying the disciplinary proceedings till the trial is concluded as complicated questions of fact and law are involved in that case.

16. A similar view has been reiterated by this Court in *Senior Superintendent of Post Offices v. A. Gopalan,* AIR 1999 SC 1514; *Kendriya Vidyalaya Sangathan & Ors. v. T. Srinivas,* AIR 2004 SC 4127; *Krishnakali Tea Estate v. Akhil Bhartiya Chah Mazdoor Sangh & Anr.,* (2004) 8 SCC 200; *Commissioner of Police Delhi v. Narendra Singh,* AIR 2006 SC 1800; *South Bengal State Transport Corporation v. Span Kumar Mitra & Ors.,* (2006) 2 SCC 584; and *Punjab Water Supply & Sewerage Board v. Ram Sajivan,* (2007) 9 SCC 86.

17. In *Union of India & Ors. v. Naman Singh Shekhawat,* (2008) 4 SCC 1, this Court held that departmental proceeding can be initiated after acquittal by the Criminal Court. However, the departmental proceeding should be initiated provided the department intended to adduce any evidence which could prove the charges against the delinquent officer. Therefore, initiation of proceeding should be bona fide and must be reasonable and fair.

18. In *Pandiyan Roadways Corpn. Ltd. v. N.*

Balakrishnan, (2007) 9 SCC 755, this Court re-considered the issue taking into account all earlier judgments and observed as under:

"There are evidently two lines of decisions of this Court operating in the field. One being the cases which would come within the purview of *Capt. M. Paul Anthony v. Bharat Gold Mines Ltd* (supra), and *G.M. Tank v. State of Gujarat,* (2006) 5 SCC C446. However, the second line of decisions show that an honourable acquittal in the criminal case itself may not be held to be determinative in respect of order of punishment meted out to the delinquent officer, inter alia, when: (i) the order of acquittal has not been passed on the same set of facts or same set of evidence; (ii) the effect of difference in the standard of proof in a criminal trial and disciplinary proceeding has not been considered (See: *Commr. of Police v. Narender Singh,* (supra) or; where the delinquent officer was charged with something more than the subject-matter of the criminal case and/or covered by a decision of the civil court (See: *G.M. Tank,* (supra), *Jasbir Singh v. Punjab & Sind Bank,* (2007) 1 SCC 566; and *Noida Entrepreneurs' Assn. v. Noida,* (2007) 10 SCC 385, para 18).....We may not be understood to have laid down a law that in all such circumstances the decision of the civil court or the criminal court would be binding on the disciplinary authorities as this Court in a large number of decisions points out that the same would depend upon other factors as well. (See: e.g. *Krishnakali Tea Estate (supra); and Manager, Reserve Bank of India v. S. Mani,* (2005) 5 SCC 100). . Each case is, therefore, required to be considered on its own facts."

(See also: *Ram Tawekya Sharma v. State of Bihar & Ors.,* (2008) 8 SCC 261; and *Roop Singh Negi v. Punjab National Bank & Ors.,* (2009) 2 SCC 570).

19. Thus, there can be no doubt regarding the settled legal

proposition that as the standard of proof in both the proceedings is quite different, and the termination is not based on mere conviction of an employee in a criminal case, the acquittal of the employee in criminal case cannot be the basis of taking away the effect of departmental proceedings. Nor can such an action of the department be termed as double jeopardy. The judgment of this Court in *Capt. M. Paul Anthony* (supra) does not lay down the law of universal application. Facts, charges and nature of evidence etc. involved in an individual case would determine as to whether decision of acquittal would have any bearing on the findings recorded in the domestic enquiry.

LOSS OF CONFIDENCE

20. Once the employer has lost the confidence in the employee and the *bona fide* loss of confidence is affirmed, the order of punishment must be considered to be immune from challenge, for the reason that discharging the office of trust and confidence requires absolute integrity, and in a case of loss of confidence, reinstatement cannot be directed. (Vide: *Air India Corporation Bombay v. V.A. Ravellow,* AIR 1972 SC 1343; *Francis Kalein & Co. Pvt. Ltd. v. Their Workmen,* AIR 1971 SC 2414; and *Bharat Heavy Electricals Ltd. v. M. Chandrashekhar Reddy & Ors.,* AIR 2005 SC 2769).

In *Kanhaiyalal Agrawal & Ors. v. Factory Manager, Gwaliar Sugar Co. Ltd.,* AIR 2001 SC 3645, this Court laid down the test for loss of confidence to find out as to whether there was bona fide loss of confidence in the employee, observing that, (i) the workman is holding the position of trust and confidence; (ii) by abusing such position, he commits act which results in forfeiting the same; and (iii) to continue him in service/establishment would be embarrassing and inconvenient to the employer, or would be detrimental to the discipline or security of the establishment. Loss of confidence cannot be subjective, based upon the mind of the management. Objective facts which would lead to a definite inference of apprehension

in the mind of the management, regarding trustworthiness or reliability of the employee, must be alleged and proved.

(See also: *Sudhir Vishnu Panvalkar v. Bank of India,* AIR 1997 SC 2249).

21. In *State Bank of India & Anr. v. Bela Bagchi & Ors.,* AIR 2005 SC 3272, this Court repelled the contention that even if by the misconduct of the employee the employer does not suffer any financial loss, he can be removed from service in a case of loss of confidence. While deciding the said case, reliance has been placed upon its earlier judgment in *Disciplinary Authority-cum-Regional Manager v. Nikunja Bihari Patnaik,* (1996) 9 SCC 69.

22. An employer is not bound to keep an employee in service with whom relations have reached the point of *complete loss of confidence*/faith between the two. (Vide: *Binny Ltd. v. Their Workmen & Anr.,* AIR 1972 SC 1975; *The Binny Ltd. v. Their Workmen,* AIR 1973 SC 1403; *Anil Kumar Chakraborty & Anr. v. M/s. Saraswatipur Tea Company Ltd. & Ors.,* AIR 1982 SC 1062; *Chandu Lal v. The Management of M/s. Pan American World Airways Inc.,* AIR 1985 SC 1128; *Kamal Kishore Lakshman v. Management of M/s. Pan American World Airways Inc. & Ors.,* AIR 1987 SC 229; and *M/s. Pearlite Liners Pvt. Ltd. v. Manorama Sirsi,* AIR 2004 SC 1373).

In *Indian Airlines Ltd. v. Prabha D. Kanan,* AIR 2007 SC 548, while dealing with the similar issue this Court held that "loss of confidence cannot be subjective but there must be objective facts which would lead to a definite inference of apprehension in the mind of the employer regarding trustworthiness of the employee and which must be alleged and proved."

In case of theft, the quantum of theft is not important and what is important is the loss of confidence of employer in

employee. (Vide: *A.P. SRTC v. Raghuda Shiva Sankar Prasad,* AIR 2007 SC 152).

23. The instant case requires to be examined in the light of the aforesaid settled legal proposition and keeping in view that judicial review is concerned primarily with the decision making process and not the decision itself. More so, it is a settled legal proposition that in a case of misconduct of grave nature like corruption, theft, no punishment other than the dismissal may be appropriate. (Vide: *Pandiyan Roadways Corpn. Ltd.* (supra); and *U.P. State Road Transport Corporation v. Suresh Chand Sharma,* (2010) 6 SCC 555).

24. The domestic enquiry found the delinquent employee guilty of all the charges. The enquiry report was accepted by the Disciplinary Authority and there is no grievance on behalf of the respondent-workman that statutory provisions/principles of natural justice have not been observed while conducting the enquiry. The Disciplinary Authority imposed the punishment of dismissal from service which cannot be held to be disproportionate or non-commensurate to the delinquency. The Labour Court after reconsidering the whole case came to the conclusion that the enquiry has been conducted strictly in accordance with law in a fair manner and charges have rightly been proved against the delinquent employee. However, considering the difference in the standard of proof required in domestic enquiry, vis-à-vis that applicable to a criminal case, the Labour Court repelled the argument of respondent-workman that once he stood acquitted he was entitled for all reliefs including re-instatement and back wages. The learned Single Judge as well as the Division Bench had simply decided the case taking into consideration the acquittal of delinquent employee and nothing else.

25. In view of the aforesaid settled legal propositions that there is no finding by the High Court that the charges leveled in the domestic enquiry had been the same which were in the criminal trial; the witnesses had been the same; there were no

additional or extra witnesses; and without considering the gravity of the charge, we are of the view that the award of the Labour Court did not warrant any interference.

Be that as it may, the learned Single Judge had granted relief to the delinquent employee which was not challenged by the present appellant by filing writ appeal. Therefore, the delinquent employee is entitled for the said relief.

26. In view of the above, we dispose of the appeal holding that the delinquent employee shall be entitled only to the relief granted by the writ court and the judgment and order of the court in writ appeal is set aside. The benefit of the judgment of the learned Single Judge may be made available to the delinquent employee within a period of 4 months from the date of production of the certified copy of the order before the appellant. There shall be no order as to costs.

D.G. Appeal disposed of.

RAGHBIR SINGH SEHRAWAT
v.
STATE OF HARYANA AND OTHERS
(Civil Appeal Nos. 10080-10081 of 2011)

NOVEMBER 23, 2011

[G.S. SINGHVI AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Land Acquisition Act, 1894:

ss. 4(1), 6(1), 5A(2) and 9 – Acquisition of agricultural land – Issuance of notification and declaration u/ss. 4(1) and 6(1) – Passing of award by the Land Acquisition Collector – Writ petition by the appellant-land owner challenging the acquisition of land – On the ground of non-publication of Notifications; not given opportunity of hearing by the Land Acquisition Collector; not served notice as per the mandate; and that the possession of the land was still with him and the paper possession taken by the respondents was inconsequential – Writ petition dismissed by the High Court – On appeal, held: No evidence to show that actual possession of the land on which the crop was standing had been taken after giving notice to the appellant nor was he present at the site when the possession of the acquired land was delivered to the State Industrial Infrastructure Development Corporation – Exercise undertaken by the respondents showing delivery of possession was farce and inconsequential – Possession of the acquired land had not been taken from the appellant on the day on which the award was passed – Crops were standing on several parcels of land including the appellant's land and possession as such could not have been taken without giving notice to the landowners – Also it was not possible to give notice to large number of persons on the same day and take actual possession of land comprised in various survey numbers – Thus, the record

prepared by the revenue authorities showing delivery of possession of the acquired land to the Development Corporation has no legal sanctity – High Court erred in dismissing the writ petition on the specious ground that possession of the acquired land had been taken and the same vested in the State Government in terms of s.16 – More so, the appellant was not given opportunity of hearing as per the mandate of s.5A(2) – Thus, the acquisition of appellant's land is illegal and is quashed – State directed to pay appellant cost of Rs. 2,50,000/- – Costs.

Land acquisition – Approach of the State Government – State and its instrumentalities resorting to massive acquisition of agricultural land in the name of public purpose, without complying with the mandate of the statute – Justification of – Held: It is wholly unjust, arbitrary and unreasonable to deprive such persons of their houses/land/industry by way of acquisition of land in the name of development of infrastructure or industrialization – Before acquiring private land the State and/or its agencies/instrumentalities should, as far as possible, use land belonging to the State for the specified public purposes – If the acquisition of private land becomes absolutely necessary, then the authorities must strictly comply with the relevant statutory provisions and the rules of natural justice.

Appellant purchased certain land and is cultivating the same. The State Government issued a Notification under Section 4(1) of the Land Acquisition Act proposing to acquire the land for industrial development. The appellant filed an objection and pleaded that his land may not be acquired because it was an agricultural land and was the only source of income. The Land Acquisition Collector heard the objectors and made recommendations for acquisition of some parcels of land and for release of some parcels of land specified in the Notification. Thereafter, the declaration was issued under

Section 6(1) of the Act, notifying acquisition of lands. The Land Acquisition Collector passed an award on 28.11.2008. The appellant filed a writ petition challenging the acquisition of his land. He contended that the Notifications issued under Section 4(1) and 6(1) of the Act were not duly published; that he was not given opportunity of hearing by the Land Acquisition Collector; that notice had not been served upon him as per the mandate; and that the possession of the land was still with him and the paper possession taken by the respondents was inconsequential. The Division Bench of the High Court dismissed the writ petition. The review petition filed by the appellant was also dismissed. Therefore, the appellant filed the instant appeals.

Allowing the appeals, the Court

HELD: 1.1. In the writ petition filed by the appellant, he categorically averred that physical possession of the acquired land was with him and he has been cultivating the same. This assertion finds support from the entries contained in Girdawari/Record of cultivation (years 2001 to 2010). A reading of these entries shows that during those years crops of wheat, paddy and chari were grown by the appellant and the date on which possession of the acquired land is said to have been taken and delivered to Haryana State Industrial Infrastructure Development Corporation (HSIIDC), paddy crop was standing on 5 Kanals 2 Marlas of land. The respondents did not question the genuineness and correctness of the entries contained in the Girdawaris. Therefore, there is no reason to disbelieve or discard the same. That apart, it is neither the pleaded case of the respondents nor any evidence was produced before this Court to show that the appellant had unauthorisedly taken possession of the acquired land after 28.11.2008 as also that the appellant had been given

notice that possession of the acquired land would be taken on 28.11.2008 and he should remain present at the site. Therefore, Rojnamcha Vakyati prepared by SK and three Patwaris showing delivery of possession to Senior Manager (IA), HSIIDC, which is a self serving document, cannot be made basis for recording a finding that possession of the acquired land had been taken by the concerned revenue authorities. The respondents did not produce any other evidence to show that actual possession of the land, on which crop was standing, had been taken after giving notice to the appellant or that he was present at the site when possession of the acquired land was delivered to the Senior Manager of HSIIDC. It is not even the case of the respondents that any independent witness was present at the time of taking possession of the acquired land. The Land Acquisition Collector and his subordinates may claim credit of having acted swiftly inasmuch as immediately after pronouncement of the award, possession of the acquired land of village 'J' is said to have taken from the landowners and handed over to the officer of HSIIDC but keeping in view the fact that crop was standing on the land, the exercise undertaken by the respondents showing delivery of possession cannot but be treated as farce and inconsequential. If the High Court had summoned the relevant records and scrutinized the same, it would not have summarily dismissed the writ petition on the premise that possession of the acquired land had been taken and the same vested in the State Government. [Para 16]

1.2. Possession of the acquired land had not been taken from the appellant on 28.11.2008, i.e. the day on which the award was declared by the Land Acquisition Collector because crops were standing on several parcels of land including the appellant's land and

possession thereof could not have been taken without giving notice to the landowners. That apart, it was humanly impossible to give notice to large number of persons on the same day and take actual possession of land comprised in various survey numbers (total measuring 214 Acres 5 Kanals and 2 Marlas). The record prepared by the revenue authorities showing delivery of possession of the acquired land to HSIIDC has no legal sanctity and the High Court committed serious error by dismissing the writ petition on the specious ground that possession of the acquired land had been taken and the same vested in the State Government in terms of Section 16 of the Act. [Paras 19 and 20]

Balwant Narayan Bhagde v. M. D. Bhagwat **(1976) 1 SCC 700: 1975 (0) Suppl. SCR 250;** *Banda Development Authority, Banda v. Moti Lal Agarwal and Ors.* **(2011) 5 SCC 394;** *Balmokand Khatri Educational and Industrial Trust v. State of Punjab* **(1996) 4 SCC 212: 1996 (2) SCR 643;** *P. K. Kalburqi v. State of Karnataka* **(2005) 12 SCC 489;** *NTPC Ltd. v Mahesh Dutta* **(2009) 8 SCC 339;** *Sita Ram Bhandar Society v. Govt. of NCT of Delhi* **(2009) 10 SCC 501: 2009 (14) SCR 507;** *Municipal Corporation of Greater Bombay v. Industrial Development and Investment Company (P) Limited* **(1996) 11 SCC 501: 1996 (5) Suppl. SCR 551;** *Star Wire (India) Ltd. v. State of Haryana* **(1996) 11 SCC 698 :1996 (9) Suppl. SCR 158;** *C. Padma v. Deputy Secretary to the Government of Tamil Nadu* **(1997) 2 SCC 627: 1996 (9) Suppl. SCR 158;** *Municipal Council, Ahmednagar v. Shah Hyder Beig* **(2000) 2 SCC 48: 1999 (5) Suppl. SCR 197;** *Swaika Properties (P) Ltd. v. State of Rajasthan* **(2008) 4 SCC 695: 2008 (2) SCR 521;** *NTPC Limited v. Mahesh Dutta* **(2009) 8 SCC 339 – referred to.**

1.3. A careful scrutiny of record reveals that the Land Acquisition Collector had fixed 29.10.2006 as the date for hearing the objections. He issued notices dated 2.11.2006

to inform the objectors that hearing would take place on 29.11.2006 at 11 a.m. in P.W.D. Rest House and asked them to appear either in person or through their agent. The notices were delivered to some of the landowners, who acknowledged the receipt thereof. However, the notices issued to the appellant and his wife were not served upon them. This is evident from the fact that other objectors had acknowledged the receipt of notices by putting their signatures, the notices allegedly served upon the appellant and his wife do not bear their signatures and no explanation has been offered by the respondents about this omission. The Land Acquisition Collector proceeded to decide the objections by assuming that the notice has been delivered to all the objectors. Someone in the office of Land Acquisition Collector forged the appellant's signature to show his presence in P.W.D. Rest House on 29.11.2006. A bare comparison of the signatures appearing against the appellant's name at serial No.90 (page 184 of the paper book) and those appearing on the vakalatnama and affidavit filed in support of the special leave petitions shows that there is no similarity in the two signatures. In the list, appended with Annexure R-3, the appellant's wife was shown as widow of RS'. It is impossible to believe that a woman who knows how to sign a document would put signatures against her name showing her as a widow despite the fact that her husband is alive. When the court pointed out to the counsel for the respondents that the signatures appearing against serial No. 90 did not tally with the signatures of the appellant on the vakalatnama and the affidavit filed in support of special leave petitions, the counsel expressed his inability to offer any explanation. He also expressed helplessness in defending the description of the appellant's wife as widow of 'RS'. [Para 22]

Munshi Singh v. Union of India **(1973) 2 SCC 337: 1973**

(1) SCR 973; *State of Punjab v. Gurdial Singh* **(1980) 2 SCC 471: 1980 (1) SCR 1071;** *Shyam Nandan Prasad v. State of Bihar* **(1993) 4 SCC 255: 1993 (1) Suppl. SCR 533;** *Union of India v. Mukesh Hans* **(2004) 8 SCC 14;** *Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai* **(2005) 7 SCC 627: 2005 (3) Suppl. SCR 388 – referred to.**

1.4. The rules of natural justice have been ingrained in the scheme of Section 5A of the Land Acquisition Act, 1894 with a view to ensure that before any person is deprived of his land by way of compulsory acquisition, he must get an opportunity to oppose the decision of the State Government and/or its agencies/instrumentalities to acquire the particular parcel of land. At the hearing, the objector can make an effort to convince the Land Acquisition Collector to make recommendation against the acquisition of his land. He can also point out that land proposed to be acquired is not suitable for the purpose specified in the Notification issued under Section 4(1). Not only this, he can produce evidence to show that another piece of land is available and the same can be utilized for execution of the particular project or scheme. Though, it is neither possible nor desirable to make a list of the grounds on which the landowner can persuade the Collector to make recommendations against the proposed acquisition of land, but what is important is that the Collector should give a fair opportunity of hearing to the objector and objectively consider his plea against the acquisition of land. Only thereafter, he should make recommendations supported by brief reasons as to why the particular piece of land should or should not be acquired and whether or not the plea put forward by the objector merits acceptance. The recommendations made by the Collector must reflect objective application of mind to the objections filed by the landowners and other interested persons. [Paras 23 and 25]

1.5. It if difficult, if not impossible, to appreciate as to why the State and its instrumentalities resort to massive acquisition of land and that too without complying with the mandate of the statute. The National Commission of Farmers have noted that the acquisition of agricultural land in the name of planned development or industrial growth would seriously affect the availability of food in future. After independence, the administrative apparatus of the State has not spent enough investment in the rural areas and those who have been doing agriculture have not been educated and empowered to adopt alternative sources of livelihood. If land of such persons is acquired, not only the current but the future generations are ruined and this is one of the reasons why the farmers who are deprived of their holdings commit suicide. It also appears that the concerned authorities are totally unmindful of the plight of those sections of the society, who are deprived of their only asset like small house, small industrial unit etc. They do not realise that having one's own house is a lifetime dream of majority of population of this country. Economically affluent class of society can easily afford to have one or more houses at any place or locality in the country but other sections of the society find it extremely difficult to purchase land and construct house. Majority of people spend their lifetime savings for building a small house so that their families may be able to live with a semblance of dignity. Therefore, it is wholly unjust, arbitrary and unreasonable to deprive such persons of their houses by way of the acquisition of land in the name of development of infrastructure or industrialisation. Similarly, some people set up small industrial unit after seeking permission from the competent authority. They do so with the hope of generating additional income for their family. If the land on which small units are established is acquired, their hopes are shattered. Therefore, before acquiring private land the State and/or

its agencies/instrumentalities should, as far as possible, use land belonging to the State for the specified public purposes. If the acquisition of private land becomes absolutely necessary, then too, the concerned authorities must strictly comply with the relevant statutory provisions and the rules of natural justice. [Para 26]

1.6. The impugned orders are set aside. The writ petition filed by the appellant is allowed and the acquisition of his land is declared illegal and quashed. The appellant would get cost of Rs. 2,50,000/- from the respondents. [Para 27]

Case Law Reference:

1996 (5) Suppl. SCR 551	**Referred to.**	**Para 11**
1996 (9) Suppl. SCR 158	**Referred to.**	**Para 11**
1996 (9) Suppl. SCR 158	**Referred to.**	**Para 11**
1999 (5) Suppl. SCR 197	**Referred to.**	**Para 11**
2008 (2) SCR 521	**Referred to.**	**Para 11**
(2009) 8 SCC 339	**Referred to.**	**Para 12**
1975 (0) Suppl. SCR 250	**Referred to.**	**Para 17**
(2011) 5 SCC 394	**Referred to.**	**Para 18**
1996 (2) SCR 643	**Referred to.**	**Para 18**
(2005) 12 SCC 489	**Referred to.**	**Para 18**
2009 (14) SCR 507	**Referred to.**	**Para 18**
1973 (1) SCR 973	**Referred to.**	**Para 23**
1980 (1) SCR 1071	**Referred to.**	**Para 23**
1993 (1) Suppl. SCR 533	**Referred to.**	**Para 23**
(2004) 8 SCC 14	**Referred to.**	**Para 24**
2005 (3) Suppl. SCR 388	**Referred to.**	**Para 24**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 10080-10081 of 2011.

From the Judgment & Order dated 17.5.2010 of the High Court of Punjab & Haryana at Chandigarh in Civil Writ Petition No. 8441 of 2009 along with final order dated 19.11.2010 in Review Application No. 321 of 2010 in Civil Writ Petition No. 8441 of 2009.

Neeraj Kr. Jain, Amit Singh, Dr. Kailash Chand for the Appellant.

Ravindra Bana for the Respondent.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Delay condoned.

2. Leave granted.

3. More than 16 decades ago, John Stuart Mill wrote: “land differs from other elements of production, labour and capital in not being susceptible to infinite increase. Its extent is limited and the extent of the more productive kinds of it more limited still. It is also evident that the quantity of produce capable of being raised on any given piece of land is not indefinite. These limited quantities of land, and limited productiveness of it, are the real limits to the increase of production”.

4. In 1947, the first Prime Minister of India Pt. Jawahar Lal Nehru said “everything else can wait, but not agriculture”. In its fifth and final report, the National Commission on Farmers headed by Dr. M.S. Swaminathan observed that prime farmland must be conserved for agriculture and should not be diverted for non-agricultural purposes, else it would seriously affect

availability of food in the country where 60% population still depends on agriculture and people living below poverty line are finding it difficult to survive.

5. Unfortunately, these words of wisdom appear to have become irrelevant for the State apparatus which has used the Land Acquisition Act, 1894 (for short, 'the Act') in last two decades for massive acquisition of the agricultural land in different parts of the country, which has not only adversely impacted the farmers, but also generated huge litigation adjudication consumes substantial time of the Courts. These appeals filed against orders dated 17.5.2010 and 19.11.2010 of the Division Bench of the Punjab and Haryana High Court is one of many such cases which the landowners are compelled to file with the hope that by Court's intervention they will be able to save their land.

6. The appellant purchased 8 Kanals 4 Marlas land in village Jatheri, District Sonepat in 1984 and is cultivating the same. He claims to have constructed a boundary wall and is growing different crops. His land is surrounded by agricultural fields, factories and residential houses. In the south of his land, there is a canal and a school.

7. By Notification dated 22.6.2006 issued under Section 4(1) of the Act, the Government of Haryana proposed the acquisition of 3813 Kanals 17 Marlas (476 Acres 5 Kanals 17 Marlas) land situated at villages Badhmalik, Badkhalsa, Jatheri, Liwan, Pritampura and Rai, Tehsil and District Sonepat for the development of Industrial Sector 38, Sonepat. The appellant filed objections under Section 5A(1) and pleaded that his land may not be acquired because the same was being used for agricultural purposes and was the only source of income for his family. The other landowners also submitted their respective objections. District Revenue Officer-cum-Land Acquisition Collector, Sonepat (for short, 'the Land Acquisition Collector') is said to have heard the objectors on 29.10.2006 and made

recommendations for the acquisition of some parcels of land and for release of some other parcels of land specified in Notification dated 22.6.2006. Thereafter, the State Government issued declaration under Section 6 (1), which was notified on 20.6.2007 for the acquisition of 216 Acres 7 Kanals and 11 Marlas land. As a sequel to this, the Land Acquisition Collector passed award dated 28.11.2008.

8. The appellant challenged the acquisition of his land in Writ Petition No.8441 of 2009 on several grounds including the following:

(i) that the notification issued under Section 4(1) had not been published as per the requirement of the statute,

(ii) that he was not given opportunity of hearing in terms of Section 5A(2),

(iii) that land of large number of persons had been excluded from acquisition at the stage of Section 6 declaration but his land was not released and, in this manner, he had been discriminated,

(iv) that there was no justification to acquire his land, which was the only source of livelihood for him and his family,

(v) that he was not served with notice in terms of Section 9 (3), and

(vi) that the declaration issued under Section 6(1) was not published as per the requirement of Section 6(3).

9. In the written statement filed on behalf of the respondents, it was averred that the notifications issued under Sections 4(1) and 6(1) were duly published; that the appellant was given opportunity of personal hearing and that after issue

of declaration under Section 6(1), the Land Acquisition Collector passed the award. It was further averred that possession of the acquired land had been taken and delivered to Haryana State Industrial Infrastructure Development Corporation (HSIIDC) on 28.11.2008.

10. The appellant filed rejoinder affidavit and reiterated that the notifications issued under Sections 4(1) and 6(1) had not been duly published; that he was not given opportunity of hearing by the Land Acquisition Collector; that notice had not been served upon him as per the mandate of Section 9(3). He also pleaded that possession of land was still with him and the paper possession taken by the respondents was inconsequential.

11. The Division Bench of the High Court did not examine the grounds on which the appellant challenged the acquisition of his land and dismissed the writ petition by relying upon the judgments of this Court in *Municipal Corporation of Greater Bombay v. Industrial Development and Investment Company (P) Limited* (1996) 11 SCC 501, *Star Wire (India) Ltd. v. State of Haryana* (1996) 11 SCC 698, *C. Padma v. Deputy Secretary to the Government of Tamil Nadu* (1997) 2 SCC 627, *Municipal Council, Ahmednagar v. Shah Hyder Beig* (2000) 2 SCC 48 and *Swaika Properties (P) Ltd. v. State of Rajasthan* (2008) 4 SCC 695, wherein it has been held that once the award is passed and possession taken, the acquired land will be deemed to have vested in the Government and the High Court cannot entertain the writ petition filed for quashing the acquisition proceedings.

12. The appellant challenged the order of the High Court in SLP(C) No.26631 of 2010 but withdrew the same with liberty to seek review of the impugned order. Thereafter, he filed Review Application No.321 of 2010. He relied upon the judgment of this Court in NTPC Limited v. Mahesh Dutta (2009) 8 SCC 339 and pleaded that possession of the acquired land

cannot be treated to have been taken because the procedure laid down in Order XXI Rule 35 of the Code of Civil Procedure had not been followed. He also pleaded that paper possession taken by the respondents does not have any sanctity in the eye of law and physical possession of land was still with him. The Division Bench rejected the review application by observing that the order dismissing the writ petition does not suffer from any error apparent. However, the date of filing the writ petition mentioned in paragraph (1) of order dated 17.5.2010 was corrected from 27.3.2010 to 27.3.2009.

13. Shri Neeraj Jain, learned senior counsel for the appellant argued that the view taken by the High Court on the issue of maintainability of the writ petition is clearly erroneous and the impugned orders are liable to be set aside because possession taken by the respondents was only on papers and the same did not result in vesting of land in the State Government. Learned senior counsel further argued that the acquisition of the appellant's land is liable to be quashed because the Land Acquisition Collector had made recommendations under Section 5A(2) without giving him opportunity of hearing. He submitted that the official to whom the Land Acquisition Collector had entrusted the task of serving the notice had not performed his duty and submitted false report showing delivery of notice to the appellant and his wife. Shri Jain referred to the typed and xerox copies of notices dated 2.11.2006 issued to S/Shri Madan Lal s/o. Shri Jagdish, Ram Singh s/o. Chhote Lal, Jai Bhagwan s/o. of Hoshiar Singh, Mukhtar Singh s/o. Lakhi Ram, Rajender Singh s/o. Hoshiar Singh, Mohinder Singh s/o. Swarup Singh, the appellant and his wife Smt. Moorti Devi and pointed out that while other addressees acknowledged the receipt of notices by putting their signatures, the notices shown as duly served upon the appellant and his wife do not contain their signatures acknowledging the receipt thereof. Learned senior counsel also invited our attention to Annexure R-3 filed with the counter affidavit of the respondents to show that the name of the

appellant's wife has been shown as Moorti Devi widow of Raghbir though he is very much alive. He then pointed out that the signatures appended against the appellant's name in the list of objectors, who are said to have appeared before the Land Acquisition Collector on 29.10.2006 are not that of the appellant and someone had forged the signatures to show his presence. Learned senior counsel submitted that notice under Section 9(3) was not served upon the appellant before passing of award dated 28.11.2008 and physical possession of the acquired land is still with him. In support of this argument, Shri Jain relied upon the entries contained in the copy of Girdawari/ Record of cultivation of village Jatheri, Tehsil and District Sonepat for the years 2001 to 2010, which have been placed on record as Annexure P-20. Learned senior counsel emphasized that the High Court failed to notice that the respondents had prepared false record showing delivery of possession of the acquired land to HSIIDC and this has caused serious prejudice to the appellant. In the end, Shri Jain argued that release of more than 50% of land proposed to be acquired is clearly indicative of total non-application of mind by the concerned functionaries of the State and the entire exercise undertaken by them for the acquisition of land is liable to be nullified on the ground of violation of the mandate of Sections 4, 5A, 6 and 9 of the Act and, in any case, there is no justification for uprooting persons like the appellant, whose livelihood is dependent on small parcels of land or who have constructed residential houses or have set up small industrial units by spending lifetime earnings.

14. Learned counsel for the respondents supported the impugned orders and argued that even though the appellant may not have been given opportunity of personal hearing by the Land Acquisition Collector, he cannot question the acquisition proceedings because possession of the acquired land has already been taken by the competent authority and handed over to HSIIDC. Learned counsel submitted that minor discrepancies in the list containing signatures of the objectors, who appeared

before the Land Acquisition Collector on 29.10.2006, cannot lead to an inference that the concerned officer had not given opportunity of personal hearing to the appellant and his wife. He further submitted that the Land Acquisition Collector had made recommendations after giving due opportunity of hearing to the objectors and the declaration under Section 6(1) was issued by the State Government after duly considering the recommendations of the Land Acquisition Collector and this is evinced from the fact that various parcels of land on which residential houses and factories were existing on the date of Section 4(1) notification were not included in the declaration issued under Section 6(1). Learned counsel invited our attention to Part Layout Plan of Sector 38 (Phase II), which has been placed on record as Annexure R-1 along with affidavit dated 12.8.2011 of Shri Yogesh Mohan Mehra, Senior Manager (IA), HSIIDC to show that the acquired land has already been utilised for development of industrial estate and plots have been allotted to entrepreneurs, who are desirous of setting up industries. He submitted that HSIIDC has taken up development of the acquired land at an estimated cost of rupees fifty eight crores and submitted that the acquisition of the appellant's land may not be quashed at this stage because 24 meter wide road has already been constructed through his land.

15. We have considered the respective submissions and carefully scrutinized the record.

16. Since the appellant has been non suited by the High Court only on the ground that possession of the acquired land had been taken by the concerned officers and the same will be deemed to have vested in the State Government free from all encumbrances, we think that it will be appropriate to first consider this facet of his challenge to the impugned orders. In the writ petition filed by him, the appellant categorically averred that physical possession of the acquired land was with him and he has been cultivating the same. This assertion finds support from the entries contained in Girdawari/Record of cultivation,

Book No.1, village Jatheri, Tehsil and District Sonepat (years 2001 to 2010). A reading of these entries shows that during those years crops of wheat, paddy and chari were grown by the appellant and at the relevant time, i.e. the date on which possession of the acquired land is said to have been taken and delivered to HSIIDC, paddy crop was standing on 5 Kanals 2 Marlas of land. The respondents have not questioned the genuineness and correctness of the entries contained in the Girdawaris. Therefore, there is no reason to disbelieve or discard the same. That apart, it is neither the pleaded case of the respondents nor any evidence has been produced before this Court to show that the appellant had unauthorisedly taken possession of the acquired land after 28.11.2008. It is also not the pleaded case of the respondents that the appellant had been given notice that possession of the acquired land would be taken on 28.11.2008 and he should remain present at the site. Therefore, Rojnamcha Vakyati prepared by Sadar Kanungo and three Patwaris showing delivery of possession to Shri Yogesh Mohan Mehra, Senior Manager (IA), HSIIDC, Rai, which is a self serving document, cannot be made basis for recording a finding that possession of the acquired land had been taken by the concerned revenue authorities. The respondents have not produced any other evidence to show that actual possession of the land, on which crop was standing, had been taken after giving notice to the appellant or that he was present at the site when possession of the acquired land was delivered to the Senior Manager of HSIIDC. Indeed, it is not even the case of the respondents that any independent witness was present at the time of taking possession of the acquired land. The Land Acquisition Collector and his subordinates may claim credit of having acted swiftly inasmuch as immediately after pronouncement of the award, possession of the acquired land of village Jatheri is said to have taken from the landowners and handed over to the officer of HSIIDC but keeping in view the fact that crop was standing on the land, the exercise undertaken by the respondents showing delivery of possession cannot but be treated as farce and inconsequential. We have no doubt that

if the High Court had summoned the relevant records and scrutinized the same, it would not have summarily dismissed the writ petition on the premise that possession of the acquired land had been taken and the same vested in the State Government.

17. The legality of the mode and manner of taking possession of the acquired land has been considered in a number of cases. In *Balwant Narayan Bhagde v. M. D. Bhagwat* (1976) 1 SCC 700, Untwalia, J. referred to provisions of Order 21 Rules 35, 36, 95 and 96 of the Code of Civil Procedure and opined that delivery of symbolic possession should be construed as delivery of actual possession of the right, title and interest of the judgment-debtor. His Lordship further observed that if the property is land over which there is no building or structure, then delivery of possession over the judgment-debtor's property becomes complete and effective against him the moment the delivery is effected by going upon the land. The learned Judge went on to say:

> "When a public notice is published at a convenient place or near the land to be taken stating that the Government intends to take possession of the land, then ordinarily and generally there should be no question of resisting or impeding the taking of possession. Delivery or giving of possession by the owner or the occupant of the land is not required. The Collector can enforce the surrender of the land to himself under Section 47 of the Act if impeded in taking possession. On publication of the notice under Section 9(1) claims to compensation for all interests in the land has to be made; be it the interest of the owner or of a person entitled to the occupation of the land. On the taking of possession of the land under Section 16 or 17(1) it vests absolutely in the Government free from all encumbrances. It is, therefore, clear that taking of possession within the meaning of Section 16 or 17(1) means taking of possession on the spot. It is neither a

possession on paper nor a 'symbolical' possession as generally understood in civil law. But the question is what is the mode of taking possession? The Act is silent on the point. Unless possession is taken by the written agreement of the party concerned the mode of taking possession obviously would be for the authority to go upon the land and to do some act which would indicate that the authority has taken possession of the land. It may be in the form of a declaration by beat of drum or otherwise or by hanging a written declaration on the spot that the authority has taken possession of the land. The presence of the owner or the occupant of the land to effectuate the taking of possession is not necessary. No further notice beyond that under Section 9(1) of the Act is required. When possession has been taken, the owner or the occupant of the land is dispossessed. Once possession has been taken the land vests in the Government."

Bhagwati, J. (as he then was) and Gupta, J., who constituted the majority did not agree with Untwalia, J. and observed as under :

"We think it is enough to state that when the Government proceeds to take possession of the land acquired by it under the Land Acquisition Act, 1894, it must take actual possession of the land, since all interests in the land are sought to be acquired by it. There can be no question of taking 'symbolical' possession in the sense understood by judicial decisions under the Code of Civil Procedure. Nor would possession merely on paper be enough. What the Act contemplates as a necessary condition of vesting of the land in the Government is the taking of actual possession of the land. How such possession may be taken would depend on the nature of the land. Such possession would have to be taken as the nature of the land admits of. There can be no hard-and-fast rule laying down what act would be sufficient to constitute taking of possession of land. We should not, therefore, be taken as

laying down an absolute and inviolable rule that merely going on the spot and making a declaration by beat of drum or otherwise would be sufficient to constitute taking of possession of land in every case. But here, in our opinion, since the land was lying fallow and there was no crop on it at the material time, the act of the Tahsildar in going on the spot and inspecting the land for the purpose of determining what part was waste and arable and should, therefore, be taken possession of and determining its extent, was sufficient to constitute taking of possession. It appears that the appellant was not present when this was done by the Tahsildar, but the presence of the owner or the occupant of the land is not necessary to effectuate the taking of possession. It is also not strictly necessary as a matter of legal requirement that notice should be given to the owner or the occupant of the land that possession would be taken at a particular time, though it may be desirable where possible, to give such notice before possession is taken by the authorities, as that would eliminate the possibility of any fraudulent or collusive transaction of taking of mere paper possession, without the occupant or the owner ever coming to know of it."

18. In *Banda Development Authority, Banda v. Moti Lal Agarwal and others* (2011) 5 SCC 394, the Court referred to the judgments in *Balwant Narayan Bhagde v. M. D. Bhagwat* (supra), *Balmokand Khatri Educational and Industrial Trust v. State of Punjab* (1996) 4 SCC 212, *P.K. Kalburqi v. State of Karnataka* (2005) 12 SCC 489, *NTPC Ltd. v. Mahesh Dutta* (supra), *Sita Ram Bhandar Society v. Govt. of NCT of Delhi* (2009) 10 SCC 501 and culled out the following propositions:

"(i) No hard-and-fast rule can be laid down as to what act would constitute taking of possession of the acquired land.

(*ii*) If the acquired land is vacant, the act of the State authority concerned to go to the spot and prepare a

panchnama will ordinarily be treated as sufficient to constitute taking of possession.

(*iii*) If crop is standing on the acquired land or building/structure exists, mere going on the spot by the authority concerned will, by itself, be not sufficient for taking possession. Ordinarily, in such cases, the authority concerned will have to give notice to the occupier of the building/structure or the person who has cultivated the land and take possession in the presence of independent witnesses and get their signatures on the panchnama. Of course, refusal of the owner of the land or building/structure may not lead to an inference that the possession of the acquired land has not been taken.

(*iv*) If the acquisition is of a large tract of land, it may not be possible for the acquiring/designated authority to take physical possession of each and every parcel of the land and it will be sufficient that symbolic possession is taken by preparing appropriate document in the presence of independent witnesses and getting their signatures on such document.

(*v*) If beneficiary of the acquisition is an agency/instrumentality of the State and 80% of the total compensation is deposited in terms of Section 17(3-A) and substantial portion of the acquired land has been utilised in furtherance of the particular public purpose, then the court may reasonably presume that possession of the acquired land has been taken."

19. If the appellant's case is examined in the light of the propositions culled out in Banda Development Authority, Banda v. Moti Lal Agarwal and others, we have no hesitation to hold that possession of the acquired land had not been taken from the appellant on 28.11.2008, i.e. the day on which the award was declared by the Land Acquisition Collector because crops were standing on several parcels of land including the

appellant's land and possession thereof could not have been taken without giving notice to the landowners. That apart, it was humanly impossible to give notice to large number of persons on the same day and take actual possession of land comprised in various survey numbers (total measuring 214 Acres 5 Kanals and 2 Marlas).

20. In view of the above discussion, we hold that the record prepared by the revenue authorities showing delivery of possession of the acquired land to HSIIDC has no legal sanctity and the High Court committed serious error by dismissing the writ petition on the specious ground that possession of the acquired land had been taken and the same vested in the State Government in terms of Section 16.

21. The judgments on which reliance has been placed in the impugned order are clearly distinguishable. In *Municipal Corporation of Greater Bombay v. Industrial Development and Investment Company (P) Limited* (supra), this Court reversed the judgment of the Bombay High Court which had quashed the acquisition of land under the Land Acquisition Act, 1894 read with the provisions of Maharashtra Regional and Town Planning Act, 1966. This Court noted that the respondent had approached the High Court after a gap of four years' and held:

> "It is thus well-settled law that when there is inordinate delay in filing the writ petition and when all steps taken in the acquisition proceedings have become final, the Court should be loath to quash the notifications. The High Court has, no doubt, discretionary powers under Article 226 of the Constitution to quash the notification under Section 4(1) and declaration under Section 6. But it should be exercised taking all relevant factors into pragmatic consideration. When the award was passed and possession was taken, the Court should not have exercised its power to quash the award which is a material factor to be taken into consideration before exercising the power under Article

226. The fact that no third party rights were created in the case is hardly a ground for interference. The Division Bench of the High Court was not right in interfering with the discretion exercised by the learned Single Judge dismissing the writ petition on the ground of laches."

Similar view was expressed in *C. Padma v. Deputy Secretary to the Government of Tamil Nadu* (supra), *Star Wire (India) Ltd. v. State of Haryana* (supra), *Municipal Council, Ahmednagar v. Shah Hyder Beig* (supra) and *Swaika Properties (P) Ltd. v. State of Rajasthan* (supra). In all the cases, challenge to the acquisition proceedings was negatived primarily on the ground of delay. An additional factor which influenced this Court was that physical possession of the acquired land had been taken by the concerned authorities. In none of these cases, the landowners appear to have questioned the legality of the mode adopted by the concerned authorities for taking possession of the acquired land. Therefore, these judgments cannot be relied upon for sustaining the High Court's negation of the appellant's challenge to the acquisition of his land.

22. The next issue which merits consideration is whether the acquisition of the appellant's land is vitiated due to violation of Section 5A(2) and the rules of natural justice. A careful scrutiny of record reveals that the Land Acquisition Collector had fixed 29.10.2006 as the date for hearing the objections. He issued notices dated 2.11.2006 to inform the objectors that hearing will take place on 29.11.2006 at 11 a.m. in P.W.D. Rest House, Rai and asked them to appear either in person or through their agent. The notices were delivered to some of the landowners, who acknowledged the receipt thereof. However, the notices issued to the appellant and his wife were not served upon them. This is evident from the fact that other objectors had acknowledged the receipt of notices by putting their signatures, the notices allegedly served upon the appellant and his wife do not bear their signatures and no explanation has been offered

by the respondents about this omission. The Land Acquisition Collector proceeded to decide the objections by assuming that the notice has been delivered to all the objectors. Not only this, someone in the office of Land Acquisition Collector forged the appellant's signature to show his presence in P.W.D. Rest House, Rai on 29.11.2006. A bare comparison of the signatures appearing against the appellant's name at serial No.90 (page 184 of the paper book) and those appearing on the vakalatnama and affidavit filed in support of the special leave petitions shows that there is no similarity in the two signatures. Not only this, in the list, appended with Annexure R-3, the appellant's wife has been shown as widow of Raghbir Singh. It is impossible to believe that a woman who knows how to sign a document would put signatures against her name showing her as a widow despite the fact that her husband is alive. When the Court pointed out to the learned counsel for the respondents that the signatures appearing against serial No. 90 at page 8 of Annexure R-3 (page 184 of the paper book) do not tally with the signatures of the appellant on the vakalatnama and the affidavit filed in support of special leave petitions, the learned counsel expressed his inability to offer any explanation. He also expressed helplessness in defending the description of the appellant's wife Smt. Moorti Devi as widow of Raghbir Singh.

23. From what we have stated above, it is clear that the appellant had not been given opportunity of hearing as per the mandate of Section 5A(2). The importance of Section 5A(2) was highlighted by this Court in *Munshi Singh v. Union of India* (1973) 2 SCC 337 in the following words:

"Sub-section (2) of Section 5-A makes it obligatory on the Collector to give an objector an opportunity of being heard. After hearing all objections and making further inquiry he is to make a report to the appropriate Government containing his recommendation on the objections. The decision of the appropriate Government on the objections

is then final. The declaration under Section 6 has to be made after the appropriate Government is satisfied, on a consideration of the report, if any, made by the Collector under Section 5-A(2). 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.

In *State of Punjab v. Gurdial Singh* (1980) 2 SCC 471, this Court observed:

"….it is fundamental that compulsory taking of a man's property is a serious matter and the smaller the man the more serious the matter. Hearing him before depriving him is both reasonable and pre-emptive of arbitrariness, and denial of this administrative fairness is constitutional anathema except for good reasons. Save in real urgency where public interest does not brook even the minimum time needed to give a hearing land acquisition authorities should not, having regard to Articles 14 (and 19), burke an enquiry under Section 17 of the Act. Here a slumbering process, pending for years and suddenly exciting itself into immediate forcible taking, makes a travesty of emergency power."

In *Shyam Nandan Prasad v. State of Bihar* (1993) 4 SCC 255, this Court reiterated that compliance with provisions of Section 5A is *sine qua non* for valid acquisition and observed as under:

"The decision of the Collector is supposedly final unless the appropriate Government chooses to interfere therein and cause affectation, suo motu or on the application of any person interested in the land. These requirements

obviously lead to the positive conclusion that the proceeding before the Collector is a blend of public and individual enquiry. The person interested, or known to be interested, in the land is to be served personally of the notification, giving him the opportunity of objecting to the acquisition and awakening him to such right. That the objection is to be in writing, is indicative of the fact that the enquiry into the objection is to focus his individual cause as well as public cause. That at the time of the enquiry, for which prior notice shall be essential, the objector has the right to appear in person or through pleader and substantiate his objection by evidence and argument."

24. The same view has been reiterated in *Union of India v. Mukesh Hans* (2004) 8 SCC 14, *Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai* (2005) 7 SCC 627, *Anand Singh v. State of U.P.* (supra) and *Radhy Shyam v. State of U. P.* (supra).

25. In this context, it is necessary to remember that the rules of natural justice have been ingrained in the scheme of Section 5A with a view to ensure that before any person is deprived of his land by way of compulsory acquisition, he must get an opportunity to oppose the decision of the State Government and/or its agencies/instrumentalities to acquire the particular parcel of land. At the hearing, the objector can make an effort to convince the Land Acquisition Collector to make recommendation against the acquisition of his land. He can also point out that land proposed to be acquired is not suitable for the purpose specified in the notification issued under Section 4(1). Not only this, he can produce evidence to show that another piece of land is available and the same can be utilized for execution of the particular project or scheme. Though, it is neither possible nor desirable to make a list of the grounds on which the landowner can persuade the Collector to make recommendations against the proposed acquisition of land, but

what is important is that the Collector should give a fair opportunity of hearing to the objector and objectively consider his plea against the acquisition of land. Only thereafter, he should make recommendations supported by brief reasons as to why the particular piece of land should or should not be acquired and whether or not the plea put forward by the objector merits acceptance. In other words, the recommendations made by the Collector must reflect objective application of mind to the objections filed by the landowners and other interested persons.

26. Before concluding, we deem it necessary to observe that in recent past, various State Governments and their functionaries have adopted very casual approach in dealing with matters relating to the acquisition of land in general and the rural areas in particular and in a large number of cases, the notifications issued under Sections 4(1) and 6(1) with or without the aid of Section 17 and the consequential actions have been nullified by the Courts on the ground of violation of the mandatory procedure and the rules of natural justice. The disposal of cases filed by the landowners and others take some time and the resultant delay has great adverse impact on implementation of the projects of public importance. Of course, the delay in deciding such cases may not be of much significance when the State and its agencies want to confer benefit upon private parties by acquiring land in the name of public purpose. It if difficult, if not impossible, to appreciate as to why the State and its instrumentalities resort to massive acquisition of land and that too without complying with the mandate of the statute. As noted by the National Commission on Farmers, the acquisition of agricultural land in the name of planned development or industrial growth would seriously affect the availability of food in future. After independence, the administrative apparatus of the State has not spent enough investment in the rural areas and those who have been doing agriculture have not been educated and empowered to adopt alternative sources of livelihood. If land of such persons is acquired, not only the current but the future generations are

ruined and this is one of the reasons why the farmers who are deprived of their holdings commit suicide. It also appears that the concerned authorities are totally unmindful of the plight of those sections of the society, who are deprived of their only asset like small house, small industrial unit etc. They do not realise that having one's own house is a lifetime dream of majority of population of this country. Economically affluent class of society can easily afford to have one or more houses at any place or locality in the country but other sections of the society find it extremely difficult to purchase land and construct house. Majority of people spend their lifetime savings for building a small house so that their families may be able to live with a semblance of dignity. Therefore, it is wholly unjust, arbitrary and unreasonable to deprive such persons of their houses by way of the acquisition of land in the name of development of infrastructure or industrialisation. Similarly, some people set up small industrial unit after seeking permission from the competent authority. They do so with the hope of generating additional income for their family. If the land on which small units are established is acquired, their hopes are shattered. Therefore, before acquiring private land the State and/or its agencies/instrumentalities should, as far as possible, use land belonging to the State for the specified public purposes. If the acquisition of private land becomes absolutely necessary, then too, the concerned authorities must strictly comply with the relevant statutory provisions and the rules of natural justice.

27. In the result, the appeals are allowed. The impugned orders are set aside. As a corollary to this, the writ petition filed by the appellant is allowed and the acquisition of his land is declared illegal and quashed. The appellant shall get cost of Rs.2,50,000/- from the respondents.

N.J. Appeals allowed.

RASIKLAL MANICKCHAND DHARIWAL & ANR.
v
M/S. M.S.S. FOOD PRODUCTS
(Civil Appeal No. 10112 of 2011)

NOVEMBER 25, 2011

[AFTAB ALAM AND R.M. LODHA, JJ.]

Code of the Civil Procedure, 1908:

Or. 18 r.15, 2, 2(1), (2), (3) and (3A), 7, 4, 5 and 6(1)(a); Or. 9 r. 7; Or. 20 r. 1 – Ex parte decree – Set aside in appeal – Challenge to – On facts, respondent-plaintiff filing suit for passing off action, declaration and injunction against appellants-defendants as also application for temporary injunction – Ad interim ex parte injunction granted in favour of plaintiff – Appeal by defendants – High Court dismissed the same and directed the trial court to conclude the trial of the suit expeditiously and finally dispose it of, within the stipulated period – In complete disregard of the said direction, the defendants filing application after application – Subsequently, due to non-appearance of defendants their right to cross examine the plaintiff's witness were closed and matter was fixed for pronouncement of judgment and on the said date none appeared and defendants were proceeded ex parte – Plaintiff closed its evidence, the trial court heard the arguments of the plaintiff ex-parte and fixed the matter for pronouncement of judgment – Defendants filing application for setting aside the said ex parte order – Meanwhile the presiding officer who heard the arguments got transferred and new Presiding officer assumed the charge – Trial court dismissing the application and decreed the suit against defendants – Appeal filed by defendants against the ex parte decree dismissed by the High Court – Appeal before Supreme Court – Case of defendants that judgment passed by Presiding Officer of trial court and upheld by High Court was

nullity as it was delivered by a Judge who never heard the matter; that the predecessor Judge fixed the date for pronouncement of judgment but she never delivered judgment – Held: Defendants, having lost their privilege of cross-examining the plaintiff's witnesses and of advancing oral arguments, forfeited their right to address the trial court on merits – Successor Judge can deliver the judgment without oral arguments where one party has already lost his right of making oral arguments and the other party does not insist on it – It cannot be said that the trial court violated the fundamental principle of law-one who hears must decide the case – Plaintiff closed his evidence and defendants failed to appear, the trial court did not commit any error in ordering the suit to proceed ex parte; hearing the arguments and closing the suit for pronouncement of judgment – Once the suit is closed for pronouncement of judgment, there is no question of further proceedings in the suit – Merely, because the defendants continued to make application after application and the trial court heard those applications, it cannot be said that such appearance by the defendants is covered by the expression "appeared on the day fixed for his appearance" occurring in Or. 9 r. 7 and thereby entitling them to address the court on the merits of the case – Or. 9 r. 7 has no application – It cannot be said that any prejudice was caused to the defendants if these witnesses did not enter the witness box – Defendants by their conduct and tactics disentitled themselves from any further indulgence by the trial court – Thus, the trial court did not act illegally or with material irregularity or irrationally or in an arbitrary manner in passing the orders closing the right of the defendants to cross-examine plaintiff's witnesses and fixing the matter for pronouncement of judgment.

Or. XVIII r.15 – Nature of – Held: Provision contained in r. 15 Or. XVIII is a special provision – It enables the successor Judge to proceed from the stage at which his predecessor left the suit – The idea behind this provision is to obviate re-

recording of the evidence or re-hearing of the suit where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit and to take the suit forward from the stage the predecessor Judge left the matter – Care is taken that in such event the progress that has already taken place in the hearing of the suit is not set at naught – Expression "from the stage at which his predecessor left it" is wide and comprehensive enough to take in its fold all situations and stages of the suit – It cannot be narrowed down by any exception – The principle that one who hears must decide the case, is not applicable to all situations in the hearing of the suit – Hearing of a suit does not mean oral arguments alone but it comprehends both production of evidence and arguments – Hearing of the suit begins when evidence in suit begins and was concluded by pronouncement of judgment.

Or. XVIII r. 2 – Statement and production of evidence – Purpose of – Held: Is to give an option to the parties to argue their case when the evidence is conducted – Parties themselves decide whether they would avail of this privilege and if they do not avail, they do so at their peril.

Or. XVIII r. 2(1) and (2) – Expressions "state his case", "produce his evidence" and "address the court generally on the whole case" occurring therein – Held: Said expressions have different meaning and connotation.

Or. IX r. 7 – Conclusion of hearing of the suit and the suit closed for judgment – Applicability of Or. IX r. 7 – Held: Is not applicable – Or. IX r. 7 pre-supposes the suit having been adjourned for hearing – Adjournment for the purposes of pronouncing judgment is no adjournment of the "hearing of the suit".

Or. IX r. 6 (1)(a) – After due service of summons, the defendant not appearing when the suit is called on for hearing – Effect of – Held: Order might be passed to hear the suit ex

parte – Said provision does not in any way impinge upon the power of the court to proceed for disposal of the suit in case both the parties or either of the parties fail to appear as provided in Or. IX.

Or. XVIII r. 4 – Recording of evidence – Purpose and objective of – Held: Is speedy trial of the case and to save precious time of the court – Examination-in-chief of a witness is now mandated to be made on affidavit with a copy thereof to be supplied to the opposite party – Cross-examination and re-examination of witness shall be taken either by the court or by Commissioner appointed by it – In a case in which appeal is allowed, r. 5 provides that the evidence of each witness shall be taken down in writing by or in the presence and superintendence of the Judge – There is no requirement in Or. XVIII r 5 that in appealable cases, the witness must enter the witness box for production of his affidavit and formally prove the affidavit – Such witness is required to enter the witness box in his cross-examination and, if necessary, re-examination.

Or. XXX r. 10 – Suit against person carrying on business in name other than his own – Held: Is an enabling provision – It provides that a person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name – As a necessary corollary, the said provision does not enable a person carrying on business in a name or style other than in his own name to sue in such name or style.

Or. XX r 1 – Matter fixed for pronouncement of judgment – Plea that plaintiff not arguing the matter as required by Or. XX r. 1 – Effect of, on the decision of the suit – Held: The plaintiffs had already advanced the arguments and the judgment was reserved and kept for pronouncement – Judgment could not be pronounced on that day and the matter, thereafter, was fixed on various dates on the diverse

applications made by the defendants – It cannot be said that the trial judge ought to have dismissed the suit.

Interlocutory applications – Contentions raised by the defendants not considered by the High Court – Challenge made to the orders passed by the trial court on the interlocutory applications before this Court and arguing that trial court erred in not adhering to the pre-trial procedures – Permissibility of – Held: Not permissible – The proper course available to the appellants was to bring to the notice of the High Court the aspect by filing a review application – Such course was never adopted.

Evidence – Secondary evidence – Trial court granting plaintiff to lead secondary evidence – Correctness of – Held: Trial court did not commit any error in permitting the plaintiff to lead secondary evidence when the original assignment deed was reportedly lost.

Administrative law – Doctrine of proportionality – Applicability of – To civil disputes' governed by the Code of Civil Procedure – Held: Is not necessary – Code is comprehensive and exhaustive in respect of the matters provided therein – Parties must abide by the procedure prescribed therein which is extremely rational, reasonable and elaborate – Where the Code is silent, the court acts according to justice, equity and good conscience – If the trial court commits illegality or irregularity in exercise of its judicial discretion, such order is always amenable to correction by a higher court in appeal or revision or by a High Court in its supervisory jurisdiction.

Respondent-plaintiff filed a suit against the appellants-defendants before the Additional District Judge for passing off action, declaration and injunction as also filed an application for temporary injunction. An ad interim ex parte injunction was granted in favour of the plaintiff. Thereafter, the same was made absolute till the

disposal of the suit. The defendant then filed an appeal. The High Court while dismissing the appeal directed the trial court to conclude the trial of the suit expeditiously and dispose it of within the stipulated period. Aggrieved, the defendants filed Special Leave Petition before this Court challenging the order of temporary injunction granted by the trial court and upheld in appeal by the High Court. During the course of proceedings in the suit many interlocutory applications were filed by the defendants and the plaintiff. This Court dismissed defendants' appeal, directing the trial court to comply with the direction of the High Court and complete the trial and disposal of the suit within six months from that date. However, the defendants continued to make application after application stalling the effort of the trial court in that direction. On February 28, 2005, the trial court rejected the defendants' applications and asked the advocate for the defendants to cross-examine plaintiff's witnesses. The advocate for the defendants stated that he had no authority to cross-examine plaintiff's witnesses; and he is not in position to do anything and the court may do whatever it wanted. The trial court closed the defendants' right to cross-examine the plaintiff's witnesses and fixed the matter for March 17, 2005. On that date, nobody appeared on behalf of the defendants and the matter was directed to proceed ex parte. The plaintiff closed the evidence and the trial court heard the arguments of the plaintiff and reserved the judgment and fixed the matter for March 28, 2005 for pronouncement of judgment. It appears that later on the advocate for the defendants appeared on that date and signed the order sheet. Thereafter, the arguments were heard. Though the matter was fixed for pronouncement of judgment on March 28, 2005, meanwhile, the defendants moved an application for setting aside the ex parte order. Even thereafter the defendants continued to make applications. The judgment was not pronounced on the date fixed or

immediately thereafter. The Presiding Officer who had heard the arguments got transferred and the new Presiding Officer assumed the charge. Even thereafter the defendants kept on making application after application and the same were dismissed. Thereafter, the trial court decreed the plaintiff's suit. The defendants filed an appeal against ex parte decree. The Division Bench of the High Court dismissed the appeal except the relief in respect of profits relating to damages. Therefore, the defendants filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1 Order XX Rule 1 of the Code of the Civil Procedure, 1908 provides that the court, after the case has been heard, shall pronounce the judgment in an open court either at once or on some future date after fixing a day for that purpose of which due notice shall be given to the parties or their pleaders. The hearing of a suit begins on production of evidence by the parties and suit gets culminated on pronouncement of the judgment. Under Order XVIII Rule 1 of the Code, the plaintiff has a right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by him the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin. On the day fixed for the hearing of the suit or any other day to which the hearing is adjourned, as per the provisions contained in Order XVIII Rule 2, party having the right to begin is required to state his case and produce his evidence in support of issues which he is bound to prove. Under Order XVIII, Rule 2 sub-rule (2), the other party shall then state his case and produce his evidence. Under sub-rule (3A) of Rule 2 of Order XVIII, the parties in suit may address oral arguments in a case and may also avail opportunity of filing written arguments

before conclusion of oral arguments. Rule 15 of Order XVIII provides for the contingency where the Judge before whom the hearing of the suit has begun is prevented by death, transfer or other cause from concluding the trial of a suit. This provision enables the successor Judge to proceed from the stage at which his predecessor left the suit. The provision contained in Rule 15 of Order XVIII of the Code is a special provision. The idea behind this provision is to obviate re-recording of the evidence or re-hearing of the suit where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit and to take the suit forward from the stage the predecessor Judge left the matter. The trial of a suit is a long drawn process and in the course of trial, the Judge may get transferred; he may retire or in an unfortunate event like death, he may not be in a position to conclude the trial. The Code has taken care by this provision that in such event the progress that has already taken place in the hearing of the suit is not set at naught. This provision comes into play in various situations such as where part of the evidence of a party has been recorded in a suit or where the evidence of the parties is closed and the suit is ripe for oral arguments or where the evidence of the parties has been recorded and the Judge has also heard the oral arguments of the parties and fixed the matter for pronouncement of judgment. The expression "from the stage at which his predecessor left it" is wide and comprehensive enough to take in its fold all situations and stages of the suit. No category or exception deserves to be carved out while giving full play to Rule 15 of Order XVIII of the Code which amply empowers the successor Judge to proceed with the suit from the stage at which his predecessor left it. [Para 25]

Gullapalli Nageswara Rao and Ors. v. Andhra Pradesh State Road Transport Corporation and Anr. **(1959) Supp 1**

SCR 319 – referred to.

1.2. The principle that one who hears must decide the case, with reference to hearing by a quasi judicial forum is not applicable to all situations in the hearing of the suit. "Hearing of the suit" as understood is not confined to oral hearing. Hearing of the suit begins when the evidence in the suit begins and is concluded by the pronouncement of judgment. The Code contemplates that at various stages of the hearing of the suit, the Judge may change or he may be prevented from concluding the trial and in that situation, the successor Judge must proceed in the suit from the stage the predecessor Judge has left it. [Para 27]

American Baptist Foreign Mission Society, by its Attorney Rev. W.L. Ferguson, Jaladi Ayyappaseti and Anr. **and** *Gurram Seshiah and Anr. v. Amalanadhuni Pattabhiramayya and Ors.* **48 Ind. Cas.859 – referred to.**

1.3. Order XVIII Rule 2 of the Code gives an option to the parties to argue their case when the evidence is conducted and it is for them to decide whether they would avail themselves of this privilege and if they do not, they do so at their peril. In the instant case, the right of the appellants-defendants to cross-examine respondent-plaintiff was closed on February 28, 2005. The matter was then fixed for March 17, 2005 for the remaining evidence of the respondent. On that day, none appeared for the defendants although the matter was called out twice. In that situation, the Judge ordered the suit to proceed ex parte against the defendants; heard the arguments of the plaintiff and closed the suit for pronouncement of judgment on March 28, 2005. In these facts, the defendants, having lost their privilege of cross-examining the respondent's witnesses and of advancing oral arguments, now cannot be permitted to raise any

grievance that the successor Judge who delivered the judgment did not given them an opportunity of oral arguments. [Para 30]

Harji Mal and Anr. v. Devi Ditta Mal and Ors. **AIR (1924) Lah 107 – approved.**

1.4. The expressions "state his case", "produce his evidence" and "address the court generally on the whole case" occurring in Order XVIII Rule 2, sub-rule (1) and (2) have different meaning and connotation. By use of the expression "state his case", the party before production of his evidence is accorded an opportunity to give general outlines of the case and also indicate generally the nature of evidence likely to be let in by him to prove his case. The general outline by a party before letting in evidence is intended to help the court in understanding the evidence likely to be followed by a party in support of his case. After case is stated by a party, the evidence is produced by him to prove his case. After evidence has been produced by all the parties, a right is given to the parties to make oral arguments and also submit written submissions, if they so desire. The hearing of a suit does not mean oral arguments alone but it comprehends both production of evidence and arguments. The scheme of the Code, as embodied, in Order XVIII Rule 2, particularly, sub-rules (1), (2), (3) and (3A) and Rule 15 enables the successor Judge to deliver the judgment without oral arguments where one party has already lost his right of making oral arguments and the other party does not insist on it. It cannot be said that the trial court violated the fundamental principle of law, i.e. "one who hears must decide the case". [Paras 31 and 32]

2.1. In the first place, once the hearing of the suit is concluded; and the suit is closed for judgment, Order IX Rule 7 of the Code has no application at all. The very

language of Order IX Rule 7 makes this clear. This provision pre-supposes the suit having been adjourned for hearing. The courts, number of times have said that adjournment for the purposes of pronouncing judgment is no adjournment of the "hearing of the suit". In the instant case, the trial court on March 17, 2005, did four things, namely, closed the evidence of the plaintiff as was requested by the plaintiff; ordered the suit to proceed ex parte as defendants failed to appear on that date; heard the arguments of the Advocate for the plaintiff; and kept the matter for pronouncement of judgment on March 28, 2005. Thus, Order IX Rule 7 of the Code has no application at all and that the application made by the defendants under this provision was rejected by the trial court. Secondly, once the suit is closed for pronouncement of judgment, there is no question of further proceedings in the suit. Merely, because the defendants continued to make application after application and the trial court heard those applications, it cannot be said that such appearance by the defendants is covered by the expression "appeared on the day fixed for his appearance" occurring in Order IX Rule 7 of the Code and thereby entitling them to address the court on the merits of the case. [Paras 34 and 35]

2.2. There is no quarrel to the legal position that if a party appears before the case is actually heard and if he has otherwise not disqualified himself from being heard, he has a right to be heard as also the general observations made in Kashirao Panduji that the provisions of Order 9 are never meant to be penal provisions, and it is only in clear cases of gross negligence and misconduct that a party should be deprived of the opportunity of having a satisfactory disposal of the case which evidently can only be done when both parties have full opportunity of placing their

case and their evidence before the Court but each case has to be seen in its own facts. In the instant case, the High Court in its order dated May 11, 2004 while dismissing the defendants' appeal directed the trial court to conclude the trial of the suit expeditiously and finally dispose of it, preferably within the stipulated period. Unfortunately, the suit could not be disposed of by the trial court as directed by the High Court. This Court while dismissing the defendants' appeal arising from the High Court's order, directed the trial court to comply with the direction of the High Court and complete the trial and dispose of the suit within six months from that date. In complete disregard of the said direction, the defendants continued to make application after application. Nine interlocutory applications were filed by the defendants after the hearing of the suit was expedited by the High Court and the order of this Court reiterating the expeditious disposal of the suit. After the direction was issued by this Court, the trial court endeavoured to dispose of the suit speedily but the defendants continued to make application after application. It was in this backdrop that on February 28, 2005, the trial court rejected the defendants' applications and asked the Advocate for the defendants to cross-examine plaintiff's witnesses. On that date, the Advocate for the defendants stated that he had no authority to cross-examine plaintiff's witnesses; and he is not in position to do anything and the court may do whatever it wants. Thus, the trial court closed the defendants' right to cross-examine the three witnesses of the plaintiff and as regards remaining witnesses of the plaintiff, the trial court fixed the matter for the next date on which nobody appeared on behalf of the defendants although the matter was called twice. It was then that the trial court directed the matter to be proceeded ex parte. The plaintiff closed its evidence and the trial court heard the arguments of the plaintiff ex-parte

and closed the suit for pronouncement of judgment. Thus, the defendants forfeited their right to address the trial court on merits. The course adopted by the trial court is permissible in law. In a situation like this where the plaintiff closed his evidence and the defendants failed to appear, Order XVII Rule 2 was clearly attracted, in view of Order XVII Rule 2, the trial court was required to proceed to dispose of the suit in one of the modes prescribed in Order IX. [Paras 37, 40]

Radhabai Bhaskar Sakharam v. Anant Pandurang Pandit and Anr. **AIR (1922) Bom 345;** *Kashirao Panduji v. Ramchandra Balaji* **AIR (35) 1948 Nag 362 – referred to.**

3. Order IX Rule 6 (1)(a) lays down the procedure where after due service of summons, the defendant does not appear when the suit is called on for hearing. In that situation, the court may make an order that suit shall be heard ex parte. In the instant case, the trial court cannot be said to have committed any error in ordering the suit to proceed ex parte; hearing the arguments and closing the suit for pronouncement of judgment. What is provided by Rule 6 is that each case fixed for any day shall be entered in advance immediately upon a date or adjourned date being fixed and such entry would show the purpose for which it is set down on each date. The cases should be classified in such a manner as to show at a glance the nature of work fixed for the particular date. Rule 6 basically provides for a procedure which is required to be followed in maintaining the register for the purpose of the dates fixed in the matter and the purpose for which the date has been fixed. The said provision does not in any way impinge upon the power of the court to proceed for disposal of the suit in case both the parties or either of the parties fail to appear as provided in Order IX of the Code. [Paras 40, 42]

Sahara India and Ors. v. M.C. Aggawal HUF **(2007) 11**

SCC 800: 2007 (2) SCR 1037 – distinguished.

Arjun Singh v. Mohindra Kumar and Ors. **(1964) 5 SCR 946 – relied on.**

4. In the counter affidavit filed by the respondent-plaintiff, nothing was said about the statement made in the synopsis. However, in case the contentions raised by the appellants-defendants were not considered by the High Court, the proper course available to the appellants was to bring to the notice of the High Court the aspect by filing a review application. Such course was never adopted. Thus, the appellants cannot be permitted to challenge the orders passed by the trial court on the interlocutory applications now and argue that trial court erred in not adhering to the pre-trial procedures. [Para 46]

5. The trial court cannot be said to have erred in permitting the plaintiff to lead secondary evidence when the original assignment deed was reportedly lost. [Para 47]

6.1. The purpose and objective of Rule 4 of Order XVIII of the Code is speedy trial of the case and to save precious time of the court as the examination-in-chief of a witness is now mandated to be made on affidavit with a copy thereof to be supplied to the opposite party. The provision makes it clear that cross-examination and re-examination of witness shall be taken either by the court or by Commissioner appointed by it. Proviso appended to sub-rule (1) of Rule 4 of Order XVIII further clarifies that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with the affidavit shall be subject to the order of the court. In a case in which appeal is allowed, Rule 5 of Order XVIII provides that the evidence of each witness shall be taken down in writing by or in the presence and under the personal direction

and superintendence of the Judge or from the dictation of the Judge directly on a typewriter or recorded mechanically in the presence of the Judge if the Judge so directs for reasons to be recorded in writing. [Para 51]

6.2. There is no requirement in Order XVIII Rule 5 that in appealable cases, the witness must enter the witness box for production of his affidavit and formally prove the affidavit. As it is such witness is required to enter the witness box in his cross-examination and, if necessary, re-examination. Since a witness who has given his examination-in-chief in the form of affidavit has to make himself available for cross-examination in the witness box, unless defendant's right to cross examine him has been closed, such evidence (examination-in-chief) does not cease to be legal evidence. [Para 57]

6.3. In the instant case, the three witnesses whose examination-in-chief was tendered by the plaintiff in the form of affidavits were present for cross-examination but despite the opportunity given to the defendants, they chose not to cross-examine them and thereby the trial court closed the defendants' right to cross-examine these witnesses. Thus, it cannot be said that any prejudice was caused to the defendants if these three witnesses did not enter the witness box. [Para 58]

F.D.C. Limited v. Federation of Medical Representatives Association India & Ors. **AIR 2003 Bom 371;** *Ameer Trading Corpn. Ltd. v. Shapoorji Data Processing Ltd.* **(2004) 1 SCC 702: 2003 (5) Suppl. SCR 634;** *Laxman Das v. Deoji Mal & Ors.* **AIR 2003 Rajasthan 74 – referred to.**

7.1. Order XXX Rule 10 is an enabling provision which provides that a person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name. As a

necessary corollary, the provision does not enable a person carrying on business in a name or style other than in his own name to sue in such name or style.[Para 61]

7.2. The description of the plaintiff in the plaint at best may be called to be not in proper order inasmuch as the name of 'NV' must have preceded the business name in the cause title. This was not an illegality which goes to the root of the matter. Moreover, the defendants did file an application under Order XXX Rule 10 of the Code before the trial court but that came to be rejected. The said order was challenged at interlocutory stage and the matter ultimately reached this Court. This Court refused to interfere with the order but gave liberty to the defendants to challenge the same in the first appeal, if aggrieved by the judgment and decree. Even after rejection of the application under Order XXX Rule 10 of the Code by the trial court, the defendants yet attempted to raise the same controversy by making an application for amendment in the written statement but that too was dismissed. This order was also challenged at interlocutory stage by the defendants but the said order was not interfered with by the High Court and this Court and liberty was granted to the defendants to challenge the same in the first appeal against the final judgment and decree. However, from the perusal of the judgment of the High Court, it appears that no argument was advanced with regard to correctness of these two orders. [Para 63]

Bhagvan Manaji Marwadi & Ors. v. Hiraji Premaji Marwadi **AIR 1932 Bom 516 – referred to.**

8. The defendants did not cross-examine the plaintiff's witnesses despite opportunity having been granted to them. There could have been some merit in the submissions, had the defendants cross-examined the

plaintiff's witnesses on these aspects. But, unfortunately, they did not avail of that opportunity. In the circumstances, if the trial court and the High Court accepted the plaintiff's evidence which remained unrebutted and unchallenged and also relied upon the documents produced by the plaintiff, it cannot be said that any illegality was committed by the trial court in decreeing plaintiff's suit or any illegality was committed by the High Court in dismissing the first appeal. [Para 65]

Gopal Krishnaji Ketkar v. Mahomed Haji Latif and Ors. **AIR 1968 SC 1413: 1968 SCR 862 – referred to.**

9. The matter was fixed for pronouncement of judgment on March 28, 2005. The judgment could not be pronounced on that day and the matter, thereafter, was fixed on various dates on the diverse applications made by the defendants. In the meanwhile, the Presiding Officer who heard the arguments of the plaintiff and kept the judgment reserved got transferred and new Presiding Officer assumed the office. In the facts and circumstances of the case, on transfer of the predecessor Judge who heard the arguments, it was not incumbent upon the successor Judge to hear the arguments of the defendants. The proceedings reveal that ultimately the matter was kept for pronouncement of judgment on March 7, 2007. On that day, the court disposed of various applications made by the defendants and pronounced the judgment. The order sheet of March 7, 2007 did record that the plaintiff's advocate expressed that he did not want to address any arguments. This statement is in the context of not advancing further arguments as on behalf of the plaintiff, the arguments had already been advanced; the judgment was reserved and kept for pronouncement. [Para 66]

10. The doctrine of proportionality has been

expanded in recent times and applied to the areas other than administrative law. However, its applicability to the adjudicatory process for determination of 'civil disputes' governed by the procedure prescribed in the Code is not at all necessary. The Code is comprehensive and exhaustive in respect of the matters provided therein. The parties must abide by the procedure prescribed in the Code and if they fail to do so, they have to suffer the consequences. As a matter of fact, the procedure provided in the Code for trial of the suits is extremely rational, reasonable and elaborate. Fair procedure is its hallmark. The courts of civil judicature also have to adhere to the procedure prescribed in the Code and where the Code is silent about something, the court acts according to justice, equity and good conscience. The discretion conferred upon the court by the Code has to be exercised in conformity with settled judicial principles and not in a whimsical or arbitrary or capricious manner. If the trial court commits illegality or irregularity in exercise of its judicial discretion that occasions in failure of justice or results in injustice, such order is always amenable to correction by a higher court in appeal or revision or by a High Court in its supervisory jurisdiction. Having regard to the facts of the instant case, it cannot be said that the trial court acted illegally or with material irregularity or irrationally or in an arbitrary manner in passing the orders dated February 28, 2005 closing the right of the defendants to cross-examine plaintiff's witnesses and March 17, 2005. The defendants by their conduct and tactics disentitled themselves from any further indulgence by the trial court. The course adopted by the trial court cannot be said to be unfair or inconsistent with the provisions of the Code. [Para 70]

Kunhayammed and Ors. v. State of Kerala and Anr. **(2000) 6 SCC 359: 2000 (1) Suppl. SCR 538 – referred to.**

Case Law Reference:

2000 (1) Suppl. SCR 538	**Referred to.**	**Para 21**
(1959) Supp 1 SCR 319	**Referred to.**	**Para 26**
48 Ind. Cas.859	**Referred to.**	**Para 28**
AIR (1924) Lah 107	**Approved.**	**Para 29**
AIR (1922) Bom 345	**Referred to.**	**Para 35**
AIR (35) 1948 Nag 362	**Referred to.**	**Para 36**
(1964) 5 SCR 946	**Referred to.**	**Para 40, 41**
2007 (2) SCR 1037	**Distinguished.**	**Para 43**
AIR 2003 Bom 371	**Referred to.**	**Para 52, 57**
2003 (5) Suppl. SCR 634	**Referred to.**	**Para 52, 55, 57**
AIR 2003 Rajasthan 74	**Referred to.**	**Para 57**
AIR 1932 Bom 516	**Referred to.**	**Para 63**
1968 SCR 862	**Referred to.**	**Para 64**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10112 of 2011.

From the Judgment & Order dated 13.8.2008 of the High Court of Judicature of Madhya Pradesh at Indore in First Appeal No. 217 of 2007.

Shekhar Naphade, Pravin H. Parekh, Sameer Parekh, Lalit Chuhan, Ashish Jha, Rohit Gupta, Vivek Dalal, Jayant Mohan, Ranjeeta Rohtagi, Subhash Jadhav, K. Shashank, S. Goud (for "Coac"), for the Appellant.

Dr. A.M. Singhvi, Mukul Rohatgi, Vikas Singh, Sanjeev Sachdeva, P.K. Saxena, Amit Bhandari, Preet Pal Singh, Vivek

Gautam, Shiv Prakash Pandey, Shiva Laxmi, Gopal Singh Chauhan for the Respondent.

The Judgment of the Court was delivered by

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

2. This appeal, by special leave, raises questions of legality of an ex parte decree passed by the trial court and affirmed in first appeal by the High Court of Madhya Pradesh.

3. M/s. M.S.S. Food Products—respondent (hereinafter referred to as 'plaintiff') sued the appellants—(i) Dhariwal Industries Ltd. and (ii) Rasiklal Manikchand Dhariwal (hereinafter referred to as 'defendants') in the court of 1st Additional District Judge, Mandaleshwar (West) Madhya Pradesh for declaration that defendants do not have right to use the mark "Manikchand" to sell masala, gutka, supari, supari mix or any other goods which is deceptively similar to the mark "Malikchand'; for perpetual injunction restraining the defendants from dealing in or selling the above articles under the name/ brand "Manikchand"; for rendition of the accounts of profits earned by the defendants by selling the said goods and other consequential reliefs.

4. The case of the plaintiff is this: Prabhudayal Choubey son of Ramprasad alias Malikchand started the business of supari, ayurvedic pan masala and ayurvedic medicines in the brand name "Malikchand" in the year 1959-60. He continued his business upto April 1986. Prabhudayal Choubey assigned his trade mark of supari and ayurvedic pan masala "Malikchand" to his son Ashok Sharma sometime in the month of April, 1986. Ashok Sharma continued his business of supari, ayurvedic pan masala and ayurvedic medicines etc. upto March 1992. Ashok Sharma assigned the trade mark "Malikchand", vide assignment deed dated April 1, 1992, to Kishore Vadhwani, proprietor of M/s. Tulsi Stores who continued with the business of pan masala, gutka, supari and supari mix etc.

till March, 1996. Kishore Vadhwani further assigned the trade mark "Malikchand" to the plaintiff on April 1, 1996. Since then plaintiff has been carrying on the business of gutka, pan masala, mix supari etc. in the trade mark "Malikchand".

5. It is further case of the plaintiff that the defendants have started selling gutka, pan masala, supari, supari mix, zarda, etc. in the name of "Manikchand", - phonetically similar to the plaintiff's mark "Malikchand" – and thereby passing off their goods as and for plaintiff's goods. The plaintiff alleged that defendants have been selling the inferior quality goods resulting in huge losses to it.

6. The defendants filed written statement and traversed plaintiff's claim. They disputed plaintiff's claim of prior user and averred that name of Prabhudayal's father was Ramprasad and not Malikchand. They denied that any business was run by Prabhudayal Choubey in the name of "Malikchand". On the other hand, the defendants claimed that way back in 1966, an application for registration of trade mark "Manikchand" was submitted as the name of Defendant No. 2's father was Manikchand and they have been doing their business of supari, gutka, tobacco, etc. in the name of "Manikchand". It is the case of the defendants that the plaintiff started running business of gutka, using the name "Malikchand" identical to the trade name of the defendants "Manikchand" wrongly and fraudulently with an intention to ride on the goodwill of the defendants and to protect their right, the defendants have filed a suit (Suit No. 574 of 2004) in the Bombay High Court wherein plaintiff's counsel appeared on March 10, 2004. As regards the documents concerning prior user of the trade name "Malikchand" by the plaintiff, the defendants averred that the plaintiff has fabricated and forged these documents and then filed the suit for passing off action, declaration and injunction. The defendants, thus, prayed that plaintiff's suit was liable to be dismissed.

7. The trial court having regard to the pleadings of the

parties, on December 6, 2004, initially framed the following eight issues :

"1. Whether the plaintiff has been running his business of Food, Pan Masala, Supari Mix by the name of Mailkchand from the year 1959-60?

2. Whether the defendants have been running the said business by the name of "Manikchand" trademark identical to trademark of plaintiff i.e. "Malikchand"? If yes then its effect?

3. Whether the defendants have been selling the goods having prepared of inferior quality by the name of Manikchand trademark identical to the trademark of plaintiff "Malikchand" due to which credit of plaintiff is being adversely affected? If yes, then its effect?

4. Whether defendants have been running their business from the year 1960 having lawfully obtained the trademark "Manikchand" from the competent officer? If yes, then its effect?

5. Whether the plaintiff is entitled to get the accounts of the said amount which defendants have earned unlawful profits having sold the pouch by the name of Manikchand trademark identical to the trademark of plaintiff?

6. (a) Whether plaintiff valued the suit properly?

6. (b) Whether the plaintiff has paid the sufficient court fee?

7 Whether the plaintiff has instituted the suit on false grounds? If yes, then whether the defendants are entitled to get special damages for the plaintiff?

8 Relief & cost?"

8. Then, on December 24, 2004, the following two additional issues were framed by the trial court:

"9. Whether the suit instituted by the plaintiff is liable to be stayed under Section 10 C.P.C.

10. Whether this court has got the jurisdiction to entertain the present suit instituted by the plaintiff?"

9. Along with the plaint, the plaintiff made an application for temporary injunction pending suit, restraining the defendants from selling their products under the name 'Manikchand'.

10. On March 16, 2004, an *ad interim ex parte* injunction restraining the defendants from using the mark 'Manikchand' was granted by the trial court in favour of the plaintiff and against the defendants. The appeal preferred by the defendants against that order was disposed of by the High Court on March 22, 2004. On April 6, 2004, the trial court allowed the plaintiff's application for temporary injunction and made the *ad interim ex parte* injunction order dated March 16, 2004 absolute to remain operative till the disposal of the suit. The appeal preferred by the defendants against that order was dismissed by the High Court on May 11, 2004. The High Court while dismissing the defendants' appeal directed the trial court to conclude the trial of the suit expeditiously and finally dispose of it, preferably within a period of six months from the date of receipt of the copy of the order i.e. May 11, 2004.

11. The defendants challenged the order of temporary injunction passed by the trial court and affirmed in appeal by the High Court in a special leave petition before this Court on July 20, 2004.

12. In the course of proceedings in the suit many interlocutory applications were made by the defendants and few by the plaintiff. Some of these applications are: On June 14,

2004, an application (I.A. No. 9) was made by the defendants before the trial court under Order VII Rule 11 of the Civil Procedure Code, 1908 (for short, 'the Code') for rejection of the plaint. On August 19, 2004, the defendants made another application (I.A. No. 10) under Section 151 of the Code for directing the parties to file respective original documents. On September 10, 2004, the defendants filed an application (IA No. 11) under Order XXX Rule 10 of the Code for dismissal of suit as the same was filed in the name of a proprietorship firm. On December 6, 2004, the defendants moved an application (IA No. 14) for discovery and production of documents under Order XI Rules 12 and 14 of the Code. On January 5, 2005, the defendants made an application (IA No. 20) under Order VI Rule 17 for the amendment of the written statement. On January 19, 2005, the plaintiff filed an application (IA No. 21) for summoning of the witnesses and on January 20, 2005, the plaintiff made an application for permission to file photocopies of the original documents and (I.A.No. 22) for leading secondary evidence. On January 24, 2005, the plaintiff made an application for production of additional documents. The defendants responded to these applications. On February 8, 2005, the plaintiff made application (IA No. 26) under Section 152 of the Code. On February 15, 2005, the defendants made three applications, namely, I.A. No. 27 for summoning documents under Order XVI Rules 1 and 6 of the Code; IA No. 28 for inspection of documents under Order XI Rule 14 read with Section 151 of the Code and IA No. 29 for production of documents on oath. On that day, plaintiff also made an application under Order VII Rule 14(3) of the Code for filing additional documents.

13. Pertinently, all the applications made by the defendants such as amendment of written statement; for leave to deliver interrogatories and discovery and production of documents; dismissal of suit under Order XXX Rule 10 of the Code; for summoning of documents etc., were dismissed by the trial court.

14. On February 25, 2005 this Court dismissed defendants' appeal arising from the order of temporary injunction granted by the trial court and affirmed in appeal by the High Court. While dismissing the special leave petition, this Court directed the trial court to comply with the direction of the High Court and complete the trial and disposal of the suit within six months from that date.

15. In terms of the order of the High Court and subsequent order of this Court, the suit was required to be disposed of by the trial court expeditiously and the trial court endeavoured to proceed accordingly, but the defendants continued to make application after application stalling the effort of the trial court in that direction. We shall refer to the proceedings appropriately while considering the arguments of the learned Senior Counsel for the appellants. Suffice it to state here that on February 28, 2005, the trial court closed the defendants' right to cross-examine the plaintiff's witnesses. The matter was then fixed for March 17, 2005. On that date, nobody appeared on behalf of the defendants and the matter was directed to proceed *ex parte*. The plaintiff closed the evidence and the trial court heard the arguments of the plaintiff and reserved the judgment and fixed the matter for March 28, 2005 for pronouncement of judgment. It appears that later on the Advocate for the defendants appeared on that date and signed the order sheet.

16. After the arguments were heard on March 17, 2005 and although the matter was fixed for pronouncement of judgment on March 28, 2005, on behalf of the defendants, an application was made on March 21, 2005 for setting aside the *ex parte* order. The defendants continued to make applications even thereafter. The judgment was not pronounced on March 28, 2005 or immediately thereafter.

17. Then, it so happened that the Presiding Officer who heard the arguments got transferred and the new Presiding Officer assumed charge on August 28, 2006. Even thereafter the defendants kept on making application after application.

The trial court heard arguments on those applications and all these applications were dismissed. The trial court pronounced the judgment on March 7, 2007 whereby plaintiff's suit was decreed as follows :

"23. Consequently, finally having allowed the suit, decree has been issued that :-

(a) It has been declared that defendants do not have any right to sell Supari, Pan Masala, Mixed Supari, Gutka sell by packing in pouch under the name and trade mark "Manikchand".

(b) Defendants are hereby restrained by order of permanent injunction from selling the pouch of supari, pan masala and mix supari under the name Manikchand and should not copy the colour screen and design of "Manikchand" zarda pouch and should not advertise or publish their pouch of supari, pan masala, jarda under the trade mark "Manikchand".

(c) Defendants are hereby directed to submit the accounts of the profits earned by them during the period from 15.3.2001 to 15.3.2005 by selling the supari, pan masala, gutka etc. under the "Manikchand" within two months in this court.

(d) Defendants shall bear the cost of this suit of the plaintiff."

18. Against the *ex parte* decree dated March 7, 2007, the defendants preferred first appeal before the Madhya Pradesh High Court. The Division Bench of that Court vide its judgment dated August 13, 2008 dismissed the defendants' first appeal except the relief in respect of profits relating to damages. In other words, the High Court maintained the judgment and decree of the trial court insofar as reliefs granted in paragraph 23(a) and (b) were concerned but set aside the relief granted

to the plaintiff in paragraph 23(c) and instead awarded token relief of Rs. 11,00,000/- (Rupees Eleven Lakh) only. It is from this judgment that the present special leave petition has arisen.

19. We heard Mr. Shekhar Naphade and Mr. Pravin H. Parekh, Senior Advocates for the appellants at quite some length. We also heard Dr. A.M. Singhvi, Mr. Mukul Rohatgi and Mr. Vikas Singh, Senior Advocates for the respondent. We also permitted the parties to file their brief written submissions which they did.

20. Mr. Shekhar Naphade, learned senior counsel for the appellants argued that the judgment passed by the Presiding Officer of the trial court on March 7, 2007 and affirmed in appeal by the High Court is a nullity having been delivered by a Judge who never heard the matter. He submitted that the predecessor Judge Smt. Bharati Baghel had recorded the evidence ex parte and heard advocate for the plaintiff on March 17, 2005; reserved the judgment and fixed the date for pronouncement of judgment but she never delivered the judgment. She was transferred and the new Presiding Officer assumed charge on August 28, 2006. The successor Presiding Officer though heard various applications made by the defendants but never heard the parties insofar as suit was concerned and delivered the judgment which apparently is not in conformity with the legal mandate that one who hears the matter must decide the case. In this regard, Mr. Naphade relied upon a decision of this Court in *Gullapalli Nageswara Rao and Ors. v. Andhra Pradesh State Road Transport Corporation and Anr.*[1]. He also referred to Order XX Rule 1 of the Code and argued that this provision requires the Judge to hear the parties and, thus, there was an obligation on the Presiding Judge who delivered the judgment to have heard oral arguments of the parties. In support of his submission, he relied upon a decision of Madras High Court in the *American Baptist Foreign Mission Society, by its Attorney Rev. W.L. Ferguson, Jaladi Ayyappaseti and Anr.*

1. (1959) Supp 1 SCR 319.

and Gurram Seshiah and Anr. v. Amalanadhuni Pattabhiramayya and Ors.[2]. Mr. Shekhar Naphade also argued that Order XVIII Rule 15 of the Code has no application since the defendants had appeared before the Trial Judge on March 17, 2005 itself after the matter was heard ex parte and reserved for the judgment thereafter and that entitled the defendants to make oral arguments.

21. On the other hand, learned Senior Advocates for the respondent heavily relied upon Order XVIII Rule 15 of the Code and submitted that the successor Judge has to proceed from the stage the predecessor Judge had left the case and, therefore, the successor Judge had jurisdiction to prepare and deliver the judgment on the basis of the record of the case and had no jurisdiction to fix the case again for arguments and set the clock back to the pre-judgment stage. Reliance, in this regard, was placed on a decision of this Court in *Arjun Singh v. Mohindra Kumar and Others*[3]. It was also submitted on behalf of the respondent that from the two orders passed by the trial court on February 28, 2005 and March 17, 2005, the two special leave petitions (Special Leave Petition (Civil) Nos. 7339 of 2006 and 7340 of 2006) were filed which were dismissed by this Court as withdrawn on December 1, 2006. By that time, the Presiding Officer had already changed but this Court did not remand the matter to the trial court for fresh arguments and permitted the appellants to raise their plea in the first appeal which necessarily implied that the successor Judge could proceed from the stage left by the predecessor Judge i.e., pronounce the judgment. It was also submitted on behalf of the respondent that appellants have not at all been prejudiced as the High Court has considered the entire case of the appellants threadbare as was put forth in the course of arguments. Moreover, the judgment and decree of the trial court has now merged with the judgment of the High Court. In this

2. 48 Ind. Cas. 859.
3. (1964) 5 SCR 946.

regard, reliance was placed on a decision of this Court in *Kunhayammed and others* v. *State of Kerala and another*[4].

22. Order XVIII Rule 2 of the Code provides as under :

> "2. Statement and production of evidence.—(1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.
>
> (2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.
>
> (3) The party beginning may then reply generally on the whole case.
>
> (3A) Any party may address oral arguments in a case, and shall, before he concludes the oral arguments, if any, submit if the Court so permits concisely and under distinct headings written arguments in support of his case to the Court and such written arguments shall form part of the record.
>
> (3B) A copy of such written arguments shall be simultaneously furnished to the opposite party.
>
> (3C) No adjournment shall be granted for the purpose of filing the written arguments unless the Court, for reasons to be recorded in writing, considers it necessary to grant such adjournment.
>
> (3D) The Court shall fix such time limits for the oral arguments by either of the parties in a case, as it thinks fit."

4. (2000) 6 SCC 359.

23. Order XVIII Rule 15 of the Code is as follows:

> "15. Power to deal with evidence taken before another Judge.- (1) Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rule and may proceed with the suit from the stage at which his predecessor left it.
>
> (2) The provisions of sub-rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 24."

24. Order XX Rule 1 of the Code provides that the court, after the case has been heard, shall pronounce the judgment in an open court either at once or on some future date after fixing a day for that purpose of which due notice shall be given to the parties or their pleaders.

25. The hearing of a suit begins on production of evidence by the parties and suit gets culminated on pronouncement of the judgment. Under Order XVIII Rule 1 of the Code, the plaintiff has a right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by him the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin. On the day fixed for the hearing of the suit or any other day to which the hearing is adjourned, as per the provisions contained in Order XVIII Rule 2, party having the right to begin is required to state his case and produce his evidence in support of issues which he is bound to prove. Under Order XVIII, Rule 2 sub-rule (2), the other party shall then state his case and produce his evidence. Under sub-rule (3A) of Rule 2 of Order XVIII, the parties in suit may address oral arguments in a case and may also avail

opportunity of filing written arguments before conclusion of oral arguments. Rule 15 of Order XVIII provides for the contingency where the Judge before whom the hearing of the suit has begun is prevented by death, transfer or other cause from concluding the trial of a suit. This provision enables the successor Judge to proceed from the stage at which his predecessor left the suit. The provision contained in Rule 15 of Order XVIII of the Code is a special provision. The idea behind this provision is to obviate re-recording of the evidence or re-hearing of the suit where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit and to take the suit forward from the stage the predecessor Judge left the matter. The trial of a suit is a long drawn process and in the course of trial, the Judge may get transferred; he may retire or in an unfortunate event like death, he may not be in a position to conclude the trial. The Code has taken care by this provision that in such event the progress that has already taken place in the hearing of the suit is not set at naught. This provision comes into play in various situations such as where part of the evidence of a party has been recorded in a suit or where the evidence of the parties is closed and the suit is ripe for oral arguments or where the evidence of the parties has been recorded and the Judge has also heard the oral arguments of the parties and fixed the matter for pronouncement of judgment. The expression "from the stage at which his predecessor left it" is wide and comprehensive enough to take in its fold all situations and stages of the suit. No category or exception deserves to be carved out while giving full play to Rule 15 of Order XVIII of the Code which amply empowers the successor Judge to proceed with the suit from the stage at which his predecessor left it.

26. In *Gullapalli Nageswara Rao and Ors.*[1], this Court stated the principle that one who hears must decide the case. The Court said :

"The second objection is that while the Act and the Rules

framed thereunder impose a duty on the State Government to give a personal hearing, the procedure prescribed by the Rules impose a duty on the Secretary to hear and the Chief Minister to decide. This divided responsibility is destructive of the concept of judicial hearing. Such a procedure defeats the object of personal hearing. Personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear-up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned argument to accept his point of view. If one person hears and another decides, then personal hearing becomes and empty formality. We therefore hold that the said procedure followed in this case also offends another basic principle of judicial procedure."

27. The above principle with reference to hearing by a quasi judicial forum is not applicable to all situations in the hearing of the suit. "Hearing of the suit" as understood is not confined to oral hearing. "Hearing of the suit" begins when the evidence in the suit begins and is concluded by the pronouncement of judgment. The Code contemplates that at various stages of the hearing of the suit, the Judge may change or he may be prevented from concluding the trial and in that situation, the successor Judge must proceed in the suit from the stage the predecessor Judge has left it.

28. Learned senior counsel for the appellants has placed reliance on the decision of the Madras High Court in the case of *American Baptist Foreign Mission Society2* . The principle of law in that case that a decree passed behind back of a legal representative of the deceased party is nullity has no application to the facts of the present case. The facts in the *American Baptist Foreign Mission Society2* were peculiar. That was a case where after evidence was let in on April 19, 1916, the case was adjourned to April 26 for further arguments. On April 20, one of the defendants (14th defendant) died but

his legal representatives were not brought on record. The judgment was delivered on May 3, 1916. It was contended on behalf of the legal representative of the deceased party before the High Court that the decree passed behind her back after her husband's death was without jurisdiction. The Madras High Court upheld the argument. Referring to Rule 1 of Order XX, the Madras High Court held that the arguments should be heard before the case can be regarded as ripe for judgment and in the case before them before the conclusion of arguments, the 14th defendant had died and, thus, the case was not ripe for judgment rendering the decree bad in law. We are afraid, the above decision of Madras High Court has no application at all. Order XVIII Rule 15 of the Code was not at all under consideration before the Madras High Court.

29. A decision of the Lahore High Court, in the case of *Harji Mal and Anr. v. Devi Ditta Mal and Ors.*[5] deserves to be noticed by us. In that case, in the second appeal before the High Court, one of the contentions advanced by the appellants was that the Senior Sub- Judge who disposed of the case and wrote the judgment did not actually hear oral arguments although written arguments were before him and, therefore, the judgment was a nullity and the matter needed to be remanded to the trial court. The facts in that case were these : the Sub-Judge who heard the case fixed the 10th of November, for arguments. On that date, an adjournment was sought by the counsel who appeared. The Sub-Judge did not allow adjournment but directed them to file written arguments, if they wished to do so. The written arguments were submitted. While the matter was reserved for the judgment, the Sub-Judge decided to inspect the spot but he could not carry out inspection as he was transferred. The successor Judge took over and he inspected the spot and delivered the judgment. While dealing with the argument, as noticed above, the Division Bench of the Lahore High Court referred to Order XVIII Rule 2 of the Code and noted that the said provision gave an option to the parties

5. AIR (1924) Lah 107.

to argue their case when their evidence was conducted and it was for them to decide whether they would avail of this privilege. The High Court held that it was for a party to argue the case if they wished to do so and as they did not do so, the only construction which can be put upon the events is that they deliberately failed to avail themselves of such opportunity. The judgment is in brief and to the extent it is relevant may be reproduced :

> "1. In this second appeal the first point raised by counsel is that the Senior Sub-Judge who disposed of the case and wrote the judgment did not actually hear oral arguments although written arguments were before him, and reliance has been placed on 57 I.C. 34 and 91 P.R. 1904, as authorities to show that under these circumstances the judgment is a nullity and the case must be remanded to the trial court.
>
> 2. The facts are that Mr. Muhammad Shah, the Sub-Judge, who heard the case fixed the 10th of November, for arguments. On that date Counsel appeared and stated that they were not ready to argue and asked for an adjournment, which he did not allow but directed them to put in written arguments, if they wished to do so. They, therefore failed to avail themselves of the opportunity given them to argue the case before the Judge who had tried it. Further adjournments were given for written arguments and these were finally submitted on the 10th December. The Sub-Judge then came to the conclusion that it was necessary to inspect the spot, though what advantage exactly was to be obtained from this inspection is not clear. He was transferred before he carried out his inspection leaving the judgment unwritten and on the 22nd of January the parties appeared before Mr. Strickland, his successor, who fixed the 5th February for inspection. Later, the counsel for the defendants, who are now the appellants, appeared before him and asked for an adjournment which

he granted. He eventually carried out the inspection in the presence of the parties and then gave judgment. Now 91 P.R. 1904 is to be distinguished as being the case of a first appeal and in 57 I.C. 34 it is clear that the parties had no opportunity to argue the case before the successor. Here they had ample opportunity before both Sub-Judges. In Order 18, Rule 2, an option is given to the parties to argue their case when the evidence is conducted and it is for them to decide whether they will avail themselves of this privilege. Here they were given a further opportunity at a later date, the 10th November, and failed to make use of it. It is contended that even so they were entitled to an opportunity before the successor of Muhammad Shah who was not in the same advantageous position as he was, inasmuch as he had not heard the evidence. Even so they certainly had more than one opportunity when they appeared before Mr. Trickland. It was for them to argue the case if they wished to do so. They did not do so and the only construction which can be put upon the events is that they deliberately failed to avail themselves of such opportunity and left the case in his hands knowing that the written arguments were before him."

30. We are in agreement with the view of the Lahore High Court that Order XVIII Rule 2 of the Code gives an option to the parties to argue their case when the evidence is conducted and it is for them to decide whether they will avail themselves of this privilege and if they do not, they do so at their peril. Insofar as the case in hand is concerned, the right of the defendants to cross-examine plaintiff was closed on February 28, 2005. The matter was then fixed for March 17, 2005 for the remaining evidence of the plaintiff. On that day, none appeared for the defendants although the matter was called out twice. In that situation, the Judge ordered the suit to proceed *ex parte* against the defendants; heard the arguments of the plaintiff and closed the suit for pronouncement of judgment on March 28, 2005. In these facts, the defendants, having lost their privilege

of cross-examining the plaintiff's witnesses and of advancing oral arguments, now cannot be permitted to raise any grievance that the successor Judge who delivered the judgment has not given them an opportunity of oral arguments.

31. The expressions "state his case", "produce his evidence" and "address the court generally on the whole case" occurring in Order XVIII Rule 2, sub-rule (1) and sub-rule (2) have different meaning and connotation. By use of the expression "state his case", the party before production of his evidence is accorded an opportunity to give general outlines of the case and also indicate generally the nature of evidence likely to be let in by him to prove his case. The general outline by a party before letting in evidence is intended to help the court in understanding the evidence likely to be followed by a party in support of his case. After case is stated by a party, the evidence is produced by him to prove his case. After evidence has been produced by all the parties, a right is given to the parties to make oral arguments and also submit written submissions, if they so desire. The hearing of a suit does not mean oral arguments alone but it comprehends both production of evidence and arguments. The scheme of the Code, as embodied, in Order XVIII Rule 2, particularly, sub-rules (1), (2), (3) and (3A) and Order XVIII Rule 15 enables the successor Judge to deliver the judgment without oral arguments where one party has already lost his right of making oral arguments and the other party does not insist on it.

32. In light of the legal position and the factual matrix of the case, we are unable to accept the contention of the learned senior counsel for the appellants that the trial court violated the fundamental principle of law, i.e. "one who hears must decide the case".

33. Mr. Shekhar Naphade, learned senior counsel for the appellants contended that even if it be assumed (though the appellants seriously dispute that) that the trial court was justified

in proceeding *ex parte* against the defendants on March 17, 2005 but since the defendants had appeared on subsequent dates, their right to address the court on merits of the case could not have been denied. Learned senior counsel submitted that proceeding *ex parte* under Order IX Rule 7 of the Code on March 17, 2005, did not take away the defendants' right to participate further in the proceedings of the suit. In this regard, senior counsel relied upon a decision of the Bombay High Court in *Radhabai Bhaskar Sakharam v. Anant Pandurang Pandit and Anr.*[6] and a decision of Nagpur High Court in *Kashirao Panduji v. Ramchandra Balaji.*[7] It was submitted that the judgment of the Nagpur High Court in *Kashirao Panduji*[7] was binding on the trial court as at the relevant time, Mandaleshwar was within the jurisdiction of the Nagpur High Court.

34. The contention, at the first blush, appears to be attractive but has no substance at all. In the first place, once the hearing of the suit is concluded; and the suit is closed for judgment, Order IX Rule 7 of the Code has no application at all. The very language of Order IX Rule 7 makes this clear. This provision pre-supposes the suit having been adjourned for hearing. The courts, time out of number, have said that adjournment for the purposes of pronouncing judgment is no adjournment of the "hearing of the suit". On March 17, 2005, the trial court in the present case did four things, namely, (i) closed the evidence of the plaintiff as was requested by the plaintiff; (ii) ordered the suit to proceed *ex parte* as defendants failed to appear on that date; (iii) heard the arguments of the Advocate for the plaintiff; and (iv) kept the matter for pronouncement of judgment on March 28, 2005. In view of the above, Order IX Rule 7 of the Code has no application at all and it is for this reason that the application made by the defendants under this provision was rejected by the trial court.

6. AIR (1922) Bom 345.

7. AIR (35) 1948 Nag 362.

35. Secondly, once the suit is closed for pronouncement of judgment, there is no question of further proceedings in the suit. Merely, because the defendants continued to make application after application and the trial court heard those applications, it cannot be said that such appearance by the defendants is covered by the expression "appeared on the day fixed for his appearance" occurring in Order IX Rule 7 of the Code and thereby entitling them to address the court on the merits of the case. The judgment of Bombay High Court in *Radhabai Bhaskar Sakharam*[6] on which reliance has been placed by the learned senior counsel for the appellants, does not support the legal position canvassed by him. Rather in *Radhabai Bhaskar Sakharam*[6], the Division Bench of the Bombay High Court held that if a party did not appear before the suit was heard, then he had no right to be heard. This is clear from the following statement in the judgment :

> "……Until a suit is actually called on, a party is entitled to appear and defend. It may be that he is guilty of delay and if that is the case he may be mulcted in costs. *But if he does not appear before the suit is heard, then he has no right to be heard……."*
>
> *(Emphasis supplied)*

36. The Nagpur High Court in the case of *Kashirao Panduji*[7] referred to the decision of Bombay High Court in *Radhabai Bhaskar Sakharam*[6] and observed as under:

> "14. The suit was just in its initial stage. In *Radhabai v. Anant Pandurang* A.I.R. 1922 Bom. 345 it is held that if a party appears before the case is actually heard, he has a right to be heard. The provisions of Order 9 are never meant to be penal provisions, and it is only in clear cases of gross negligence and misconduct that a party should be deprived of the opportunity of having a satisfactory disposal of the case which evidently can only be done when both parties have full opportunity of placing their case and

their evidence before the Court."

37. There is no quarrel to the legal position that if a party appears before the case is actually heard and if he has otherwise not disqualified himself from being heard, he has a right to be heard. There can also be no quarrel about the general observations made by the Nagpur High Court with regard to Order IX of the Code but each case has to be seen in its own facts. As regards the instant case, it has to be borne in mind that the High Court in its order dated May 11, 2004 while dismissing the defendants' appeal directed the trial court to conclude the trial of the suit expeditiously and finally dispose of it, preferably within a period of six months from the date of receipt of the copy of the order which was passed on May 11, 2004. Unfortunately, the suit could not be disposed of by the trial court as directed by the High Court. This Court on February 25, 2005 while dismissing the defendants' appeal arising from the High Court's order dated May 11, 2004, directed the trial court to comply with the direction of the High Court and complete the trial and dispose of the suit within six months from that date. In complete disregard of the above direction, the defendants continued to make application after application. As a matter of fact, nine interlocutory applications were filed by the defendants after the hearing of the suit was expedited by the High Court and the order of this Court of February 25, 2005 reiterating the expeditious disposal of the suit. After the direction was issued by this Court on February 25, 2005, the trial court endeavoured to dispose of the suit speedily but the defendants continued to make application after application. It was in this backdrop that on February 28, 2005, the trial court rejected the defendants' applications and asked the Advocate for the defendants to cross-examine plaintiff's witnesses. On that date, the Advocate for the defendants stated that he has no authority to cross-examine plaintiff's witnesses; he is not in position to do anything and the court may do whatever it wants. It was in this background that the trial court closed the

defendants' right to cross-examine the three witnesses of the plaintiff and fixed the matter for March 17, 2005. On that day, i.e., March 17, 2005 nobody appeared on behalf of the defendants although the matter was called twice. It was then that the trial court directed the matter to proceed *ex parte*. The plaintiff closed its evidence and the trial court heard the arguments of the plaintiff ex-parte and closed the suit for pronouncement of judgment. The above narration of facts leads to irresistible conclusion that the defendants forfeited their right to address the trial court on merits.

38. Learned senior counsel for the appellants also contended that the suit was listed on March 17, 2005 for plaintiff's evidence only and, therefore, the trial court could not have heard the final arguments and reserved the judgment for pronouncement. In this regard, reference was made to the proceedings of the trial court recorded on February 28, 2005 and also Rule 6 of the Madhya Pradesh Civil Courts Act, 1958 (for short, 'Civil Courts Act'). Learned senior counsel also pressed into service a decision of this Court in *Sahara India and Ors. v. M.C. Aggarwal HUF*[8].

39. We have already noted above the proceedings of the trial court on February 28, 2005. The said proceedings do indicate that on that date the defendants' counsel refused to cross-examine the three witnesses tendered in evidence by plaintiff and told the trial court that he was not in position to do anything and the court may do whatever it wants to. Faced with this situation, the trial court closed the defendants' right to cross-examine the plaintiff's three witnesses. As regards remaining witnesses of the plaintiff, the trial court kept the matter for March 17, 2005. On March 17, 2005, none appeared for the defendants and the plaintiff decided not to examine more witnesses. It was in this situation that the trial court ordered the suit to proceed *ex parte*. The trial court heard the arguments of the plaintiff's advocate and reserved the judgment for

8. (2007) 11 SCC 800.

pronouncement. Is the course adopted by the trial court impermissible in law? We think not. In a situation like this where the plaintiff has closed his evidence and the defendants failed to appear, Order XVII Rule 2 of the Code was clearly attracted. The said provision is as follows :

> "2. Procedure if parties fail to appear on day fixed.— Where, , on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.
>
> *Explanation.*—Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present."

40. In view of the above provision, the trial court was required to proceed to dispose of the suit in one of the modes prescribed in Order IX of the Code. Order IX Rule 6 (1)(a) lays down the procedure where after due service of summons, the defendant does not appear when the suit is called on for hearing. In that situation, the court may make an order that suit shall be heard *ex parte*. The legal position with regard to Order IX Rule 6 has been explained by a 3-Judge Bench of this Court in the case of *Arjun Singh*[3], wherein this Court stated thus :

> ".....Rule 6(1)(*a*) enables the Court to proceed ex parte where the defendant is absent even after due service. Rule 6 contemplates two cases: (1) The day on which the defendant fails to appear is one of which the defendant has no intimation that the suit will be taken up for final hearing for example, where the hearing is only the first hearing of the suit, and (2) where the stage of the first hearing is passed and the hearing which is fixed is for the disposal

> of the suit and the defendant is not present on such a day. The effect of proceeding ex parte in the two sets of cases would obviously mean a great difference in the result. So far as the first type of cases is concerned it has to be adjourned for final disposal and, as already seen, it would be open to the defendant to appear on that date and defend the suit. In the second type of cases, however, one of two things might happen. The evidence of the plaintiff might be taken then and there and judgment might be pronounced....."

41. The following observations made by this Court in *Arjun Singh*[3] with reference to Order IX Rule 7, Order IX Rule 13 and Order XX Rule 1 are quite apposite and may be reproduced as it is:

> ".....On the terms of O.IX, r.7 if the defendant appears on such adjourned date and satisfies the court by showing good cause for his non-appearance on the previous day or days he might have the earlier proceedings recalled — "set the clock back" and have the suit heard in his presence. On the other hand, he might fail in showing good cause. Even in such a case he is not penalised in the sense of being forbidden to take part in the further proceedings of the suit or whatever might still remain of the trial, only he cannot claim to be relegated to the position that he occupied at the commencement of the trial. Thus every contingency which is likely to happen in the trial *vis-a-vis* the non-appearance of the defendant at the hearing of a suit has been provided for and O.IX, r.7 and O.IX, r. 13 between them exhaust the whole gamut of situations that might arise during the course of the trial. If, thus, provision has been made for every contingency, it stands to reason that there is no scope for the invocation of the inherent powers of the Court to make an order necessary for the ends of justice. Mr. Pathak, however, strenuously contended that a case of the sort now on hand where a

> defendant appeared after the conclusion of the hearing but before the pronouncing of the judgment had not been provided for. We consider that the suggestion that there is such a stage is, on the scheme of the Code, wholly unrealistic. In the present context when once the hearing starts, the Code contemplates only two stages in the trial of the suit: (1) where the hearing is adjourned or (2) where the hearing is completed. Where the hearing is completed the parties have no further rights or privileges in the matter and it is only for the convenience of the Court that O.XX, R.1 permits judgment to be delivered after an interval after the hearing is completed. It would, therefore, follow that after the stage contemplated by O.IX, r. 7 is passed the next stage is only the passing of a decree which on the terms of O.IX, r. 6 the Court is competent to pass. And then follows the remedy of the party to have that decree set aside by application under O. IX, r.13. There is thus no hiatus between the two stages of reservation of judgment and pronouncing the judgment so as to make it necessary for the Court to afford to the party the remedy of getting orders passed on the lines of O. IX, r.7……."

42. In light of the above legal position, the trial court cannot be said to have committed any error in ordering the suit to proceed *ex parte;* hearing the arguments and closing the suit for pronouncement of judgment. What is provided by Rule 6 of the Civil Courts Act is that each case fixed for any day shall be entered in advance immediately upon a date or adjourned date being fixed and such entry would show the purpose for which it is set down on each date. It further provides that the cases should be classified in such a manner as to show at a glance the nature of work fixed for the particular date. Rule 6 basically provides for a procedure which is required to be followed in maintaining the register for the purpose of the dates fixed in the matter and the purpose for which the date has been fixed. The said provision does not in any way impinge upon the power of the court to proceed for disposal of the suit in case both the

parties or either of the parties fail to appear as provided in Order IX of the Code.

43. The decision of this Court in *Sahara India8* relied upon by the learned senior counsel for the appellants hardly has any application to the facts of the present case. The facts in that case are indicated in paragraph 4 of the Report. On May 13, 2002, the case was fixed for the evidence of the plaintiff. On that day, the Presiding Officer was on leave and the case was adjourned to May 29, 2002 for the plaintiff's evidence. On May 29, 2002, none appeared for the defendants and the matter was adjourned to May 31, 2002 for final arguments and for orders after lunch. Finally, the suit was decreed by the trial court. The first appeal from the judgment and decree of the trial court was dismissed. The matter then reached this Court. It is true that it was argued before this Court that the course adopted by the trial court has no sanctity in law and even if the defendants were not present, the order could have been passed at the most to set the defendants *ex parte* and another date should have been fixed. It was also argued before this Court that the reason for non-appearance was due to the wrong noting of the date by the counsel appearing for the defendants. In paragraph 8 of the decision, this Court stated thus :

> "**8.** We find that the High Court has disposed of the first appeal practically by a non-reasoned order. It did not even consider the plea of the defendants as to why there was non-appearance. Be that as it may, the course adopted by the trial court appears to be unusual. Therefore, we deem it proper to remit the matter to the trial court for fresh adjudication. Since the matter is pending the trial court shall dispose of the matter within three months from the date of receipt of our order.

44. From the above, it is clear that what persuaded this Court in remanding the matter back to the trial court was that the High Court disposed of the first appeal by a non-reasoned

order. The High Court did not even consider the plea of the defendants as to why there was non-appearance. The observation, "Be that as it may, the course adopted by the trial court appears to be unusual" must be seen in its perspective. The statement does not exposit any principle of law.

45. It was contended by Mr. Shekhar Naphade, learned senior counsel for the appellants that diverse interlocutory applications, particularly, applications (i) to produce original documents under Section 151 of the Code (IA No. 10), (ii) under Order XXX Rule 10 of the Code for dismissal of the suit (IA No. 11), (iii) for the leave of the court to deliver interrogatories under Order XI Rule 1 of the Code (IA No. 13), (iv) for production of excise documents under Order XI Rules 12 and 14 of the Code (IA No. 14), (v) for summoning records from the Central Excise Department under Order XVI Rules 1 and 6 of the Code (IA No. 27) and (vi) for inspection of documents under Order XI Rule 14 of the Code (IA No. 28) were made but wrongly rejected by the trial court by various orders. He submitted that these orders were challenged before the High Court and then brought to this Court. This Court granted liberty to the defendants to raise contentions concerning rejection of these applications in the appeal against the decree. The appellants challenged the orders rejecting these applications before the High Court in the first appeal and raised contentions in this regard but the High Court did not advert to these contentions at all. Learned senior counsel submitted that rejection of these applications and non-adherence to pre-trial procedures have rendered the impugned judgment and decree bad in law.

46. The judgment of the High Court is not brief, and is rather occupied with an elaborate discussion but there is no reference of challenge to the orders passed by the trial court on various interlocutory applications. Confronted with this difficulty, learned senior counsel relied upon statement made at page 'I' of the synopsis, paragraph 21, wherein it is stated :

> "The following issues were taken in the ground of appeal and argued but have not even been discussed by the Hon'ble High Court in its impugned judgment.
>
> …….
>
> (d) That the Petitioner had also assailed the dismissal of various applications filed by the Petitioner during the course of trial in view of the liberty granted by this Hon'ble Court but none of the grounds has been considered or discussed or even averred to in the impugned judgment.
>
> ……."

It is true that in the counter affidavit filed by the respondent, nothing has been said about the above statement made in the synopsis. However, in our view, in case the contentions raised by the appellants were not considered by the High Court, the proper course available to the appellants was to bring to the notice of the High Court this aspect by filing a review application. Such course was never adopted. In view of this, we are not persuaded to permit the appellants to challenge the orders passed by the trial court on the interlocutory applications now and argue that trial court erred in not adhering to the pre-trial procedures.

47. Mr. Shekhar Naphade, learned senior counsel for the appellants also challenged the correctness of the order dated December 7, 2005 passed by the trial court granting plaintiff permission to lead secondary evidence. In our view, the trial court cannot be said to have erred in permitting the plaintiff to lead secondary evidence when the original assignment deed was reportedly lost.

48. Learned senior counsel for the appellants vehemently contended that the evidence let in by the plaintiff is no evidence in the eye of law and, therefore, on such evidence, the plaintiff's suit could not have been decreed. The argument of the learned

senior counsel is that on behalf of the plaintiff, three witnesses were tendered in evidence; their examination-in-chief was filed by means of affidavits but, as required under Order XVIII Rule 5 of the Code, they never entered the witness box nor confirmed the contents of the affidavits. In this regard, learned senior counsel relied upon a decision of the Bombay High Court in the case of *F.D.C. Limited* v. *Federation of Medical Representatives Association India & Ors.* and a decision of this Court in *Ameer Trading Corpn. Ltd.* v. *Shapoorji Data Processing Ltd.* affirming the view of the Bombay High Court in the case of *F.D.C. Limited9*. Learned senior counsel would submit that as a matter of fact, the plaintiff did make an application on February 28, 2005 for permission to follow the procedures as stated in the case of *Ameer Trading Corpn. Ltd.10* but on the next date, i.e., March 17, 2005 that application was withdrawn. According to him, irrespective of withdrawal of such application, the plaintiff had to follow the procedure provided in order XVIII Rule 5 of the Code before examination-in-chief of its witnesses through affidavits could be treated as evidence as the case before the trial court was an appealable case. He also argued that the documents referred to in the affidavits have not been proved according to the provisions of the Evidence Act and under Order XVIII Rule 4 of the Code. It was, thus, contended by the learned senior counsel that there has been absolutely non-application of mind by the trial court in decreeing plaintiff's suit.

49. Order XVIII Rule 4 of the Code provides for the mode of recording the evidence. The said provision reads as follows :

> "4. Recording of evidence.—(1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:
>
> Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.
>
> (2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court shall be taken either by the Court or by the Commissioner appointed by it:
>
> Provided that the Court may, while appointing a commission under this sub-rule, consider taking into account such relevant factors as it thinks fit:
>
> (3) The Court or the Commissioner, as the case may be, shall record evidence either in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit.
>
> (4) The Commissioner may record such remarks as it thinks material respecting the demeanour of any witness while under examination.
>
> Provided that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments.
>
> (5) The report of the Commissioner shall be submitted to the Court appointing the commission within sixty days from the date of issue of the commission unless the Court for reasons to be recorded in writing extends the time.

9. AIR 2003 Bom 371.

10. (2004) 1 SCC 702.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of Commissioners to record the evidence under this rule.

(7) The Court may by general or special order fix the amount to be paid as remuneration for the services of the Commissioner.

(8) The provisions of rules 16, 16A, 17 and 18 of Order XXVI, in so far as they are applicable, shall apply to the issue, execution and return of such commission under this rule."

50. As to how the evidence is to be taken in appealable cases is provided in Rule 5 of Order XVIII of the Code. This provision reads as follows :

"5. How evidence shall be taken in appealable cases.—In cases in which an appeal is allowed, the evidence of each witness shall be,—

(a) taken down in the language of the Court,-

(i) in writing by, or in the presence and under the personal direction and superintendence of, the Judge, or

(ii) from the dictation of the Judge directly on a typewriter, or

(b) if the Judge, for reasons to be recorded, so directs, recorded mechanically in the language of the Court in the presence of the Judge."

51. The purpose and objective of Rule 4 of Order XVIII of the Code is speedy trial of the case and to save precious time of the court as the examination-in-chief of a witness is now mandated to be made on affidavit with a copy thereof to be supplied to the opposite party. The provision makes it clear that

cross-examination and re-examination of witness shall be taken either by the court or by Commissioner appointed by it. Proviso appended to sub-rule (1) of Rule 4 of Order XVIII further clarifies that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with the affidavit shall be subject to the order of the court. In a case in which appeal is allowed, Rule 5 of Order XVIII provides that the evidence of each witness shall be taken down in writing by or in the presence and under the personal direction and superintendence of the Judge or from the dictation of the Judge directly on a typewriter or recorded mechanically in the presence of the Judge if the Judge so directs for reasons to be recorded in writing.

52. The above provisions, namely, Order XVIII Rule 4 and Order XVIII Rule 5 of the Code came up for consideration before this Court in the case of *Ameer Trading Corpn. Ltd.*[10]. Before we refer to this judgment, it is appropriate that the judgment of the Bombay High Court in *F.D.C. Limited*[9] is noted. The Single Judge of that Court in *F.D.C. Limited*[9] held as under :-

"7. It is to be noted that the legislature being fully aware about the provision of law contained in Rule 5 which was already there even prior to the amendment to Rule 4, has amended the Rule 4 with effect from 1.7.2002 specifically providing thereunder that the examination in chief "in every case" shall be on affidavit. One has to bear in mind the decisions of the Apex Court in the case of Dadi Jagannadham v. Jammulu Ramulu reported in 2001 (7) SCC 71 on the settled principles of interpretation of statutes that the Court must proceed on the assumption that the legislature did not make a mistake and that it did what it intend to and the court as far as possible should adopt construction which will carry out obvious intention of legislature, and in East India Hotels Ltd., and Anr. v. Union of India and Anr. reported in (2001) 1 SCC 284 that "An

act has to be read as a whole, the different provisions have to be harmonised and the effect has to be given to all of them". The harmonious reading of Rules 4 and 5 of Order XVIII would reveal that while in each and every case of recording of evidence, the examination in chief is to be permitted in the form of affidavit and while such evidence in the form of affidavit being taken on record, the procedure described under Rule 5 is to be followed in the appealable cases. In non appealable cases, the affidavit can be taken on record by taking resort to the provisions of law contained in Rule 13 of Order XVIII. In other words, mere production of the affidavit by the witness will empower the court to take such affidavit on record as forming part of the evidence by recording the memorandum in respect of production of such affidavit taking resort to Rule 13 of Order XVIII in all cases, except in the appealable cases wherein it will be necessary for the Court to record evidence of production of the affidavit in respect of examination in chief by asking the deponent to produce such affidavit in accordance with Rule 5 of Order XVIII. Undoubtedly, in both the cases, for the purpose of cross-examination, the court has to follow the procedure prescribed under Sub-rule 2 of Rule 4 read with Rule 13 in case of non-appealable cases and the procedure prescribed under Sub-rule 2 of Rule 4 read with Rule 5 in appealable cases.

8. In other words, in the appealable cases though the examination in chief of a witness is permissible to be produced in the form of affidavit, such affidavit cannot be ordered to form part of the evidence unless the deponent thereof enters the witness box and confirms that the contents of the affidavit are as per his say and the affidavit is under his signature and this statement being made on oath to be recorded by following the procedure prescribed under Rule 5. In non appealable cases however, the affidavit in relation to examination in chief of a witness can

be taken on record as forming part of the evidence by recording memorandum of production of such affidavit by taking resort to Rule 13 of Order XVIII. The cross-examination of such deponent in case of appealable cases, will have to be recorded by complying the provisions of Rule 5, whereas in case of non appealable cases the court would be empowered to exercise its power under Rule 13.

9. In fact Rule 4, either unamended or amended makes no difference between appealable or non appealable cases in the matter of method of recording of evidence. Such differentiation is to be found in Rule 5 and 13. The Rule 4, prior to the amendment, provided that when witness would appear before the court, his testimony would require to be recorded in the presence of and under the personal direction of the Judge which was required to be done in appealable cases as well as in non appealable cases. Only method of recording testimony in appealable cases that was to be in terms of Rule 5 whereas in other cases in terms of Rule 13. Now, in terms of Rule 4, after its amendment, it provides that recording of evidence in relation to examination in chief shall be in all cases by way of affidavits. However, as already observed above, in appealable cases the same to be admitted in evidence or to be made part and parcel of the evidence by following the method prescribed under Rule 5 and in other cases, the one prescribed under Rule 13.

10. Experience has shown that by allowing the parties to place on record the examination in chief in the form of affidavit, saves lot of time of the Court, the litigants and the public. The provisions of law of procedure are to be read and interpreted, to give full effect to the intention of the legislature. The intention behind the amendment to Rule 4 is to curtail the delay in disposal of the suits. As the recording of evidence in the form of affidavit being in aid

of avoiding delay in disposal of the suits, and there being no conflict disclosed between the provisions of Rules 4 and 5 on being read as above, it is to be held that in each and every case, the evidence in examination in chief before the trial court can be in the form of affidavit, the only difference to be observed will be in the procedure of taking such affidavit on record and in the appealable cases it has to be taking resort to the provisions of Rule 5 and in other cases to Rule 13."

53. At this stage, a reference to Rule 13 of Order XVIII of the Code may also be made. The said provision provides for memorandum of evidence in unappealable cases. It reads as follows:

"13. Memorandum of evidence in unappealable cases.— In cases in which an appeal is not allowed, it shall not be necessary to take down or dictate or record the evidence of the witnesses at length; but the Judge, as the examination of each witness proceeds, shall make in writing, or dictate directly on the typewriter, or cause to be mechanically recorded, a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the Judge or otherwise authenticated, and shall form part of the record."

54. It is also relevant to mention that Rule 5 of Order XVIII was substituted by Act 104 of 1976 with effect from February 1, 1977. Order XVIII Rule 4 of the Code was in fact substituted by a later Act, namely, Act No. 22 of 2002 with effect from July 1, 2002. Rule 4 Order XVIII begins with the expression, "in every case" and says that the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence.

55. Now, we consider the decision of this Court in *Ameer Trading Corpn. Ltd.*[10] . The interpretation of Order XVIII Rule 4 and Rule 5 of the Code fell for consideration in that case. In

paragraph 15 of the Report, this Court stated, 'the examination of a witness would include evidence-in-chief, cross-examination or re-examination. Rule 4 of Order XVIII speaks of examination-in-chief. ……Such examination-in-chief of a witness in every case shall be on affidavit". The Court then stated in paragraph 17 that Rule 4 of Order XVIII, as amended with effect from July 1, 2002 specifically provides that the examination-in-chief in every case shall be on affidavit. It was noticed by this Court that Rule 5 of Order XVIII has been incorporated prior to the amendment in Rule 4. Noticing the difference between Rule 4 and Rule 5 of Order XVIII, the Court said that Rule 4 of Order XVIII did not make any distinction between appealable and non-appealable cases so far as mode of recording evidence is concerned. Then, in paragraph 19 of the Report, the Court observed as under :

"19. It, therefore, appears that whereas under the unamended rule, the entire evidence was required to be adduced in court, now the examination-in-chief of a witness including the party to a suit is to be tendered on affidavit. The expression "in every case" is significant. What thus remains viz. cross-examination or re-examination in the appealable cases will have to be considered in the manner laid down in the rules, subject to the other sub-rules of Rule 4."

56. This Court applied Heydon's Rule as well as the principles of purposive construction and stated (i) the amendment having been made in Rule 4 of Order XVIII of the Code by the Parliament later, the said provision must be given full effect and (ii) the two provisions must be construed harmoniously. In paragraph 33 of the Report, this Court stated as follows :

"33. The matter may be considered from another angle. Presence of a party during examination-in-chief is not imperative. If any objection is taken to any statement made in the affidavit, as for example, that a statement has been

made beyond the pleadings, such an objection can always be taken before the court in writing and in any event, the attention of the witness can always be drawn while cross-examining him. The defendant would not be prejudiced in any manner whatsoever if the examination-in-chief is taken on an affidavit and in the event he desires to cross-examine the said witness he would be permitted to do so in the open court. There may be cases where a party may not feel the necessity of cross-examining a witness, examined on behalf of the other side. The time of the court would not be wasted in examining such witness in open court."

57. It is pertinent to notice that in *Ameer Trading Corpn. Ltd.*[10], a decision of the Rajasthan High Court in the case of *Laxman Das v. Deoji Mal & Ors.*[11] was cited wherein the view was taken that in the appealable cases, Order XVIII Rule 4 of the Code has no application and the court must examine all the witnesses in court. The contrary view taken by the Bombay High Court in *F.D.C. Limited*[9] was also cited. This Court considered the decision of the Rajasthan High Court in the case of *Laxman Das*[11] and the decision of Bombay High Court in *F.D.C. Limited*[9] and noticed the conflict in the two decisions. When this Court stated in paragraph 32, "we agree with the view of the Bombay High Court", the Court agreed with the view of the Bombay High Court that irrespective of whether the case is appealable or non-appealable the examination-in-chief has to be permitted in the form of affidavit. Paragraph 32 of the Report cannot be read to mean that paragraphs 7 and 8 of the decision of the Bombay High Court in *F.D.C. Limited*[9] were approved by this Court in entirety. This is for more than one reason. In the first place, this Court after quoting the view of Rajasthan High Court in the case of *Laxman Das*[11] in paragraph 30 and the view of Bombay High Court in the case of *F.D.C. Limited*[9] in paragraph 31, said, "we agree with the view of the Bombay High Court". This expression, thus, means that this Court has

11. AIR 2003 Rajasthan 74.

preferred the view of Bombay High Court concerning the interpretation of Rule 4 of Order XVIII of the Code over the view of the Rajasthan High Court. Second and equally important, after quoting paragraphs 7 and 8 of the decision of the Bombay High Court in *F.D.C. Limited*[9], the Court has not said that they agree with the above view of the Bombay High Court. Third, the subsequent paragraph 33 makes the legal position further clear. This Court said, "presence of a party during examination-in-chief is not imperative. If any objection is taken to any statement made in the affidavit, as for example, that a statement has been made beyond the pleadings, such an objection can always be taken before the court in writing and in any event, the attention of the witness can always be drawn while cross-examining him". The prejudice principle was accordingly applied and the Court said that the defendant would not be prejudiced in any manner whatsoever if the examination-in-chief is taken on an affidavit and in the event the defendant desires to cross-examine the said witness he would be permitted to do so in the open court. For all this, it cannot be said that in *Ameer Trading Corpn. Ltd.*[10], it has been laid down as an absolute rule that in the appealable cases though the examination-in-chief of a witness is permissible to be produced in the form of affidavit, such affidavit cannot be treated as part of the evidence unless the deponent enters the witness box and confirms that the contents of the affidavit are as per his say and the affidavit is under his signature. Where the examination-in-chief of a witness is produced in the form of an affidavit, such affidavit is always sworn before the Oath Commissioner or the Notary or Judicial Officer or any other person competent to administer oath. The examination-in-chief is, thus, on oath already. In our view, there is no requirement in Order XVIII Rule 5 that in appealable cases, the witness must enter the witness box for production of his affidavit and formally prove the affidavit. As it is such witness is required to enter the witness box in his cross-examination and, if necessary, re-examination. Since a witness who has given his examination-in-chief in the form of affidavit has to make himself available for cross-examination in the

witness box, unless defendant's right to cross examine him has been closed, such evidence (examination-in-chief) does not cease to be legal evidence.

58. On February 28, 2005, the three witnesses whose examination-in-chief was tendered by the plaintiff in the form of affidavits were present for cross-examination but despite the opportunity given to the defendants, they chose not to cross-examine them and thereby the trial court closed the defendants' right to cross-examine these witnesses. In view of this, it cannot be said that any prejudice has been caused to the defendants if these three witnesses did not enter the witness box.

59. Learned senior counsel for the appellants also submitted that the suit was not maintainable under Order XXX Rule 10 of the Code having been filed in the name of the proprietorship firm—M/s. M.S.S. Food Products. Relying upon a decision of the Bombay High Court in the case of *Bhagvan Manaji Marwadi & Ors. v. Hiraji Premaji Marwadi*[12], it was urged that a proprietorship firm cannot sue in its name.

60. Rule 10 of Order XXX of the Code reads as follows :

> "10. Suit against person carrying on business in name other than his own.—Any person carrying on business in a name or style other than his own name, or a Hindu undivided family carrying on business under any name, may be sued in such name or style as if it were a firm name, and, in so far as the nature of such case permits, all rules under this Order shall apply accordingly."

61. The above provision is an enabling provision which provides that a person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name. As a necessary corollary, the said provision does not enable a person carrying on business in a

12. AIR 1932 Bom 516.

name or style other than in his own name to sue in such name or style.

62. The plaint filed by the plaintiff describes the title of the plaintiff as follows:

> "Messrs. M.S.S. Food Products,
> Plot No. D, Sector-E,
> Sanver Road Industrial Area, Indore,
> Through – Proprietor – Nilesh Vadhwani,
> Son of Shri Ashok Vadhwani, aged 27 years,
> Occupation – Business."

63. The above description of the plaintiff in the plaint at best may be called to be not in proper order inasmuch as the name of Nilesh Vadhwani must have preceded the business name in the cause title. This is not an illegality which goes to the root of the matter. Moreover, the defendants did file an application (IA No. 11/2004) under Order XXX Rule 10 of the Code before the trial court but that came to be rejected on November 27, 2004. The said order was challenged at interlocutory stage and the matter ultimately reached this Court. This Court refused to interfere with the order but gave liberty to the defendants to challenge the same in the first appeal, if aggrieved by the judgment and decree. Even after rejection of the application under Order XXX Rule 10 of the Code by the trial court vide order dated November 27, 2004, the defendants yet attempted to raise the same controversy by making an application for amendment in the written statement but that too was dismissed. This order was also challenged at interlocutory stage by the defendants but the said order was not interfered with by the High Court and this Court and liberty was granted to the defendants to challenge the same in the first appeal against the final judgment and decree. However, from the perusal of the judgment of the High Court, it appears that no argument was advanced with regard to correctness of these two orders. We have already referred to this aspect in the earlier part of our judgment. The judgment of the Bombay High

Court in the case of *Bhagvan Manaji Marwadi*[12] is of no help to the appellants for the above reasons.

64. Mr. Shekhar Naphade, learned senior counsel for the appellants strenuously urged that statutory excise record (since pan masala/gutka are exigible to excise duty) having not been filed by the plaintiff which was the best piece of evidence, the adverse inference ought to have been drawn against the plaintiff that plaintiff never manufactured pan masala/gutka under the brand "Malikchand" and the factum of manufacturing "Malikchand" pan masala and gutka having not been proved, there was no question of restraining the defendants from using their brand "Manikchand" in the passing off action. In support of his contention that the party is bound to produce best evidence in his possession to prove his case, learned senior counsel placed reliance on a decision of this Court in *Gopal Krishnaji Ketkar v. Mahomed Haji Latif and Ors.*[13] It was also argued that the defendants are well-known registered brand having national as well as international presence for more than two decades; the turnover of the defendants is more than rupees three hundred crores per annum and they have been incurring huge expenditure on sales, promotion and advertisement and that on account of continuous use of trade "Manikchand" from the year 1961 on a commercial scale, their mark has acquired the status of well-known mark within the meaning of Section 2(1)(zg) of the Trade Marks Act, 1999 and the High Court as well as trial court ought to have taken judicial notice of the brand and goodwill of "Manikchand". It was also submitted that the plaintiff has produced the fabricated documents viz., bill that referred to service tax in the year 1990 whereas service tax came into force in the year 1994 only. The deeds of assignment do not inspire confidence as assignment has been made for a consideration of Rs. 500/- which is too meager and, as a matter of fact, the Bombay police after investigation found that the two assignment deeds dated May 1, 1986 and April 1, 1992 were forged and fabricated.

13. AIR 1968 SC 1413.

65. We are not persuaded by the submission of learned senior counsel for the appellants. The defendants did not cross-examine the plaintiff's witnesses despite opportunity having been granted to them. There could have been some merit in the submissions, had the defendants cross-examined the plaintiff's witnesses on these aspects. But, unfortunately, they did not avail of that opportunity. In the circumstances, if the trial court and the High Court accepted the plaintiff's evidence which remained un-rebutted and unchallenged and also relied upon the documents produced by the plaintiff, it cannot be said that any illegality has been committed by the trial court in decreeing plaintiff's suit or any illegality has been committed by the High Court in dismissing the first appeal.

66. Learned senior counsel for the appellants then contended that the matter was posted for judgment on March 7, 2007 and the counsel for the plaintiff submitted that he did not wish to argue the matter and since the plaintiff did not argue the matter, as required by Order XX Rule 1 of the Code, the learned Trial Judge ought to have dismissed the suit. We find no merit in this submission. As noticed above, the matter was fixed for pronouncement of judgment on March 28, 2005. The judgment could not be pronounced on that day and the matter, thereafter, was fixed on various dates on the diverse applications made by the defendants. In the meanwhile, the Presiding Officer who heard the arguments of the plaintiff and kept the judgment reserved got transferred and new Presiding Officer assumed the office. We have already dealt with in detail that in the facts and circumstances of the case, on transfer of the predecessor Judge who heard the arguments, it was not incumbent upon the successor Judge to hear the arguments of the defendants. The proceedings reveal that ultimately the matter was kept for pronouncement of judgment on March 7, 2007. On that day, the court disposed of various applications made by the defendants and pronounced the judgment. The order sheet of March 7, 2007 does record that the plaintiff's advocate expressed that he did not want to address any arguments. This

statement is in the context of not advancing further arguments as on behalf of the plaintiff, the arguments had already been advanced; the judgment was reserved and kept for pronouncement. The contention of the learned senior counsel is noted to be rejected.

67. Lastly, learned senior counsel relying on "doctrine of proportionality" submitted that even if it is held that the defendants were in default in reaching the court late on March 17, 2005 and failed to cross-examine the plaintiff's witnesses, the court could have at best imposed cost on the defendants and given them an opportunity to lead evidence and contest the suit on merits. Had this course been adopted, there would not have been any prejudice to the plaintiff since it was enjoying an interim order in its favour since March 16, 2004. It was, thus, submitted that there was no occasion for the Trial Judge to proceed *ex parte*, and in not permitting the defendants to argue the case. The contention of the learned senior counsel for the appellants is that the judgment and decree passed by the trial court is not proportionate to the default on the part of the defendants and, accordingly, liable to be set aside.

68. We have already indicated above that in view of the direction of the High Court and reiteration of that direction by this Court, the trial court was required to complete the trial and dispose of the suit within six months from the date of the order of this Court. Obviously, the trial court had to proceed with the trial of the suit speedily. On February 28, 2005, the matter was fixed before the trial court for cross-examination of plaintiff's witnesses. The defendants' advocate moved an application for adjournment which was rejected by the trial court and when the trial court asked the defendants' advocate to proceed with the cross-examination, he told the court to do whatever it wanted. What option was left to the court except to close the right of the defendants to cross-examine plaintiff's witnesses. On the next date, the defendants or their advocates even did not appear. The court was constrained to proceed ex parte against

the defendants, hear the plaintiff's advocate when the plaintiff closed its evidence and reserve the judgment to be pronounced at a later date.

69. Recently, in the case of *M/s. Shiv Cotex v. Tirgun Auto Plast P. Ltd. & Ors.* (Civil Appeal No. 7532 of 2011) decided on August 30, 2011, this Bench speaking through one of us (R.M. Lodha, J.), said, "……. Should the court be a silent spectator and leave control of the case to a party to the case who has decided not to take the case forward? …….". In paragraph 16 of the judgment, we stated :

> "No litigant has a right to abuse the procedure provided in the CPC. Adjournments have grown like cancer corroding the entire body of justice delivery system…….The past conduct of a party in the conduct of the proceedings is an important circumstance which the courts must keep in view whenever a request for adjournment is made. A party to the suit is not at liberty to proceed with the trial at its leisure and pleasure and has no right to determine when the evidence would be let in by it or the matter should be heard. The parties to a suit – whether plaintiff or defendant – must cooperate with the court in ensuring the effective work on the date of hearing for which the matter has been fixed. If they don't, they do so at their own peril……."

70. The doctrine of proportionality has been expanded in recent times and applied to the areas other than administrative law. However, in our view, its applicability to the adjudicatory process for determination of 'civil disputes' governed by the procedure prescribed in the Code is not at all necssary. The Code is comprehensive and exhaustive in respect of the matters provided therein. The parties must abide by the procedure prescribed in the Code and if they fail to do so, they have to suffer the consequences. As a matter of fact, the procedure provided in the Code for trial of the suits is extremely rational, reasonable and elaborate. Fair procedure is its

hallmark. The courts of civil judicature also have to adhere to the procedure prescribed in the Code and where the Code is silent about something, the court acts according to justice, equity and good conscience. The discretion conferred upon the court by the Code has to be exercised in conformity with settled judicial principles and not in a whimsical or arbitrary or capricious manner. If the trial court commits illegality or irregularity in exercise of its judicial discretion that occasions in failure of justice or results in injustice, such order is always amenable to correction by a higher court in appeal or revision or by a High Court in its supervisory jurisdiction. Having regard to the facts of the present case, which we have already indicated above, it cannot be said that the trial court acted illegally or with material irregularity or irrationally or in an arbitrary manner in passing the orders dated February 28, 2005 and March 17, 2005. The defendants by their conduct and tactics disentitled themselves from any further indulgence by the trial court. The course adopted by the trial court can not be said to be unfair or inconsistent with the provisions of the Code.

71. In view of the above, appeal has no merit and is dismissed with costs which we quantify at Rupees 50,000/- (fifty thousand).

N.J. Appeal dismissed.

KETAN V. PAREKH

v.

SPECIAL DIRECTOR, DIRECTORATE OF ENFORCEMENT AND ANOTHER.

(Civil Appeal No. 10301 of 2011)

NOVEMBER 29, 2011

[G.S. SINGHVI AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

LIMITATION ACT, 1963: s.14 – Delay in filing appeal – Condonation of – Imposition of penalty on the appellants for contravening provisions of FEMA – Appellate tribunal directed appellants to pay 50% of penalty as pre-condition of hearing appeal – Writ petition filed before Delhi High Court, dismissed as non-maintainable – Appeal filed before Bombay High Court u/s.35 of FEMA against the order of the appellate tribunal after delay of 1056 days – Bombay High court declining condonation of delay in filing appeal – Plea of appellant that Bombay High Court while computing period of limitation erred in not taking cognizance of s.14 and in not excluding the entire period during which writ petition remained pending before Delhi High Court – Tenability of – Held: Not tenable – Existence of good faith is a sine qua non for invoking s.14 of the Act – Appellants filed writ petition before wrong forum and came to the forum having jurisdiction to entertain the appeal after delay of 1056 days and sought condonation of delay – Delay was rightly held not condonable since there was no averment in the applications seeking condonation that they had been prosecuting remedy before a wrong forum, i.e. the Delhi High Court with due diligence and in good faith – Not only this, the prayer made in the applications was for condonation of 1056 days' delay and not for exclusion of the time spent in prosecuting the writ petitions before the Delhi High Court – This showed that the appellants

were seeking to invoke s.5 which cannot be pressed into service in view of the language of s.35 of the FEMA – Moreover, appellants were well conversant with various statutory provisions including FEMA since several civil and criminal cases were pending against them and had engaged a group of eminent Advocates to present their cause before the Delhi and the Bombay High Courts – There was total absence of good faith, which is sine qua non for invoking s.14 of the Act – Foreign Exchange Management Act, 1999 – Delay – Condonation of.

Foreign Exchange Management Act, 1999: s.19 – Pre-deposit of penalty – Dispensation of – Allegation of contravention of provisions of the Act – Appellate Tribunal directed appellants to deposit 50% of the amount of penalty as a pre-condition of hearing the appeal – On appeal, held: The appellants miserably failed to make out a case, which could justify an order by the Appellate Tribunal to relieve them of the statutory obligation to deposit the amount of penalty – The appellants had the exclusive knowledge of their financial condition/status and it was their duty to candidly disclose all their assets, movable and immovable including those in respect of which orders of attachment may have been passed by the judicial and quasi judicial forums – However, instead of coming clean, they tried to paint a gloomy picture about their financial position, which the Appellate Tribunal rightly refused to accept – Appellants deliberately concealed the facts relating to their financial condition – Therefore, the Appellate Tribunal did not commit any error by refusing to entertain their prayer for total exemption.

The Special Director of Enforcement, Mumbai passed an order imposing penalty on the appellants on the ground of contravention of the provisions of the Foreign Exchange Management Act, 1999. The appellants challenged the said order by filing appeals under Section 19 of the Act. They also filed applications under Rule 10

of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 read with Section 19 (1) of the Act for dispensing with the requirement of deposit of the amount of penalty. The Appellate Tribunal passed order dated 2.8.2007 and directed the appellants to deposit 50% of the amount of penalty as a pre-condition of hearing the appeal. The appellants filed writ petitions in Delhi High Court which was dismissed on the ground of non-maintainability. The appellants filed appeals under Section 35 of the Act before the Bombay High Court. They also filed applications for condonation of 1056 days' delay. The Bombay High Court dismissed the applications for condonation of delay on the ground that it did not have the power to entertain an appeal filed beyond 120 days and even though in terms of the liberty given by the Delhi High Court, the appellants could have filed appeals within 30 days, but they failed to do so and, therefore, delay in filing the appeals could not be condoned.

In the instant appeal, it was contended for the appellants that while dismissing the applications for condonation of delay, the High Court did not take cognizance of Section 14 of the Limitation Act, 1963; that in terms of Section 14, entire period during which the writ petitions filed by the appellants remained pending before the Delhi High Court was liable to be excluded while computing the period of limitation and if that was done, the appeals filed under Section 35 would have not been barred by time.

Dismissing the appeal, the Court

HELD: 1. Section 14 of the Limitation Act cannot be relied upon for exclusion of the period during which the writ petitions filed by the appellants remained pending before the Delhi High Court. In the applications filed by

them before the Bombay High Court, the appellants had sought condonation of 1056 days' delay by stating that after receiving copy of the order passed by the Appellate Tribunal, they had filed writ petitions before the Delhi High Court, which were disposed of on 26.7.2010 and, thereafter, they filed appeals before the Bombay High Court under Section 35 of the Act. A careful reading of the averments in applications for condonation of delay showed that there was not even a whisper in the applications filed by the appellants that they had been prosecuting remedy before a wrong forum, i.e. the Delhi High Court with due diligence and in good faith. Not only this, the prayer made in the applications was for condonation of 1056 days' delay and not for exclusion of the time spent in prosecuting the writ petitions before the Delhi High Court. This showed that the appellants were seeking to invoke Section 5 of the Limitation Act which cannot be pressed into service in view of the language of Section 35 of the Act and interpretation of similar provisions by this Court. There is another reason why the benefit of Section 14 of the Limitation Act cannot be extended to the appellants. All of them were well conversant with various statutory provisions including FEMA. One of them was declared a notified person under Section 3(2) of the Special Court (Trial of Offences relating to Transactions in Securities) Act, 1992 and several civil and criminal cases were pending against them. The very fact that they had engaged a group of eminent Advocates to present their cause before the Delhi and the Bombay High Courts showed that they had the assistance of legal experts and this seemed to the reason why they invoked the jurisdiction of the Delhi High Court and not of the Bombay High Court despite the fact that they were residents of Bombay and had been contesting other matters including the proceedings pending before the Special Court at Bombay. It also appeared that the

appellants were sure that keeping in view their past conduct, the Bombay High Court may not interfere with the order of the Appellate Tribunal. Therefore, they took a chance before the Delhi High Court and succeeded in persuading Single Judge of the Court to entertain their prayer for stay of further proceedings before the Appellate Tribunal. The promptness with which the counsel appearing for appellant made a statement before the Delhi High Court on 7.11.2007 that the writ petition may be converted into an appeal and considered on merits is a clear indication of the appellant's unwillingness to avail remedy before the Bombay High Court which had the exclusive jurisdiction to entertain an appeal under Section 35 of the Act. It is not possible to believe that as on 7.11.2007, the appellants and their Advocates were not aware of the judgment of this Court in whereby dismissal of the writ petition by the Delhi High Court on the ground of lack of territorial jurisdiction was confirmed and it was observed that the parties cannot be allowed to indulge in forum shopping. After having made a prayer that the writ petitions filed by them be treated as appeals under Section 35, two of the appellants filed applications for recall of that order. No doubt, the Single Judge accepted their prayer and the Division Bench confirmed the order of the Single Judge but the manner in which the appellants prosecuted the writ petitions before the Delhi High Court would leave no room for doubt that they had done so with the sole object of delaying compliance of the direction given by the Appellate Tribunal and, by no stretch of imagination, it can be said that they were bona fide prosecuting remedy before a wrong forum. Rather, there was total absence of good faith, which is *sine qua non* for invoking Section 14 of the Limitation Act. [Paras 21, 22, 23]

Union of India v. Popular Construction Co. **(2001) 8 SCC 470: 2001 (3) Suppl. SCR 619: 2001 (3) Suppl. SCR 619;**

Singh Enterprises v. CCE **(2008) 3 SCC 70: 2007 (13) SCR 952;** *Commissioner of Customs, Central Excise v. Punjab Fibres Ltd.* **(2008) 3 SCC 73: 2008 (2) SCR 861;** *Commissioner of Customs and Central Excise v. Hongo India Private Limited* **(2009) 5 SCC 791;** *Chhattisgarh State Electricity Board v. Central Electricity Regulatory Commission and Ors.* **(2010) 5 SCC 23: 2010 (4) SCR 680;** *Hukumdev Narain Yadav v. Lalit Narain Mishra* **(1974) 2 SCC 133: 1974 (3) SCR 31;** *Vidyacharan Shukla v. Khubchand Baghel* **AIR 1964 SC 1099: 1964 SCR 129;** *Hukumdev Narain Yadav v. Lalit Narain Mishra* **(1974) 2 SCC 133: 1974 (3) SCR 31:;** *Mangu Ram v. MCD* **(1976) 1 SCC 392: 1976 (2) SCR 260;** *Patel Naranbhai Marghabhai v. Dhulabhai Galbabhai* **(1992) 4 SCC 264: 1992 (3) SCR 384 – relied on.**

State of Goa v. Western Builders **(2006) 6 SCC 239: 2006 (3) Suppl. SCR 288;** *Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department and Ors.* **(2008) 7 SCC 169: 2008 (5) SCR 1108;** *Coal India Limited and Anr. v. Ujjal Transport Agency and Ors.* **(2011) 1 SCC 117;** *Ambica Industries v. Commissioner of Central Excise* **(2007) 6 SCC 769: 2007 (7) SCR 685 – referred to.**

2. The issue deserves to be considered from another angle. By taking advantage of the liberty given by the Single Judge of the Delhi High Court, the appellants invoked the jurisdiction of the Bombay High Court under Section 35 of the Act. However, while doing so, they violated the time limit specified in order dated 26.7.2010. Indeed, it is not even the case of the appellants that they had filed appeals under Section 35 of the Act within 30 days computed from 26.7.2010. Therefore, the Division Bench of the Bombay High Court rightly observed that even though the issue relating to jurisdiction of the Delhi High Court to grant time to the appellants to file appeals is highly debatable, the time specified in the order passed by the Delhi High Court cannot be extended. [Para 24]

3. As regards the plea of financial crisis, the appellants miserably failed to make out a case, which could justify an order by the Appellate Tribunal to relieve them of the statutory obligation to deposit the amount of penalty. The appellants have the exclusive knowledge of their financial condition/status and it was their duty to candidly disclose all their assets, movable and immovable including those in respect of which orders of attachment may have been passed by the judicial and quasi judicial forums. However, instead of coming clean, they tried to paint a gloomy picture about their financial position, which the Appellate Tribunal rightly refused to accept. If what was stated in the applications filed by the appellants and affidavit dated 10.10.2008 is correct, then the appellants must be in a state of begging which not even a man of ordinary prudence will be prepared to accept. It is clear that the appellants deliberately concealed the facts relating to their financial condition. Therefore, the Appellate Tribunal did not commit any error by refusing to entertain their prayer for total exemption. [Para 26]

Benara Values Ltd. v. Commissioner of Central Excise **(2006) 13 SCC 347: 2006 (9) Suppl. SCR 341;** *Siliguri Municipality v. Amalendu Das* **(1984) 2 SCC 436: 1984 (2) SCR 344;** *Samarias Trading Co. (P) Ltd. v. S. Samuel* **(1984) 4 SCC 666: 1985 (2) SCR 24;** *Commissioner of Central Excise v. Dunlop India Ltd.* **(1985) 1 SCC 260: 1985 (2) SCR 190;** *Indu Nissan Oxo Chemicals Industries Ltd. v. Union of India* **(2007) 13 SCC 487: 2007 (13) SCR 173 – relied on**

Case Law Reference:

2006 (3) Suppl. SCR 288	**Referred to.**	**Para 8**
2008 (5) SCR 1108	**Referred to.**	**Para 8**
2011 (1) SCC 117	**Referred to.**	**Para 8**

2001 (3) Suppl. SCR 619	**Relied on.**	**Para 11**
2007 (13) SCR 952	**Relied on.**	**Para 11**
2008 (2) SCR 861	**Relied on.**	**Para 11**
(2009) 5 SCC 791	**Relied on.**	**Para 11**
2010 (4) SCR 680	**Relied on.**	**Para 11**
1974 (3) SCR 31	**Relied on.**	**Para 12**
1964 SCR 129	**Relied on.**	**Para 13**
1974 (3) SCR 31	**Relied on.**	**Para 13**
1976 (2) SCR 260	**Relied on.**	**Para 13**
1992 (3) SCR 384	**Relied on.**	**Para 13**
2007 (7) SCR 685	**Referred to.**	**Para 23**
2006 (9) Suppl. SCR 341	**Relied on.**	**Para 27**
1984 (2) SCR 344	**Relied on.**	**Para 27**
1985 (2) SCR 24	**Relied on.**	**Para 27**
1985 (2) SCR 190	**Relied on.**	**Para 27**
2007 (13) SCR 173	**Relied on.**	**Para 27**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10301 of 2011 etc.

From the Judgment & Order dated 18.02.2011 of the High Court of Bombay in FEMA Appeal (ST) No. 22247 of 2010.

WITH

C.A. Nos. 10302 & 10303 of 2011.

Ranjit Kumar, Manik Dogra, Bharat Arora, Navin Chawla, Amit Mahajal for the Appellant.

A.K. Panda, P.K. Dey, B. Krishna Prasad for the Respondents.

The Judgment of the Court was delivered by

G. S. SINGHVI, J. 1. Leave granted.

2. In these appeals prayer has been made for setting aside the order of the Division Bench of the Bombay High Court whereby the applications filed by the appellants for condonation of delay in filing appeals under Section 35 of the Foreign Exchange Management Act, 1999 (for short, 'the Act') were dismissed along with the appeals filed against order dated 2.8.2007 passed by the Appellate Tribunal for Foreign Exchange (for short, 'the Appellate Tribunal').

Background facts

3. On an information received from the Reserve Bank of India that M/s. Classic Credit Ltd. and M/s. Panther Fincap and Management Services Ltd. had taken loan of 25 lakh shares each of DSQ Industries Ltd. on 1.3.2011 from M/s. Greenfield Investment Ltd, Mauritius and the Indus Ind Bank Ltd with whom M/s. Greenfield Investment Ltd. was maintaining NRE Account had informed that records did not indicate any such transaction, the Directorate of Enforcement, Mumbai conducted enquiries from different sources including Securities and Exchange Board of India, Shri Ketan Parekh, M/s. Integrated Enterprises (I) Ltd., Chennai and Indsec Securities and Finance Ltd. Thereafter, show cause notice dated 23.9.2004 was issued to M/s. Greenfield Investments Ltd., Mauritius, Shri Pravin Guwalewala, Mauritius, Smt. Neena Guwalewala, Mauritius, Shri A. K. Sen, Mauritius, M/s. Classic Credit Ltd., Mumbai, M/s. Panther Fincap and Management Services Ltd., Mumbai, Shri Ketan Parekh, Shri Kartik K. Parekh, Shri Kirit Kumar N. Parekh and Shri Navinchandra Parekh for taking action against them for contravention of the provisions of the Act. After hearing the noticees, the Special Director of Enforcement, Mumbai (for

short, 'the Special Director') passed order dated 30.1.2006 and, whereby he held that some of the noticees had violated Sections 3(d) and 6(3)(e) of the Act and imposed penalty of Rs.40 crores on M/s. Classic Credit Ltd.; Rs.40 crores on M/s. Panther Fincap and Management Services Ltd.; Rs.75 crores on M/s. Greenfield Investments Ltd.; Rs.80 crores on Shri Shri Ketan Parekh; Rs.12 crores on Shri Kartik K. Parekh; Rs.60 crores on Shri Pravin Guwalewala and Rs.20 crores on Shri A.K. Sen with a direction that they shall deposit the amount within 45 days from the date of receipt of the order.

4. The appellants challenged the aforesaid order by filing appeals under Section 19 of the Act. They also filed applications under Rule 10 of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 read with Section 19 (1) of the Act for dispensing with the requirement of deposit of the amount of penalty. In paragraphs 4 to 8 of the application filed by him, Shri Ketan V. Parekh made the following averments:

"4. The applicant submits that no case is made out against the applicant as Section 3 (d) of the Act is only attracted in case of a transaction in a foreign currency/foreign security. The appellants case does not attract the provision of Section 3 (d) of the Act.

5. That impugned order passed by Special Director is liable to be set aside in view of the grounds of appeal and the applicant has every hope of succeeding in the matter. As such the applicant has a very good prima facie case on merits and is likely to succeed in the appeal.

6. That the applicant is suffering from a grave financial hardship since all his assets including, properties, movable and immovable have been attached by an order of Ld. Debt Recovery Tribunal on 11th April, 2001 (a copy of the order dated 11th April, 2001 is annexed herewith and marked as Annexure B-1). Moreover the applicant/

appellant is a notified person and all his assets including, properties, movable and immovable have been attached by the Government of India pursuant to the Notification dated 6th October, 2001. A copy of the Notification dated 6th October, 2001 is attached herewith and marked as Annexure B-2.

7. That the appellant is further suffering due to another order of attachment passed by the Dy. CIT, Central Cir 40 under Section 281B of the Income Tax Act dated 7th April, 2003 whereby accounts of the appellant have been attached. A copy of the order dated 07.04.2003 is attached herewith and marked as Annexure-B3.

8. That by order dated 12th December, 2003 passed by SEBI, the applicant has also been prohibited from carrying out its business activity at buying selling or dealing in securities in any manner directly or indirectly and have also been debarred from associating with the Securities market for the period of Fourteen years. A copy of the SEBI order dated 12th December, 2003 is annexed herewith and marked as Annexure-B4."

In paragraphs 4 to 10 of his application, Kartik Parekh averred as under:

"4. The applicant submits that no case is made out against the applicant as Section 3 (d) of the Act is only attracted in case of a transaction in a foreign currency/foreign security. The appellants case does not attract the provision of Section 3 (d) of the Act.

5. The applicant submits that the appellant was at a same footing as Mr. Kirit Kumar Parekh and Mr. Naveen Chandra Parekh. While the respondent has exonerated Mr. Kirit Kumar Parekh and Mr. Naveen Chandra Parekh from all offences, he has perversely held the applicant/ appellant liable for the offences under the Act.

6. In any event, Mr. Ketan Parekh in his letter to the adjudicating authority has admitted that the control and management of the company fully vested in him and that the applicant is not responsible for the day to day activities of the company and hence cannot be held liable for the alleged contravention of provisions of the Act. In any event, even for the sake of argument it is admitted that the appellant was an executive director of CCL and Panther, unless it can be proven beyond any scope of doubt that the appellant was managing the day to day operations of the aforesaid companies, he cannot be held liable for any offence committed by the Company. The impugned order will be set aside on this ground itself.

7. That impugned order passed by Special Director is liable to be set aside in view of the grounds of appeal and the applicant has every hope of succeeding in the matter. As such the applicant has a very good prima facie case on merits and is likely to succeed in the appeal.

8. That the applicant company is suffering from grave financial hardship since the assets of the applicant/ appellant have been attached pursuant to the order of the Hon'ble Debt Recovery Tribunal, Mumbai dated 11th April, 2001 confirmed on 25th September, 2001 (a copy of the order dated 11th April, 2001 confirmed on 25th September, 2001 is annexed herewith and marked as Annexure B-1).

9. That by order dated 12th December, 2003 passed by SEBI, the appellant has been prohibited from carrying out its business activity of buying, selling or dealing in securities in any manner directly or indirectly and have also been debarred from associating with the Securities market for the period of fourteen years. (A copy of the SEBI order dated 12th December, 2003 is annexed herewith and marked as Annexure-B4."

10. In view of the submissions made above it is respectfully submitted that the applicant/appellant is not in a position to deposit the penalty amount of Rs.12,00,00,000 (Rupees Twelve Crores) imposed in the impugned order. The appellant/applicant has absolutely no means to pay the penalty amount as pre-deposit and such pre-deposit would cause undue hardship to the applicant/appellant."

In the application filed on behalf of M/s. Panther Fincap and Management Services Limited, the following averments were made:

"4. The applicant submits that no case is made out against the applicant as Section 3 (d) of the Act is only attracted in case of a transaction in a foreign currency/foreign security. The appellants case does not attract the provision of Section 3 (d) of the Act.

5. That impugned order passed by Special Director is liable to be set aside in view of the grounds of appeal and the applicant has every hope of succeeding in the matter. As such the applicant has a very good prima facie case on merits and is likely to succeed in the appeal.

6. That the applicant is suffering from a grave financial hardship since the accounts of the Company have also been attached by the Income Tax Department under Section 281B of the Income Tax Act by order dated 7th April, 2003 passed by Dy. CIT, Central Cir. 40, Mumbai. Further even the Bank accounts and properties of the promoter and managing director of the Company has also been attached under Section 281B of the Income Tax Act by order dated 7th April, 2003 passed by Dy. CIT, Central Cir. 40, Mumbai (a copy of the order dated 7th April, 2003 is annexed herewith and marked as Annexure B-1).

7. That by order dated 12th December, 2003 passed by SEBI, the appellant company as well as its promoter have

been prohibited from carrying out its business activity of buying, selling or dealing in securities in any manner directly or indirectly and have also been debarred from associating with the Securities market for the period of fourteen years. (A copy of the SEBI order dated 12th December, 2003 is annexed herewith and marked as Annexure-B2.

8. In view of the submissions made above it is respectfully submitted that the applicant/appellant is not in a position to deposit the penalty amount of Rs.40,00,00,000 (Rupees Forty Crores) imposed in the impugned order. The appellant/applicant has absolutely no means to pay the penalty amount as pre-deposit and such pre-deposit would cause undue hardship to the applicant/appellant."

5. After hearing the counsel for the parties, the Appellate Tribunal passed order dated 2.8.2007 and directed the appellants to deposit 50% of the amount of penalty with a stipulation that if they fail to do so, the appeals will be dismissed. The relevant portion of that order is extracted below:

"Without discussing the merits of these appeals, we are of the view that the adjudication order is not ex facie bad when the price of the borrowed DSQ shares has not been discharged but is required to be paid by the appellants which normally can be at the place where creditor, i.e. GIL, resides or is engaged in business, i.e. Mauritius. Therefore, allegations of contravention of Section 3(d) cannot be termed as ex facie bad, hence the appellants have no prima facie case. They have many questions to answer. After deciding one factor included in "undue hardship", we proceed to look to the financial position of the appellants. *It is the burden on the appellants to disclose correct financial position which in these appeals the appellants have totally failed to disclose. The appellants are not candid enough to bring out their correct financial status. Merely because Directorate of Enforcement has not come out forcefully against the ground of financial disability, this Tribunal cannot believe that appellants, who were roaring in crores at one time, are not in a position to make pre-deposit of the penalty, especially when this Tribunal is simultaneously duty-bound to, as provided in Second Proviso of Section 19 (1) FEM Act, 1999, to ensure recovery of penalty. However, we are conscious that this Tribunal may not unwittingly pass an order whereby injustice can possibly be caused."*

(emphasis supplied)

6. Shri Ketan Parekh challenged the aforesaid order in Writ Petition No.8385 of 2007 filed in the Delhi High Court on 13.11.2007. The other two appellants, namely, Kartik K. Parekh and Panthar Fincap and Management Services Ltd. filed Writ Petition Nos. 8231 and 8232 of 2007 on 5.11.2007 and prayed for quashing the order of the Appellate Tribunal. After taking cognizance of the judgment of this Court in *Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement* (2010) 4 SCC 772, the learned Single Judge dismissed the writ petitions vide order dated 26.7.2010, the relevant portions of which are extracted below:

"1. There is a categorical pronouncement on 12th April 2010 by the Supreme Court in *Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement* (2010) 4 SCC 772 that even an order passed by the Appellate Tribunal in an application seeking dispensation of the pre-deposit of the penalty would be appealable under Section 35 of the Foreign Exchange Management Act 1999 (`FEMA') and that the remedy under Article 226 of the Constitution is not available against such order.

2. In that view of the matter, the present petitions cannot be entertained by this Court. It is, however, open to the

Petitioners to avail of the appropriate remedy in terms of para 45 of the above judgment of the Supreme Court.

3. The petitions are dismissed."

7. Thereafter, the appellants filed appeals under Section 35 of the Act before the Bombay High Court. They also filed applications for condonation of 1056 days' delay. The Division Bench of the Bombay High Court dismissed the applications for condonation of delay by observing that it does not have the power to entertain an appeal filed beyond 120 days and even though in terms of the liberty given by the Delhi High Court, the appellants could have filed appeals within 30 days, but they failed to do so and, therefore, delay in filing the appeals cannot be condoned.

Arguments

8. Shri Ranjit Kumar, learned senior counsel appearing for the appellants argued that the impugned order is liable to be set aside because while dismissing the applications for condonation of delay, the Division Bench of the High Court did not take cognizance of Section 14 of the Limitation Act, 1963. Learned senior counsel submitted that in terms of that section, entire period during which the writ petitions filed by the appellants remained pending before the Delhi High Court is liable to be excluded while computing the period of limitation and if that is done, the appeals filed under Section 35 cannot be treated as barred by time. Learned senior counsel referred to Section 29(2) of the Limitation Act and the judgments of this Court in *State of Goa v. Western Builders* (2006) 6 SCC 239, *Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department and others* (2008) 7 SCC 169, *Coal India Limited and another v. Ujjal Transport Agency and others* (2011) 1 SCC 117 and argued that even though the period of limitation prescribed under Section 35 of the Act is different from the period specified in Article 137 of the Schedule appended to the Limitation Act, in the absence of express

exclusion of Section 14 of the Limitation Act, the appellants are entitled to seek exclusion of the time spent by them in bona fide prosecution of remedy before a wrong forum. Shri Ranjit Kumar submitted that at the time of filing writ petitions before the Delhi High Court, all the High Courts were entertaining such petitions and granting relief to the aggrieved parties and it is only after the judgment in *Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement* (supra) that the High Courts cannot entertain writ petition because of the availability of the statutory remedy of appeal under Section 35 of the Act. Learned senior counsel further submitted that if the period between 7.11.2007, i.e. the date on which the writ petitions were filed before the Delhi High Court and 26.7.2010, i.e. the date on which the same were dismissed is excluded, the appeals filed before the Bombay High Court on 27.8.2010 cannot be treated as barred by time. Learned senior counsel then argued that financial condition of the appellant is extremely precarious and the Appellate Tribunal committed serious error by directing them to deposit 50% of the penalty imposed by the Special Director as a condition for hearing the appeals. He also referred to affidavit dated 10.10.2008 filed by appellant Ketan V. Parekh before the Appellate Tribunal to show that he was declared a notified person in terms of Section 3(2) of the Special Court (Trial of Offences relating to Transactions in Securities) Act, 1992 and all his moveable and immovable properties including bank accounts have been attached and he has been prohibited from operating the same.

9. Shri A. K. Panda, learned senior counsel appearing for the respondents supported the impugned order and argued that the Division Bench of the Bombay High Court did not commit any error by declining the appellants' prayer for condonation of delay because the appeals were filed beyond the maximum period prescribed under Section 35 and the provisions of the Limitation Act cannot be invoked for condonation of delay or for exclusion of the time during which the writ petitions filed by the appellants remained pending before the Delhi High Court.

Shri Panda emphasized that even before the judgment of this Court in *Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement* (supra), the legal position was crystal clear and in terms of Section 35 of the Act an appeal could be filed against any decision or order of the Appellate Tribunal within 60 days from the date of communication of the decision or order and in terms of proviso to that section, the High Court can extend the period by another 60 days and no more. Learned senior counsel then submitted that the appellants cannot invoke Section 14 of the Limitation Act because their action of filing the writ petitions before the Delhi High Court was not bona fide. He pointed out that vide order dated 7.11.2007, the learned Single Judge of the Delhi High Court had accepted the request made by counsel appearing for the appellants and treated the writ petition filed by Kartik K. Parekh as an appeal and similar order appears to have been passed in the case of M/s. Panther Fincap and Management Services Limited but those orders were subsequently recalled at the instance of the two appellants. Shri Panda submitted that the Appellate Tribunal did not commit any error by directing the appellants to deposit 50% of the penalty imposed by the Special Director because they had been found guilty of clandestine monetary transactions and did not disclose their true financial position.

The relevant provisions :

10. Section 35 of the Act as also Sections 5, 14 and 29(1) and (2) of the Limitation Act, which have bearing on the decision of the issue raised in the appeals, read as under –

> "35. Appeal to High Court - Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such order:
>
> Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.
>
> Explanation.—In this section "High Court" means—
>
> (a) the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain; and
>
> (b) where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the respondents, ordinarily resides or carries on business or personally works for gain."
>
> 5. Extension of prescribed period in certain cases - Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.
>
> Explanation - The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.
>
> 14. Exclusion of time of proceeding bona fide in court without jurisdiction - (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of the appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court of other cause of a like nature.

Explanation - For the purpose of this section, -

(a) In excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) Misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

29. Savings - (1) Nothing in this Act shall affect section 25 of the Indian Contract Act,1872. (9 of 1872).

(2) Where any special or local law prescribes for any suit,

appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

11. The question whether the High Court can entertain an appeal under Section 35 of the Act beyond 120 days does not require much debate and has to be answered against the appellants in view of the law laid down in *Union of India v. Popular Construction Co.* (2001) 8 SCC 470, *Singh Enterprises v. CCE* (2008) 3 SCC 70, *Commissioner of Customs, Central Excise v. Punjab Fibres Ltd.* (2008) 3 SCC 73, *Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department and others* (supra), *Commissioner of Customs and Central Excise v. Hongo India Private Limited* (2009) 5 SCC 791 and *Chhattisgarh State Electricity Board v. Central Electricity Regulatory Commission and others* (2010) 5 SCC 23.

12. In *Hukumdev Narain Yadav v. Lalit Narain Mishra* (1974) 2 SCC 133, this Court interpreted Section 29(2) of the Limitation Act in the context of the provisions of the Representation of the People Act, 1951. It was argued that the words "expressly excluded" appearing in Section 29(2) would mean that there must be an explicit mention in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. While rejecting the argument, the three-Judge Bench observed:

" … what we have to see is whether the scheme of the special law, that is in this case the Act, and the nature of the remedy provided therein are such that the legislature

intended it to be a complete code by itself which alone should govern the several matters provided by it. If on an examination of the relevant provisions it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. *In our view, even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation."*

(emphasis supplied)

13. In *Union of India v. Popular Construction Company* (supra), this Court considered the question whether Section 5 of the Limitation Act can be invoked for condonation of delay in filing an application under Section 34 of the Arbitration and Conciliation Act, 1996. The two-Judge Bench referred to earlier decisions in *Vidyacharan Shukla v. Khubchand Baghel* AIR 1964 SC 1099, *Hukumdev Narain Yadav v. Lalit Narain Mishra* (1974) 2 SCC 133, *Mangu Ram v. MCD* (1976) 1 SCC 392, *Patel Naranbhai Marghabhai v. Dhulabhai Galbabhai* (1992) 4 SCC 264 and held:

"As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are 'but not thereafter' used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase 'but not thereafter' wholly otiose. No principle of interpretation would justify such a result.

Furthermore, Section 34(1) itself provides that recourse to a court against an arbitral award may be made only by an application for setting aside such award 'in accordance with' sub-section (2) and sub-section (3). Sub-section (2) relates to grounds for setting aside an award and is not relevant for our purposes. But an application filed beyond the period mentioned in Section 34, sub-section (3) would not be an application 'in accordance with' that sub-section. Consequently by virtue of Section 34(1), recourse to the court against an arbitral award cannot be made beyond the period prescribed. The importance of the period fixed under Section 34 is emphasised by the provisions of Section 36 which provide that:

'36. Enforcement.*—Where the time for making an application to set aside the arbitral award under Section 34 has expired … the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the court.'*

This is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired, the court was required to 'proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow' (Section 17). Now the consequence of the time expiring under Section 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the court. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the court's powers by the exclusion of the operation of Section 5 of the Limitation Act."

14. *In Singh Enterprises v. CCE (supra), the Court interpreted Section 35 of the Central Excise Act, 1944 which is* pari materia *to Section 35 of the Act and observed:*

"The Commissioner of Central Excise (Appeals) as also the tribunal being creatures of statute are not vested with jurisdiction to condone the delay beyond the permissible period provided under the statute. The period up to which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Limitation Act, 1963 (in short 'the Limitation Act') can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days' time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only up to 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days' period."

15. In Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department and others (supra), a three-Judge Bench again considered Section 34(3) of the Arbitration and Conciliation Act, 1996. J.M. Panchal, J., speaking for himself and Balakrishnan, C.J., referred to the relevant provisions and observed:

"….When any special statute prescribes certain period of limitation as well as provision for extension up to specified time-limit, on sufficient cause being shown, then the period of limitation prescribed under the special law shall prevail and to that extent the provisions of the Limitation Act shall stand excluded. As the intention of the legislature in enacting sub-section (3) of Section 34 of the Act is that the application for setting aside the award should be made within three months and the period can be further extended on sufficient cause being shown by another period of 30 days but not thereafter, this Court is of the opinion that the provisions of Section 5 of the Limitation Act would not be applicable because the applicability of Section 5 of the Limitation Act stands excluded because of the provisions of Section 29(2) of the Limitation Act."

16. In *Commissioner of Customs and Central Excise v. Hongo India (P) Ltd.* (supra), another three-Judge Bench considered the question whether Section 5 of the Limitation Act can be invoked for condonation of delay in filing an appeal or reference to the High Court, referred to the judgments in *Union of India v. Popular Construction Co.* (supra), *Singh Enterprises v. CCE* (supra) and observed –

"As pointed out earlier, the language used in Sections 35, 35-B, 35-EE, 35-G and 35-H makes the position clear that an appeal and reference to the High Court should be made within 180 days only from the date of communication of the decision or order. In other words, the language used in other provisions makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning the delay only up to 30 days after expiry of 60 days which is the preliminary limitation period for preferring an appeal. In the absence of any clause condoning the delay by showing sufficient cause after the prescribed period, there is complete exclusion of Section 5 of the Limitation Act. The High Court was, therefore,

justified in holding that there was no power to condone the delay after expiry of the prescribed period of 180 days."

17. In *Chhattisgarh State Electricity Board v. Central Electricity Regulatory Commission* (supra), a two-Judge Bench interpreted Section 125 of the Electricity Act, 2003, which is substantially similar to Section 35 of the Act and observed:

"Section 125 lays down that any person aggrieved by any decision or order of the Tribunal can file an appeal to this Court within 60 days from the date of communication of the decision or order of the Tribunal. Proviso to Section 125 empowers this Court to entertain an appeal filed within a further period of 60 days if it is satisfied that there was sufficient cause for not filing appeal within the initial period of 60 days. This shows that the period of limitation prescribed for filing appeals under Sections 111(2) and 125 is substantially different from the period prescribed under the Limitation Act for filing suits, etc. The use of the expression "within a further period of not exceeding 60 days" in the proviso to Section 125 makes it clear that the outer limit for filing an appeal is 120 days. There is no provision in the Act under which this Court can entertain an appeal filed against the decision or order of the Tribunal after more than 120 days.

The object underlying establishment of a special adjudicatory forum i.e. the Tribunal to deal with the grievance of any person who may be aggrieved by an order of an adjudicating officer or by an appropriate Commission with a provision for further appeal to this Court and prescription of special limitation for filing appeals under Sections 111 and 125 is to ensure that disputes emanating from the operation and implementation of different provisions of the Electricity Act are expeditiously decided by an expert body and no court, except this Court, may entertain challenge to the decision

or order of the Tribunal. The exclusion of the jurisdiction of the civil courts (Section 145) qua an order made by an adjudicating officer is also a pointer in that direction.

It is thus evident that the Electricity Act is a special legislation within the meaning of Section 29(2) of the Limitation Act, which lays down that where any special or local law prescribes for any suit, appeal or application a period of limitation different from the one prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and provisions contained in Sections 4 to 24 (inclusive) shall apply for the purpose of determining any period of limitation prescribed for any suit, appeal or application unless they are not expressly excluded by the special or local law."

The Court then referred to some of the precedents and held:

"In view of the above discussion, we hold that Section 5 of the Limitation Act cannot be invoked by this Court for entertaining an appeal filed against the decision or order of the Tribunal beyond the period of 120 days specified in Section 125 of the Electricity Act and its proviso. Any interpretation of Section 125 of the Electricity Act which may attract the applicability of Section 5 of the Limitation Act read with Section 29(2) thereof will defeat the object of the legislation, namely, to provide special limitation for filing an appeal against the decision or order of the Tribunal and proviso to Section 125 will become nugatory."

18. The question whether Section 14 of the Limitation Act can be relied upon for excluding the time spent in prosecuting remedy before a wrong forum was considered by a two Judge Bench in *State of Goa v. Western Builders* (supra) in the context of the provisions contained in Arbitration and

Conciliation Act, 1996. The Bench referred to the provisions of the two Acts and observed:

> *"There is no provision in the whole of the Act which prohibits discretion of the court. Under Section 14 of the Limitation Act if the party has been bona fidely prosecuting his remedy before the court which has no jurisdiction whether the period spent in that proceedings shall be excluded or not. Learned counsel for the respondent has taken us to the provisions of the Act of 1996: like Section 5, Section 8(1), Section 9, Section 11, sub-sections (4), (6), (9) and sub-section (3) of Section 14, Section 27, Sections 34, 36, 37, 39(2) and (4), Section 41, sub-section (2), Sections 42 and 43 and tried to emphasise with reference to the aforesaid sections that wherever the legislature wanted to give power to the court that has been incorporated in the provisions, therefore, no further power should lie in the hands of the court so as to enable to exclude the period spent in prosecuting the remedy before other forum. It is true but at the same time there is no prohibition incorporated in the statute for curtailing the power of the court under Section 14 of the Limitation Act. Much depends upon the words used in the statute and not general principles applicable. By virtue of Section 43 of the Act of 1996, the Limitation Act applies to the proceedings under the Act of 1996 and the provisions of the Limitation Act can only stand excluded to the extent wherever different period has been prescribed under the Act, 1996. Since there is no prohibition provided under Section 34, there is no reason why Section 14 of the Limitation Act (*sic *not) be read in the Act of 1996, which will advance the cause of justice. If the statute is silent and there is no specific prohibition then the statute should be interpreted which advances the cause of justice."*

19. The same issue was again considered by the three-

Judge Bench in *Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department* (supra) to which reference has been made hereinabove. After holding that Section 5 of the Limitation Act cannot be invoked for condonation of delay, Panchal, J (speaking for himself and Balakrishnan, C.J.) observed:

> "Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:
>
> (1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;
>
> (2) The prior proceeding had been prosecuted with due diligence and in good faith;
>
> (3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;
>
> (4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and;
>
> (5) Both the proceedings are in a court.
>
> *The policy of the section is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of*

*limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity. Upon the words used in the section, it is not possible to sustain the interpretation that the principle underlying the said section, namely, that the bar of limitation should not affect a person honestly doing his best to get his case tried on merits but failing because the court is unable to give him such a trial, would not be applicable to an application filed under Section 34 of the Act of 1996. The principle is clearly applicable not only to a case in which a litigant brings his application in the court, that is, a court having no jurisdiction to entertain it but also where he brings the suit or the application in the wrong court in consequence of bona fide mistake or (*sic *of) law or defect of procedure. Having regard to the intention of the legislature this Court is of the firm opinion that the equity underlying Section 14 should be applied to its fullest extent and time taken diligently pursuing a remedy, in a wrong court, should be excluded.*

At this stage it would be relevant to ascertain whether there is any express provision in the Act of 1996, which excludes the applicability of Section 14 of the Limitation Act. On review of the provisions of the Act of 1996 this Court finds that there is no provision in the said Act which excludes the applicability of the provisions of Section 14 of the Limitation Act to an application submitted under Section 34 of the said Act. On the contrary, this Court finds that Section 43 makes the provisions of the Limitation Act, 1963 applicable to arbitration proceedings. The proceedings under Section 34 are for the purpose of challenging the award whereas the proceeding referred to under Section 43 are the original proceedings which can be equated with a suit in a court. Hence, Section 43 incorporating the Limitation Act will apply to the

proceedings in the arbitration as it applies to the proceedings of a suit in the court. Sub-section (4) of Section 43, inter alia, provides that where the court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the court shall be excluded in computing the time prescribed by the Limitation Act, 1963, for the commencement of the proceedings with respect to the dispute so submitted. If the period between the commencement of the arbitration proceedings till the award is set aside by the court, has to be excluded in computing the period of limitation provided for any proceedings with respect to the dispute, there is no good reason as to why it should not be held that the provisions of Section 14 of the Limitation Act would be applicable to an application submitted under Section 34 of the Act of 1996, more particularly where no provision is to be found in the Act of 1996, which excludes the applicability of Section 14 of the Limitation Act, to an application made under Section 34 of the Act. It is to be noticed that the powers under Section 34 of the Act can be exercised by the court only if the aggrieved party makes an application. The jurisdiction under Section 34 of the Act, cannot be exercised suo motu. The total period of four months within which an application, for setting aside an arbitral award, has to be made is not unusually long. Section 34 of the Act of 1996 would be unduly oppressive, if it is held that the provisions of Section 14 of the Limitation Act are not applicable to it, because cases are no doubt conceivable where an aggrieved party, despite exercise of due diligence and good faith, is unable to make an application within a period of four months. From the scheme and language of Section 34 of the Act of 1996, the intention of the legislature to exclude the applicability of Section 14 of the Limitation Act is not manifest. It is well to remember that Section 14 of the Limitation Act does not provide for

a fresh period of limitation but only provides for the exclusion of a certain period. Having regard to the legislative intent, it will have to be held that the provisions of Section 14 of the Limitation Act, 1963 would be applicable to an application submitted under Section 34 of the Act of 1996 for setting aside an arbitral award."

In his concurring judgment, Raveendran, J. referred to the judgment in *State of Goa v. Western Builders* (supra) and observed:

"On the other hand, Section 14 contained in Part III of the Limitation Act does not relate to extension of the period of limitation, but relates to exclusion of certain period while computing the period of limitation. Neither sub-section (3) of Section 34 of the AC Act nor any other provision of the AC Act exclude the applicability of Section 14 of the Limitation Act to applications under Section 34(1) of the AC Act. Nor will the proviso to Section 34(3) exclude the application of Section 14, as Section 14 is not a provision for extension of period of limitation, but for exclusion of certain period while computing the period of limitation. Having regard to Section 29(2) of the Limitation Act, Section 14 of that Act will be applicable to an application under Section 34(1) of the AC Act. Even when there is cause to apply Section 14, the limitation period continues to be three months and not more, but in computing the limitation period of three months for the application under Section 34(1) of the AC Act, the time during which the applicant was prosecuting such application before the wrong court is excluded, provided the proceeding in the wrong court was prosecuted bona fide, with due diligence. Western Builders therefore lays down the correct legal position."

20. The same view was reiterated in *Coal India Limited v. Ujjal Transport Agency* (supra).

21. The aforesaid three judgments do support the argument of Shri Ranjit Kumar that even though Section 5 of the Limitation Act cannot be invoked for condonation of delay in filing an appeal under the Act because that would tantamount to amendment of the legislative mandate by which special period of limitation has been prescribed, Section 14 can be invoked in an appropriate case for exclusion of the time during which the aggrieved person may have prosecuted with due diligence remedy before a wrong forum, but on a careful scrutiny of the record of these cases, we are satisfied that Section 14 of the Limitation Act cannot be relied upon for exclusion of the period during which the writ petitions filed by the appellants remained pending before the Delhi High Court. In the applications filed by them before the Bombay High Court, the appellants had sought condonation of 1056 days' delay by stating that after receiving copy of the order passed by the Appellate Tribunal, they had filed writ petitions before the Delhi High Court, which were disposed of on 26.7.2010 and, thereafter, they filed appeals before the Bombay High Court under Section 35 of the Act. Paragraphs 1, 2 and 3 of the applications for condonation of delay which are identical in all the cases were as under:

"1. The Appellant ab ove named has preferred an Appeal against the order dated 2nd August 2007 (hereinafter referred to as the "impugned order") passed by the Respondent No.1 against the Appellant above named. The Appellant states that the impugned order was received by the Appellant on 5th October 2007. The Appellant states that there is a delay of 1056 days in filing the above appeal, the reasons for which are being stated in detail hereunder and, therefore, the Appellant above named prays that the delay in filing the present appeal may please be condoned.

2. RELIEFS SOUGHT :

(a) That this Hon'ble Court be pleased to condoned the delay of 1056 days in filing the said Appeal;

(b) That such further and other reliefs as the facts and circumstances may require.

3. REASONS FOR THE DELAY :

3.1 The Appellant declares that there is delay of 1056 days in filing the appeal as prescribed in the Limitation Act, 1963.

3.2 The Appellant further states that the delay occurred as the Writ Petition was filed before Delhi High Court on 5th November, 2007. The said writ was filed under the provisions of Articles 226 and 227 of the Constitution of India seeking issuance of a writ order or direction in the nature of Mandamus or any other writ for setting aside the impugned order dated 2nd August, 2007, passed by the Appellate Tribunal for Foreign Exchange under Rule 10 of the Adjudicating Proceedings and Appeal, 2000 for Dispensation. In the said Writ proceedings Hon'ble High Court of Delhi had passed an order on 26th July 2010. Vide the said order dated 26th July, 2010, while relying on the judgment of the Hon'ble Supreme Court, it was held by the Hon'ble Delhi High Court that even an order passed by the Appellate Tribunal in an application seeking dispensation of pre-deposit of the penalty would be appealable under section 35 of the FEMA and that remedy under Article 226 is not available against such an order.

Further, Hon'ble Delhi High Court also held that the present petition cannot be entertained by this Court. It is, however, open to the Appellant's to avail of the appropriate remedy in terms of para 45 of the above judgment of the Supreme Court.

3.3 Hence, pursuant to the said order passed by Hon'ble

Delhi High Court the Appellant above named prefers an appeal before this Hon'ble Bombay High Court.

3.4 Under the said circumstances the Appellant most humbly prays that this Hon'ble Court may be pleased to condone the delay.

3.5 It is submitted that the delay, in filing of the present Appeal has not prejudiced the Respondent in any manner, whatsoever, and, therefore, this Hon'ble Court be pleased to condone the said delay.

3.6 It is, further submitted that the delay of 1056 days in filing the present Appeal was bonafide, unintentional and inadvertent."

22. A careful reading of the above reproduced averments shows that there was not even a whisper in the applications field by the appellants that they had been prosecuting remedy before a wrong forum, i.e. the Delhi High Court with due diligence and in good faith. Not only this, the prayer made in the applications was for condonation of 1056 days' delay and not for exclusion of the time spent in prosecuting the writ petitions before the Delhi High Court. This shows that the appellants were seeking to invoke Section 5 of the Limitation Act, which, as mentioned above, cannot be pressed into service in view of the language of Section 35 of the Act and interpretation of similar provisions by this Court.

23. There is another reason why the benefit of Section 14 of the Limitation Act cannot be extended to the appellants. All of them are well conversant with various statutory provisions including FEMA. One of them was declared a notified person under Section 3(2) of the Special Court (Trial of Offences relating to Transactions in Securities) Act, 1992 and several civil and criminal cases are pending against him. The very fact that they had engaged a group of eminent Advocates to present their cause before the Delhi and the Bombay High Courts

shows that they have the assistance of legal experts and this seems to the reason why they invoked the jurisdiction of the Delhi High Court and not of the Bombay High Court despite the fact that they are residents of Bombay and have been contesting other matters including the proceedings pending before the Special Court at Bombay. It also appears that the appellants were sure that keeping in view their past conduct, the Bombay High Court may not interfere with the order of the Appellate Tribunal. Therefore, they took a chance before the Delhi High Court and succeeded in persuading learned Single Judge of the Court to entertain their prayer for stay of further proceedings before the Appellate Tribunal. The promptness with which the learned senior counsel appearing for appellant – Kartik K. Parekh made a statement before the Delhi High Court on 7.11.2007 that the writ petition may be converted into an appeal and considered on merits is a clear indication of the appellant's unwillingness to avail remedy before the High Court, i.e. the Bombay High Court which had the exclusive jurisdiction to entertain an appeal under Section 35 of the Act. It is not possible to believe that as on 7.11.2007, the appellants and their Advocates were not aware of the judgment of this Court in Ambica Industries v. Commissioner of Central Excise (2007) 6 SCC 769 whereby dismissal of the writ petition by the Delhi High Court on the ground of lack of territorial jurisdiction was confirmed and it was observed that the parties cannot be allowed to indulge in forum shopping. It has not at all surprised us that after having made a prayer that the writ petitions filed by them be treated as appeals under Section 35, two of the appellants filed applications for recall of that order. No doubt, the learned Single Judge accepted their prayer and the Division Bench confirmed the order of the learned Single Judge but the manner in which the appellants prosecuted the writ petitions before the Delhi High Court leaves no room for doubt that they had done so with the sole object of delaying compliance of the direction given by the Appellate Tribunal and, by no stretch of imagination, it can be said that they were bona fide prosecuting remedy before a wrong forum. Rather, there was

total absence of good faith, which is sine qua non for invoking Section 14 of the Limitation Act.

24. The issue deserves to be considered from another angle. By taking advantage of the liberty given by the learned Single Judge of the Delhi High Court, the appellants invoked the jurisdiction of the Bombay High Court under Section 35 of the Act. However, while doing so, they violated the time limit specified in order dated 26.7.2010 which, in turn, is based on paragraph 45 of the judgment of this Court in *Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement* (supra). Indeed, it is not even the case of the appellants that they had filed appeals under Section 35 of the Act within 30 days computed from 26.7.2010. Therefore, the Division Bench of the Bombay High Court rightly observed that even though the issue relating to jurisdiction of the Delhi High Court to grant time to the appellants to file appeals is highly debatable, the time specified in the order passed by the Delhi High Court cannot be extended.

25. In view of the above discussion, we hold that the impugned order does not suffer from any legal infirmity.

26. Notwithstanding the above conclusion, we have considered the submission of Shri Ranjit Kumar that the appellants are facing huge financial crises and the Appellate Tribunal committed serious error by not entertaining their prayer to dispense with the requirement of deposit of the amount of penalty in its entirety, but have not felt convinced. In our considered view, the appellants miserably failed to make out a case, which could justify an order by the Appellate Tribunal to relieve them of the statutory obligation to deposit the amount of penalty. The appellants have the exclusive knowledge of their financial condition/status and it was their duty to candidly disclose all their assets, movable and immovable including those in respect of which orders of attachment may have been passed by the judicial and quasi judicial forums. However, instead of coming clean, they tried to paint a gloomy picture

about their financial position, which the Appellate Tribunal rightly refused to accept. If what was stated in the applications filed by the appellants and affidavit dated 10.10.2008 is correct, then the appellants must be in a state of begging which not even a man of ordinary prudence will be prepared to accept. To us, it is clear that the appellants deliberately concealed the facts relating to their financial condition. Therefore, the Appellate Tribunal did not commit any error by refusing to entertain their prayer for total exemption.

27. In this context, reference can usefully be made to the judgment of this Court in *Benara Values Ltd. v. Commissioner of Central Excise* (2006) 13 SCC 347. In that case, a two Judge Bench interpreted Section 35-F of the Central Excise Act, 1944, which is pari materia to Section 19(1) of the Act, referred to the judgments in *Siliguri Municipality v. Amalendu Das* (1984) 2 SCC 436, *Samarias Trading Co. (P) Ltd. v. S. Samuel* (1984) 4 SCC 666, *Commissioner of Central Excise v. Dunlop India Ltd.* (1985) 1 SCC 260 and observed:

> "Two significant expressions used in the provisions are "undue hardship to such person" and "safeguard the interests of the Revenue". Therefore, while dealing with the application twin requirements of considerations i.e. consideration of undue hardship aspect and imposition of conditions to safeguard the interests of the Revenue have to be kept in view.
>
> As noted above there are two important expressions in Section 35-F. One is undue hardship. This is a matter within the special knowledge of the applicant for waiver and has to be established by him. A mere assertion about undue hardship would not be sufficient. It was noted by this Court in *S. Vasudeva v. State of Karnataka* that under Indian conditions expression "undue hardship" is normally related to economic hardship. "Undue" which means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances.
>
> For a hardship to be "undue" it must be shown that the particular burden to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it.
>
> The word "undue" adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant.
>
> The other aspect relates to imposition of condition to safeguard the interests of the Revenue. This is an aspect which the Tribunal has to bring into focus. It is for the Tribunal to impose such conditions as are deemed proper to safeguard the interests of the Revenue. Therefore, the Tribunal while dealing with the application has to consider materials to be placed by the assessee relating to undue hardship and also to stipulate conditions as required to safeguard the interests of the Revenue."

28. The same view was reiterated in *Indu Nissan Oxo Chemicals Industries Ltd. v. Union of India* (2007) 13 SCC 487 by considering proviso to Section 129-E of the Customs Act, 1962, which is almost identical to Section 19 of the Act.

29. In the result, the appeals are dismissed. Four weeks' further time is allowed to the appellants to comply with the direction given by the Appellate Tribunal, failing which the appeals filed by them shall stand automatically dismissed. The parties are left to bear their own costs.

D.G. Appeal dimissed.

'

##NEXT FILE

SURESH DHANUKA
v.
SUNITA MOHAPATRA
(Civil Appeal Nos. 10434-10435 of 2011)

DECEMBER 02, 2011

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

Arbitration and Conciliation Act, 1996:

s. 9 – Object and intention of – Pending arbitration proceedings, passing of an order suspending the rights of the parties – Justification of – Joint venture agreement between parties to carry on business – Execution of deed of assignment by respondent in favour of appellant assigning 50% of right, title and interest in trade mark 'NH' along with proportional goodwill – Condition therein that on the termination of the Joint Venture, neither assignor nor the assignee would be entitled to use or register the Mark in its own name or jointly with some other party – Subsequently appellant and his son floated a company by the name of 'NHP' – Suit by the respondent wherein District Judge passing an interim order restraining the appellant and the company from selling, distributing, manufacturing and marketing any of the products in the name of 'NH' or 'NHP' which was later made absolute – Arbitration application u/s. 9 also filed by the respondent – Subsequently, the appellant came to know that in breach of the agreement, the respondent approached the dealers and distributors of the appellant to take direct

supply from the respondent on a higher discount – Respondent canceling the Agreement and also revoked the Deed of Assignment – Thereafter, in an application filed by the appellant u/s. 9, the District Judge passing an ad-interim order whereby the respondent was restrained from selling her products by herself or by any other person, save and except through the appellant which was later made absolute – Appeal thereagainst, allowed by the High Court– On appeal, held: Terms of the Deed of Assignment clearly indicate that the respondent had of her own volition parted with 50% of her right, title and interest in the Trade Mark 'NH' with proportional goodwill of the business concerning the goods in respect of which the Mark was used, absolutely and forever, from the date of the Deed – Order passed by the District Judge restraining the respondent from marketing her products through any person, other than the appellant, was more apposite, as the rights of both the parties stood protected till such time as a final decision could be taken in arbitral proceedings, which was the object and intention of s. 9 – High Court overlooked the provisions relating to the use of the trade mark contained in the deed of assignment – Money cannot be an adequate compensation since the appellant apparently acquired 50% interest in the trade mark together with the goodwill of the business – Thus, order passed by the High Court set aside and that of the District Judge restored.

s. 9 – Application u/s. 9 filed by appellant – Interim order passed and made absolute – Appeal thereagainst, by the respondent – High Court reserved the judgment – Thereafter, the High Court allowed the respondent to file an affidavit to bring on record subsequent events which did not form part of the records, without giving the appellant an opportunity of dealing with the same – Held: However innocuous the additional affidavit may have been, once the hearing was concluded and judgment was reserved, it would have been prudent on the part of the High Court to have given an opportunity to the appellant to deal with the same before

allowing it to be taken on record – It was a record of the official proceedings and the appellant could not have been prejudiced since he himself had knowledge of the same.

Specific Relief Act, 1963 – s. 42 – Deed of Assignment of trade mark – Condition therein that all goods manufactured by the respondent under the said Trade mark would be marketed solely by the appellant; and that on the termination of the Joint Venture, neither assignor nor the assignee would be entitled to use or register the Mark in its own name or jointly with some other party – Invocation of s. 42 to enforce the negative covenant contained in the Deed of Assignment of trade mark, if contrary to s. 27 of the Contract Act and thus, void – Held: Section 27 of the Contract Act is not attracted – Appellant did not ask for any injunction against the respondent from carrying on any trade or business, but he objected to the use by the respondent of the Trade Mark, in which he had acquired 50% interest, while selling her products – Interim order passed by the District Judge, restraining the respondent from selling her products by herself or by any other person, save and except through the appellant, was apposite to the circumstances – Contract Act, 1872 – s. 27.

The respondent, manufacturer of herbal products entered into an agreement with the appellant resulting in the formation of a Joint Venture Company under the name and style of 'A' for a period of five years which was further extended for five years. Thereafter, the respondent executed a deed of assignment in favour of the appellant assigning 50% of the right, title and interest in the Trade Mark 'Naturoma Herbal' which was registered in the name of the respondent, with proportional goodwill of the business concerned in the goods with a stipulation that all goods manufactured by the respondent under the said Trade mark would be marketed solely by the appellant; and that on the termination of the Joint Venture, neither assignor nor the

assignee would be entitled to use or register the Mark in its own name or jointly with some other party. Subsequently, an application was filed with the Trade Mark authorities for bringing on record the name of the appellant as the Joint Proprietor of the Trade Mark. Five years later, the appellant and his son floated a company by the name of 'Naturoma Herbals (P) Ltd.' and also applied for registration of the Trade Mark in the name of that Company. Thereafter, the appellant resigned from the company despite the fact that the company had not started manufacturing the activities until then. The respondent then filed a suit under Sections 134 and 135 of the Trade Marks Act, 1999. An *ex-parte* interim order was passed restraining the appellant and the Company from selling, distributing, manufacturing and marketing any of the products in the name of "Naturoma" or "Naturoma Herbal" which was made absolute a year later, till the disposal of the suit. The respondent filed an application under Section 9 of the 1996 Act before the District Judge. Thereafter, the appellant came to know that in breach of the agreements entered into by the parties, the respondent was approaching the dealers and distributors of the appellant to take direct supply from the respondent on a higher discount. The appellant also filed an application under Section 9 of the 1996 Act before the District Judge. Thereafter, the respondent cancelled the Agreement and also revoked the Deed of Assignment. The appellant's application was dismissed and he filed a fresh application under Section 9 of the 1996 Act. An ad-interim order was passed restraining the respondent from selling her products by herself or by any other person, save and except through the appellant which was later made absolute. Thereafter, a corrigendum was made by the Trade Mark Registrar in the Trade Mark Journal, showing the appellant as the Joint Proprietor of the Trade Mark "Naturoma Herbal" which was cancelled

without notice to the appellant. Meanwhile the respondent filed an appeal before the High Court against the interim order passed on the application filed by the appellant under Section 9 of the 1996 Act. The High Court reserved the judgment. The respondent then filed an affidavit to bring on record the said cancellation of the corrigendum and the same was relied on by the High Court though the appellant was not given an opportunity to deal with the same. The High Court allowed the appeal. Aggrieved, the appellant filed a review application and the same was dismissed. Therefore, the appellant filed the instant appeal.

The questions which, therefore, arose for determination were:

(i) Whether the High Court was justified in interfering with the order passed by the District Judge in the arbitration application, on account whereof pending arbitration, the respondent was restrained from marketing the products manufactured by her under the Trade Mark "Naturoma Herbal" or "Naturoma" by herself or through anyone, except through the appellant?

(ii) Whether, pending arbitration proceedings, an order could have been passed by which the right acquired by the appellant under the Deed of Assignment of 50% of the right, title and interest in the Trade Mark "Naturoma Herbal", could have been suspended and he could have been restrained from objecting to the use of the said Mark by the respondent?

(iii) Whether the High Court was justified in relying upon an affidavit filed on behalf of the respondent after hearing had been concluded and judgment had been reserved in the appeal, without giving the appellant an opportunity of dealing with the same?

(iv) Whether the invocation of Section 42 of the Specific Relief Act, 1963, to enforce the negative covenant contained in the Deed of Assignment, was contrary to the provisions of Section 27 of the Contract Act, 1872 and was, therefore, void.

Allowing the appeals, the Court

HELD: 1.1. The terms of the Deed of Assignment clearly indicate that the respondent had of her own volition parted with 50% of her right, title and interest in the Trade Mark "Naturoma Herbal" with proportional goodwill of the business concerning the goods in respect of which the Mark was used, absolutely and forever, from the date of the Deed. On behalf of the respondent it was claimed that the Deed of Assignment had never been acted upon and that, in any event, the same had been revoked, when the Agreement, was cancelled. However, in view of the provisions of the Deed of Assignment, it is yet to be adjudicated upon and decided as to whether by virtue of the revocation of the Deed of Assignment by the respondent, the appellant was no longer entitled to the benefits of the Trade Mark which had been transferred to him to the extent of 50% absolutely and forever. In such circumstances, the order passed by the District Judge, restraining the respondent from marketing her products through any person, other than the appellant, was more apposite in the facts of the case, as the rights of both the parties stood protected till such time as a final decision could be taken in arbitral proceedings, which, in effect, is the object and intention of Section 9 of the Arbitration and Conciliation Act, 1996. [Para 31]

1.2. It was inappropriate on the part of the High Court to allow the respondent to file an affidavit, on which reliance was placed, after the hearing had been

concluded and judgment had been reserved, without giving the appellant an opportunity of dealing with the same. However innocuous the additional affidavit may have been, once the hearing was concluded and judgment was reserved, it would have been prudent on the part of the High Court to have given an opportunity to the appellant to deal with the same before allowing it to be taken on record. It has been submitted that the additional affidavit which was filed on behalf of the respondent after the judgment had been reserved by the Appeal Court, only sought to bring on record the proceedings whereby the corrigendum which had been issued by the Trade Mark Registrar, showing the appellant as the Joint Proprietor of the Trade Mark "Naturoma Herbal", had been subsequently cancelled. Since what was produced was a record of the official proceedings, the appellant could not have been prejudiced since he himself had knowledge of the same. [Para 32]

1.3. As regards the invocation of Section 42 of the Specific Relief Act, 1963, to enforce the negative covenant contained in the Deed of Assignment, was contrary to the provisions of Section 27 of the Contract Act, 1872, the provisions of Section 27 would not be attracted to the facts of the instant case. What is declared to be void by virtue of Section 27 is any Agreement to restrain any person from exercising his right to carry on a profession or trade or business and any restraint thereupon by an Agreement would be void. It is seen from the materials on record that the appellant did not ask for any injunction against the respondent from carrying on any trade or business, but he objected to the use by the respondent of the Trade Mark, in which he had acquired a 50% interest, while selling her products. [Paras 33, 34]

1.4. The conditions in the Deed of Assignment clearly stipulate that all the goods manufactured by the respondent under the Trade Mark "Naturoma" would be marketed solely by the appellant. It was also submitted that the said Trade Mark would be used only in relation to goods connected in the course of trade with both the parties. One of the other conditions of the Deed of Assignment was that both the parties would be entitled to assign their respective shares in the Trade Mark subject to prior written consent of the other party, which presupposes that the parties were the absolute owners of their respective shares in the Trade Mark and even on termination of the joint venture, as has been done in the instant case, neither of the parties would be entitled to use or register the Mark in their own names or jointly with some other party. [Para 35]

1.5. Having regard to the arbitration clause-terms and conditions of the Deed of Assignment, the interim order passed on the application under Section 9 of the Arbitration and Conciliation Act, 1996, filed by the appellant in keeping with the terms and conditions agreed upon between the parties, was justified and within the jurisdiction of the District Judge. The interim order passed by the District Judge, restraining the respondent from selling her products by herself or by any other person, save and except through the appellant, was apposite to the circumstances. The said order took into consideration the interests of both the parties flowing from the Agreement and the Deed of Assignment, pending decision by an Arbitral Tribunal. The cause of action for the suit filed by the respondent before the District Judge was the incorporation of a Company by the appellant with his son under the name and style of "Naturoma Herbals (P) Ltd." and the subsequent application made before the Registrar of Trade Marks to register "Naturoma Herbal" in the name of the said Company. It is in that context that the interim order was

passed restraining the appellant from distributing, manufacturing or marketing any of the products in the name of "Naturoma" or Trade Mark "Naturoma Herbal". The said order of injunction did not permit the respondent to manufacture and market the goods under the said Trade Mark in violation of the provisions of the Deed of Assignment. [Para 36]

1.6. The Single Judge of the High Court, while referring to some of the provisions of the Agreement between the parties, apparently overlooked the provisions relating to the use of the Trade Mark contained in the Deed of Assignment. Although, reference was made to the clause of the Agreement, the High Court failed to notice that the same was not contained in the Deed of Assignment, whereby 50% of the right, title and interest of the respondent in the Trade Mark "Naturoma Herbal" was assigned in favour of the appellant absolutely and forever. Even upon termination of the joint venture under the Agreement between the parties, neither the appellant nor the respondent would be entitled to use or register the Mark in their own names or jointly with some other party. In fact, the relevant terms and conditions of the Deed of Assignment had been extracted by the Single Judge in the impugned judgment, but the same appear to have been lost sight of while considering the terms and conditions of the Agreement executed between the parties.[Para 37]

1.7. This is not a case where money can be an adequate compensation, since the appellant has apparently acquired a 50% interest in the Trade Mark in question, together with the goodwill of the business in relation to the products in which the Trade Mark is used. Therefore, the High Court erred in reversing the order passed by the District Judge in the application filed by the appellant, under which the status-quo would have been maintained till the dispute was settled in arbitration. The impugned judgment and order of the Single Judge of the High Court impugned in the appeals is set aside and that of the District Judge is restored. [Paras 38, 39, 40]

1.8. The order passed whereby the respondent had been allowed to continue with the running of the business, but she was directed to maintain a separate account in respect of the transaction and to place the same before this Court at the time of hearing of the matter, such account does not appear to have been filed, but since the matter is disposed of by restoring the order of the District Judge in the application filed by the appellant, the respondent is directed, as and when arbitral proceedings may be taken, to furnish such account upto this day before the Arbitrator so that the claims of the parties could be fully decided by the Arbitrator. [Para 41]

Gujarat Bottling Co. Ltd. vs. Coca Cola Company **(1995) 5 SCC 545;** *Percept D'Mark (India) (P) Ltd. vs. Zaheer Khan* **(2006) 4 SCC 227;** *K.T. Plantation Ltd. vs. State of Karnataka* **(2007) 7 SCC 125 – referred to.**

Case Law Reference:

(1995) 5 SCC 545	**Referred to.**	**Para 24**
(2006) 4 SCC 227	**Referred to.**	**Para 24**
(2007) 7 SCC 125	**Referred to.**	**Para 24**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10434-10435 of 2011.

From the Judgment & Order dated 27.10.2008 of the High Court of Orissa, Cuttack in ARBA No. 17 of 2008 and order dated 28.09.2010 on Review Application No. 21 of 2009 in ARBA No. 17 of 2008.

P.K. Ghosh, Srenik Singhvi, Saurabh Trivedi for the Appellant.

A.K. Ganguli, Shambhu Prasad Singh, Shantwani Singh, Punam Kumari for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. These appeals arising out of SLP(C)Nos.3391-3392 of 2011, are directed against the judgment and order dated 27th October, 2008, passed by the Orissa High Court in ARBA No.17 of 2008 and the order dated 28th September, 2010, passed on the Review Application No.21 of 2008.

3. The Appellant herein, Suresh Dhanuka, filed an application before the learned District Judge, Khurda, being ARB (P) No.576 of 2007, under Section 9 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as the "1996 Act".

4. The facts leading to the filing of the said application reveal that on 1st April, 1999, Suresh Dhanuka, the Appellant herein, and Sunita Mahapatra, the Respondent herein, entered into an Agreement, whereby they agreed to jointly carry on business in the name and style of "Abhilasha". Sunita Mahapatra was carrying on business in the name and style of "M/s. Nature Probiocare Inc.", as the sole proprietress thereof. The said Agreement was for a period of five years from 1st April, 1999 to 31st March, 2004, which was subsequently extended till 31st March, 2009. On 4th October, 1999, the Respondent herein applied to the Registrar of Trade Marks, Kolkata, in Form No.TM-1 under the Trade and Merchandise Marks Act, 1958, for registration of the Trade Mark "Naturoma Herbal", under Application No.879695.

5. During the first five-year period of the original Agreement dated 1st April, 1999, the Respondent, Sunita Mahapatra, executed a Deed of Assignment on 1st October, 2000, assigning 50% of her right, title and interest in the said Trade Mark "Naturoma Herbal", with proportional goodwill of the business concerned in the goods in respect of which the Mark was permanently used, interalia, on the following terms and conditions, namely,

(a) All goods manufactured by the Respondent under the said Trade Mark would be marketed solely by the Appellant herein;

(b) On the termination of the Joint Venture, neither the assignor nor the assignee would be entitled to use or register the Mark in its own name or jointly with some other party;

(C) The existing goodwill and further goodwill would vest in the owner and the assignee.

Soon thereafter, on 28th February, 2001, M/s. S. Majumdar & Co., the authorized Trade Mark agent of the Respondent, filed an application in Form No.TM-16, along with the Deed of Assignment, with the Trade Mark authorities, together with the fee of Rs.20/- for recording the name of the Appellant as the Joint Proprietor of the Trade Mark. The application for registration of the Trade Mark was advertised in the Trade Mark Journal on 13th November, 2003. While the same was pending, the Agreement dated 1st April, 1999, was extended by mutual consent till 31st March, 2009. It appears that during the period 2003-2007, the sale of the product increased from Rs.19,99,808/- to Rs.1,88,70,143/-. Meanwhile, the Agreement dated 1st April, 1999, was extended by mutual consent till 31st March, 2009, as indicated hereinbefore.

6. It appears that on 19th July, 2004, one Food Ingredients Specialties S.A. filed an opposition No.KOL-167256 to the Trade Mark application of the Respondent wherein a joint reply

was filed, which was affirmed by both the parties. It is alleged that, thereafter, in 2006, the Appellant and his son floated a company by the name of "Naturoma Herbal (P) Ltd.". It is the case of the Appellant that the Appellant and his son floated the company with the name of "Naturoma Herbal (P) Ltd.". According to the Appellant, his son floated the company with the consent of the Respondent, who, subsequently, declined to participate in the management thereof. On 31st August, 2006, the Appellant resigned from the company despite the fact that the company had not started manufacturing activities until then, as was certified by the Chartered Accountant. On 21st August, 2007, the Respondent herein filed a Suit, being CS No.26 of 2007, before the District Judge at Khurda, under Sections 134 and 135 of the Trade Marks Act, 1999. The learned District Judge, by an ex-parte order dated 29th August, 2007, restrained the Appellant and the company from selling, distributing, manufacturing and marketing any of the products in the name of "Naturoma" or "Naturoma Herbal". At this stage, on 4th September, 2007, the Respondent filed an application under Section 9 of the 1996 Act, also before the District Judge at Khurda.

7. On 12th September, 2007, the Appellant came to learn from the market that in breach of the Agreements entered into by the parties, the Respondent was approaching the Dealers and Distributors of the Appellant to take direct supplies from the Respondent on a higher discount. This led to the filing of the application under Section 9 of the 1996 Act by the Appellant before the District Judge, Alipore, Kolkata. Thereafter, on 25th September, 2007, the Respondent cancelled the Agreement dated 1st April, 1999 and also revoked the Deed of Assignment dated 1st October, 2000. The Appellant's application under Section 9 of the 1996 Act was dismissed on 26th November, 2007, on account of the earlier application filed under Section 9 of the above Act, by the Respondent before the District Judge at Khurda. Thereafter, on 19th December, 2007, the Appellant filed a fresh application under Section 9 of the 1996 Act, before the learned District Judge, Khurda. On 27th December, 2007, the learned District Judge passed an interim order restraining the Respondent from selling the products in question by herself or by any other person, save and except through the Appellant. The said interim order was made absolute on 22nd May, 2008.

8. On 1st July, 2008, a corrigendum was made by the Trade Mark Registrar in the Trade Mark Journal, showing the Appellant as the joint proprietor of the Trade Mark "Naturoma Herbal".

9. The Respondent herein preferred an appeal before the Orissa High Court on 8th July, 2008, which was heard on 18th September, 2008 and judgment was reserved. While the matter was pending, the Respondent filed a letter with the Trade Mark Authority at Mumbai on 25th September, 2008, praying for cancellation of the order allowing the request of the Appellant in January, 2001, resulting in issuance of the Corrigendum in the Trade Mark Journal on 16th September, 2008. As would appear from the materials on record, the Assistant Registrar of Trade Marks, Mumbai, cancelled the Corrigendum dated 1st July, 2008 on 26th September, 2008, without notice to the Appellant and such cancellation was published in the Trade Mark Journal on 29th September, 2008. On 30th September, 2008, the Respondent filed an affidavit to bring on record the said cancellation of the Corrigendum and, though, the same was relied upon by the High Court in its judgment dated 27th October, 2008, the Appellant was not given an opportunity to deal with the same. The High Court, by its aforesaid judgment, allowed the appeal filed by the Respondent. The Review Application filed by the Appellant on 28th January, 2009, against the judgment and order dated 27th October, 2008, was ultimately rejected by the High Court on 28th September, 2010, resulting in the filing of the Special Leave Petitions on 7th January, 2011, in which notice was issued and a limited interim order was made.

10. Appearing for the Appellant, Mr. P.K. Ghosh, learned Senior Advocate, submitted that since the Respondent's establishment was basically a production unit and did not possess any experience and/or expertise in the field of marketing, promotion, distribution and management of its manufactured goods, she entered into an Agreement with the Appellant to market and distribute her products for a period of 5 years from 1st April, 1999, as indicated hereinbefore. The same was extended for a further period of 5 years on 1st April, 2004 by mutual consent. Mr. Ghosh submitted that the Appellant incurred huge promotional expenses between 1999 and 2007 assessed at about Rs.72 lakhs and it was only after such promotional schemes that there was a substantial increase in the sale of the product with the Trade Mark "Naturoma Herbal". Mr. Ghosh submitted that the sales figures from the accounting year 2003-04 to the accounting year 2006-07 showed an increase of almost 1 crore 60 lakhs rupees.

11. Mr. Ghosh submitted that the Respondent even went so far as to sell its goods by using the Trade Mark "Naturoma Herbal" and deleting the name "Abhilasha" from the packaging of the products. Mr. Ghosh contended that suppressing all the above facts, the opposite party filed a suit, being C.S. No.26 of 2007, under Sections 134 and 135 of the Trade Marks Act, 1999, before the District Judge, Khurda, inter alia, praying for an order of injunction to restrain the Appellant from using the Mark "Naturoma Herbal" and obtained an ex-parte order of injunction to the above effect.

12. Having obtained an interim order in the aforesaid suit, the Respondent terminated the Agreement dated 1st April, 1999, and also revoked the Deed of Assignment dated 1st October, 2000, unilaterally. The Appellant thereupon moved the learned District Judge, Alipore, by way of an application under Section 9 of the 1996 Act, but the same had to be dropped on account of lack of jurisdiction. The Appellant, thereafter, filed another application under Section 9 of the above Act, being ARBP No.576 of 2007, before the Court of District Judge, Khurda, in which initially on 22nd December, 2007, an interim protection was given directing the Respondent not to sell, market, distribute, advertise its products under the Trade Mark "Naturoma Herbal", by herself or through any other person save and except the Appellant herein. The said order was subsequently confirmed on 22nd May, 2008.

13. Mr. Ghosh submitted that the Respondent had no authority to terminate the Agreement dated 1st April, 1999, on the ground that the same had been misused by the Appellant. Learned counsel submitted that even if it be accepted that the Appellant was a Director of the Naturoma Herbals Pvt. Ltd., between June, 2005, to August, 2006, then there was no substance in the applications made against the Appellant as the said Company had not conducted any business within that period and, in any event, its product was sold under different designs containing the word "SAFFIRE" in bold and prominent fonts.

14. Mr. Ghosh submitted that the Respondent did not also have any right to revoke the Deed of Assignment whereby 50% of the right, title and interest in the Trade Mark "Natural Herbal" had been assigned to the Appellant to be held by him absolutely and forever. Mr. Ghosh urged that the Deed of Assignment did not contain any clause for revocation of the right and ownership of the Trade Mark to the extent of 50% and such revocation was made with the intention to defraud the Appellant and to grab the market created by him.

15. Mr. Ghosh reiterated the conditions contained in the Deed of Assignment dated 1st October, 2000, whereby 50% of the right, title and interest in the Trade Mark "Naturoma Herbal" with proportional goodwill of the business concerned in the said goods in respect of which the Mark was used, stood assigned to the Appellant absolutely and forever. Mr. Ghosh submitted that it was not within the powers of the Respondent

to terminate the Deed of Assignment, even if the joint venture for marketing of the goods manufactured by the Respondent under the name of "Abhilasha", was discontinued. Mr. Ghosh reiterated that all goods manufactured by the Respondent under the aforesaid Trade Mark would have to be marketed solely by the Appellant and on termination of the joint venture, neither the assignor nor the assignee would be entitled to *use or register* (emphasis added) the Mark on its own name or jointly with some other party. Mr. Ghosh contended that the said condition amounted to a negative covenant which could be enforced under Section 42 of the Specific Relief Act, 1963. Learned counsel urged that while Section 41 of the aforesaid Act indicates the circumstances in which an injunction cannot be granted to prevent the breach of a contract, the performance of which could not specifically be enforced, Section 42, on the other hand, specifically provides that notwithstanding anything contained in Clause (e) of Section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the Court while not being in a position to compel specific performance of the affirmative agreement, would not be precluded from granting an injunction to perform the negative covenant, if the plaintiff had not failed to perform the contract so far as it was binding on him. Mr. Ghosh urged that in the instant case, the conditions in the Deed of Assignment made it very clear that except for the Appellant, no other person would be entitled to market, sell, distribute and advertise the goods manufactured by the manufacturer under the Trade Mark "Naturoma Herbal". It was further stipulated that if the joint venture agreement was to be terminated at any point of time, neither the assignor nor the assignee would be entitled to use or register the Mark in its own name or in the name of some other party.

16. It was submitted by Mr. Ghosh that the corrigendum which had been published by the Registrar of Trade Marks in the Trade Mark Journal on 1st July, 2008, showing the Appellant as the joint proprietor of the Trade Mark "Naturoma Herbal" was cancelled on 25th September, 2008, on the basis of a letter written by the Respondent to the Trade Mark Authority at Mumbai, seeking cancellation of the order, without any opportunity being given to the Appellant who had been shown as the joint proprietor of the Trade Mark in question. Mr. Ghosh submitted that what is more interesting is the fact that such letter seeking cancellation of the order by which the name of the Appellant was shown as the Joint Proprietor of the Trade Mark was written at a time when the Respondent's appeal against the order of the Registrar of the Trade Marks was pending before the Orissa High Court. In fact, after the hearing of the appeal was concluded and judgment was reserved, the Respondent filed an affidavit before the High Court to bring on record the cancellation of the corrigendum published on 1st July, 2008 and, although, the same was relied upon by the High Court, no opportunity was given to the Appellant to deal with the said document or to make any submissions in respect thereof. Mr. Ghosh submitted that the appeal was ultimately allowed by the High Court on the basis of documents submitted on behalf of the Respondent after the judgment had been reserved in the appeal.

17. Mr. Ghosh also submitted that the review application filed by the Appellant on the ground that the affidavit filed by the Respondent was taken on record without any opportunity to the Appellant to meet the same, was also rejected on 20th September, 2010, on the basis of an order of the Registrar of Trade Marks which was not on record at the time when the hearing of the appeal was concluded and judgment was reserved. Mr. Ghosh submitted that the manner in which the entire proceedings had been conducted clearly indicates that the High Court had not applied its judicial mind in allowing the appeal filed by the Respondent against the orders passed on the Appellant's application under Section 9 of the Arbitration and Conciliation Act, 1996, before the District Judge at Khurda.

18. Mr. Ghosh lastly contended that on the application made by the Respondent to the Registrar of Trade Marks for registration of the Trade Mark "Naturoma", certain objections had been filed in her counter statement. In such objection, it had been clearly indicated that with a view to effectively market the products under the Trade Mark "Naturoma", the Respondent joined hands with the Appellant by a Deed of Assignment dated 1st October, 2000, whereby she had transferred 50% of her right, title and interest in favour of the Appellant and pursuant to such assignment, the Trade Mark application was now jointly held by Nature Pro Biocare Inc. and Abhilasha. Mr. Ghosh submitted that the Respondent had at all times in no uncertain terms reiterated the assignment effected in favour of the Appellant with regard to the Trade Mark and the goodwill of the Company. Learned counsel submitted that having done so, there was no reason for the Registrar of Trade Marks to cancel the corrigendum by which the name of the Appellant had been brought on the Trade Mark Journal as joint owner of the Trade Mark "Naturoma Herbal" and that too not by any order of cancellation, but merely by a notification which was issued without any foundation, since the judgment in the appeal preferred by the Respondent had not yet been delivered. Mr. Ghosh submitted that the order of the High Court and that of the Registrar of Trade Marks canceling the corrigendum issued by the Registrar of Trade Marks in favour of the Appellant, were liable to be set aside.

19. On behalf of the Respondent, Mr. Shambhu Prasad Singh, learned Senior Advocate, submitted that since the arbitral proceeding was at its last stages and the Appellant could be adequately compensated in terms of money, the prayer for injunction made on behalf of the Appellant was liable to be rejected.

20. Apart from the above, Mr. Singh submitted that although a Deed of Assignment had been executed on 1st October, 2010, the same had never been acted upon, but the Appellant sought to take shelter under Clause 19 of the said Deed after having acted contrary thereto by forming a Company in the name of "Naturoma Herbals Private Limited" and applying for registration of the Respondent's Trade Mark "Naturoma" in his newly-formed Company's name. Referring to the Certificate of Incorporation and Memorandum of Association of the said Company, Mr. Singh pointed out that the name of the Appellant was shown in the Subscribers' List at Serial No.1 holding 5000 shares, while his son, Rahul Dhanuka, was shown to be holding the remaining 5000 shares.

21. On the question of grant of injunction to implement a negative covenant, as envisaged in Section 42 of the Specific Relief Act, 1963, Mr. Singh urged that the covenant contained in the Deed of Assignment, which had not been acted upon, was contrary to the provisions of Section 27 of the Indian Contract Act, 1872, and was, therefore, void.

22. Mr. Singh submitted that prior to the Agreement entered into between the parties on 1st April, 1999, regarding marketing and distribution of the goods manufactured by the Respondent, the Respondent had obtained Drug Licence on 2nd May, 1997, and Sales Tax Licence on 13th September, 1997, for marketing and selling "Naturoma Herbals". Mr. Singh urged that even eight years after the Assignment Deed was signed by the parties, the Respondent's name continued to be shown in the Trade Mark Journal as the proprietor of the aforesaid Trade Mark. Learned counsel submitted that as per the prayer of the Respondent in the application before the District Judge, Khurda, under Section 9 of the Arbitration and Conciliation Act, 1996, the Court had initially passed an interim order dated 29th August, 2007, whereby the Appellant and others were restrained from selling, distributing, manufacturing and marketing any product in the name of "Naturoma Herbals" or "Naturoma" or in any other name similar or identical to the said name. The said ad-interim order was made absolute on 25th January, 2008, till the disposal of the suit. The appeal

preferred from the said order was dismissed by the High Court. The review petition filed thereafter was also dismissed.

23. Mr. Singh then submitted that in addition to the aforesaid proceeding before the District Judge, Khurda, the Appellant had also filed an application before the learned Arbitrator under Section 17 of the Arbitration and Conciliation Act, 1996, for the self-same reliefs.

24. On the question of enforcement of a negative covenant, Mr. Singh submitted that even in such a case, the balance of convenience and inconvenience would have to be taken into consideration. In this regard, reference was made to the decision of this Court in (i) *Gujarat Bottling Co. Ltd. vs. Coca Cola Company* [(1995) 5 SCC 545], (ii) *Percept D'Mark (India) (P) Ltd. vs. Zaheer Khan* [(2006) 4 SCC 227] and (iii)*K.T. Plantation Ltd. vs. State of Karnataka* [(2007) 7 SCC 125].

25. Mr. Singh urged that the impugned decision of the High Court was without any illegality or irregularity and no interference was called for therewith.

26. In a short reply, Mr. Pradip Ghosh submitted that in the instant case there was no violation of Section 27 of the Indian Contract Act, 1872, as the injunction sought for was not on trade or business but in respect of use of the Trade Mark.

27. From the submissions made on behalf of the respective parties and the materials on record, it is clear that the Respondent who was a manufacturer of herbal products entered into an Agreement with the Appellant resulting in the formation of a Joint Venture Company under the name and style of "Abhilasha". The said Agreement was initially for a period of 5 years from 1st April, 1999, and, thereafter, extended till 31st March, 2009. There is also no dispute that a Deed of Assignment was executed by the Respondent in favour of the Appellant on 1st October, 2010, assigning 50% of the right, title and interest in the Trade Mark "Naturoma Herbal" registered in the name of the Respondent, with proportional goodwill of the business concerned in the goods in respect of which the Mark is permanently used, on certain conditions which have been extracted hereinbefore. It is also on record that an application was filed with the Trade Mark authorities for bringing on record the name of the Appellant as the Joint Proprietor of the Trade Mark and objections filed thereto were jointly resisted by the Appellant and the Respondent, accepting the fact that the Appellant was the owner of 50% of the Trade Mark and all rights, title and interest accrued therefrom. However, in 2006, it came to light that the Appellant had floated a Company by the name of "Naturoma Herbals (P) Ltd." and it had also applied for registration of the Trade Mark in the name of that Company. It is at that stage that the Respondent filed a Suit on 21st August, 2007, under Sections 134 and 135 of the Trade Marks Act, 1999, being C.S. No.26 of 2007, in which an ex-parte interim order was passed on 29th August, 2007, restraining the Appellant and the Company from selling, distributing, manufacturing and marketing any of the products in the name of "Naturoma" or "Naturoma Herbal". The said ad-interim order was made absolute on 25th January, 2008, till the disposal of the suit.

28. Thereafter, on 25th September, 2007, the Respondent cancelled the Agreement dated 1st April, 1999 and also revoked the Deed of Assignment dated 1st October, 2000. Immediately thereafter, on 19th December, 2007, the Appellant filed a fresh application under Section 9 of the Arbitration and Conciliation Act, 1996, before the District Judge, Khurda, who on 27th December, 2007, passed an ad-interim order restraining the Respondent from selling her products by herself or by any other person, save and except through the Appellant. The said interim order was made absolute on 22nd May, 2008.

29. At this point of time, there were two apparently conflicting orders in existence; one by the District Judge, Khurda, in the Suit filed by the Respondent restraining the

Appellant from selling, distributing, manufacturing or marketing any of the products in the name of "Naturoma" or "Naturoma Herbal", and on the other the District Judge passed an order under Section 9 of the Arbitration and Conciliation Act, 1996, restraining the Respondent from selling her products by herself or by any other person, save and except through the Appellant.

30. The corrigendum by which the Trade Mark Registrar had on 1st July, 2008, altered the entries in the Trade Mark Journal, showing the Appellant as the Joint Proprietor of the Trade Mark "Naturoma Herbal", was cancelled on 26th September, 2008, without notice to the Appellant. After the interim order passed on 27th December, 2007, on the application filed by the Appellant under Section 9 of the Arbitration and Conciliation Act, 1996, and the same was made absolute on 22nd May, 2008, the Respondent preferred an appeal before the Orissa High Court on 8th July, 2008, being Arb. A. No.17 of 2008. The same was heard on 18th September, 2008, and judgment was reserved. After reserving judgment, the High Court allowed the Respondent to file an affidavit to bring on record subsequent events which did not form part of the records, without giving the Appellant an opportunity of dealing with the same. What is also relevant is the fact that the said affidavit was relied upon by the High Court while allowing the Appeal filed by the Respondent herein. The questions which, therefore, arise for determination are :

(i) Whether the High Court was justified in interfering with the order passed by the District Judge, Khurda in Arb.(P) No.576 of 2007, on account whereof pending arbitration, the Respondent was restrained from marketing the products manufactured by her under the Trade Mark "Naturoma Herbal" or "Naturoma" by herself or through anyone, except through the Appellant?

(ii) Whether, pending arbitration proceedings, an order could have been passed by which the right acquired by the Appellant under the Deed of Assignment of 50% of the right, title and interest in the Trade Mark "Naturoma Herbal", could have been suspended and he could have been restrained from objecting to the use of the said Mark by the Respondent?

(iii) Whether the High Court was justified in relying upon an affidavit filed on behalf of the Respondent after hearing had been concluded and judgment had been reserved in the appeal, without giving the Appellant an opportunity of dealing with the same?

(iv) Whether the invocation of Section 42 of the Specific Relief Act, 1963, to enforce the negative covenant contained in the Deed of Assignment, was contrary to the provisions of Section 27 of the Indian Contract Act, 1872 and was, therefore, void?

31. As far as the first two questions are concerned, the terms of the Deed of Assignment clearly indicate that the Respondent had of her own volition parted with 50% of her right, title and interest in the Trade Mark "Naturoma Herbal" with proportional goodwill of the business concerning the goods in respect of which the Mark was used, absolutely and forever, from the date of the Deed, namely, 1st October, 2000. It is no doubt true that on behalf of the Respondent it has been claimed that the Deed of Assignment had never been acted upon and that, in any event, the same had been revoked on 25th September, 2007, when the Agreement dated 1st April, 1999, was cancelled. However, in view of the provisions of the Deed of Assignment, it is yet to be adjudicated upon and decided as to whether by virtue of the revocation of the Deed of Assignment by the Respondent, the Appellant was no longer entitled to the benefits of the Trade Mark which had been transferred to him to the extent of 50% absolutely and forever.

In such circumstances, the order passed by the District Judge, Khurda, in ARBP No.576 of 2007, restraining the Respondent from marketing her products through any person, other than the Appellant, was more apposite in the facts of the case, as the rights of both the parties stood protected till such time as a final decision could be taken in arbitral proceedings, which, in effect, is the object and intention of Section 9 of the Arbitration and Conciliation Act, 1996.

32. As far as the third question is concerned, it was inappropriate on the part of the High Court to allow the Respondent to file an affidavit, on which reliance was placed, after the hearing had been concluded and judgment had been reserved, without giving the Appellant an opportunity of dealing with the same. However innocuous the additional affidavit may have been, once the hearing was concluded and judgment was reserved, it would have been prudent on the part of the High Court to have given an opportunity to the Appellant to deal with the same before allowing it to be taken on record. It has been submitted that the additional affidavit which was filed on behalf of the Respondent after the judgment had been reserved by the Appeal Court, only sought to bring on record the proceedings whereby the corrigendum which had been issued by the Trade Mark Registrar on 1st July, 2008, showing the Appellant as the Joint Proprietor of the Trade Mark "Naturoma Herbal", had been subsequently cancelled on 26th September, 2008. Since what was produced was a record of the official proceedings, the Appellant could not have been prejudiced since he himself had knowledge of the same.

33. Coming to the last question, as to whether the invocation of Section 42 of the Specific Relief Act, 1963, to enforce the negative covenant contained in the Deed of Assignment, was contrary to the provisions of Section 27 of the Indian Contract Act, 1872, or not, we are inclined to accept Mr. Ghosh's submissions that the injunction sought for by the Appellant was not to restrain the Respondent from carrying on trade or business, but from using the Trade Mark which was the subject matter of dispute. Accordingly, the provisions of Section 27 of the Indian Contract Act, 1872, would not be attracted to the facts in this case. For the sake of reference, Section 27 of the above Act is reproduced hereinbelow :-

> **27. Agreement in restraint of trade, void.-** Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.
>
> **Exception 1.- Saving of agreement not to carry on business of which goodwill is sold.-** One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business."

It is obvious that what is declared to be void by virtue of Section 27 is any Agreement to restrain any person from exercising his right to carry on a profession or trade or business and any restraint thereupon by an Agreement would be void.

34. As will be seen from the materials on record, the Appellant did not ask for any injunction against the Respondent from carrying on any trade or business, but he objected to the use by the Respondent of the Trade Mark, in which he had acquired a 50% interest, while selling her products.

35. The conditions in the Deed of Assignment clearly stipulate that all the goods manufactured by the Respondent under the Trade Mark "Naturoma" would be marketed solely by the Appellant. It was also submitted that the said Trade Mark would be used only in relation to goods connected in the course of trade with both the parties. One of the other conditions of the Deed of Assignment was that both the parties would be

entitled to assign their respective shares in the Trade Mark subject to prior written consent of the other party, which presupposes that the parties were the absolute owners of their respective shares in the Trade Mark and even on termination of the joint venture, as has been done in the instant case, neither of the parties would be entitled to use or register the Mark in their own names or jointly with some other party.

36. Accordingly, having regard to the arbitration clause, which is Condition No.10 of the terms and conditions of the Deed of Assignment, the interim order passed on the application under Section 9 of the Arbitration and Conciliation Act, 1996, filed by the Appellant in keeping with the terms and conditions agreed upon between the parties, was justified and within the jurisdiction of the District Judge, Khurda. As we have mentioned hereinbefore, the interim order passed by the learned District Judge, Khurda, restraining the Respondent from selling her products by herself or by any other person, save and except through the Appellant, was apposite to the circumstances. The said order took into consideration the interests of both the parties flowing from the Agreement and the Deed of Assignment, pending decision by an Arbitral Tribunal. The cause of action for the suit filed by the Respondent before the District Judge, Khurda was the incorporation of a Company by the Appellant with his son under the name and style of "Naturoma Herbals (P) Ltd." and the subsequent application made before the Registrar of Trade Marks to register "Naturoma Herbal" in the name of the said Company. It is in that context that the interim order was passed restraining the Appellant from distributing, manufacturing or marketing any of the products in the name of "Naturoma" or Trade Mark "Naturoma Herbal". The said order of injunction did not permit the Respondent to manufacture and market the goods under the said Trade Mark in violation of the provisions of the Deed of Assignment referred to hereinabove.

37. The learned Single Judge of the High Court, while referring to some of the provisions of the Agreement between the parties, apparently overlooked the provisions relating to the use of the Trade Mark contained in the Deed of Assignment. Although, reference was made to Clause 19 of the Agreement, the High Court failed to notice that the same was not contained in the Deed of Assignment, whereby 50% of the right, title and interest of the Respondent in the Trade Mark "Naturoma Herbal" was assigned in favour of the Appellant absolutely and forever. As has been emphasized hereinbefore, even upon termination of the joint venture under the Agreement between the parties, neither the Appellant nor the Respondent would be entitled to use or register the Mark in their own names or jointly with some other party. In fact, the relevant terms and conditions of the Deed of Assignment had been extracted by the learned Single Judge in the impugned judgment, but the same appear to have been lost sight of while considering the terms and conditions of the Agreement executed between the parties.

38. In our view, this is not a case where money can be an adequate compensation, since the Appellant has apparently acquired a 50% interest in the Trade Mark in question, together with the goodwill of the business in relation to the products in which the Trade Mark is used.

39. We are, therefore, of the view that the High Court erred in reversing the order passed by the District Judge in ARBP No.576 of 2007 filed by the Appellant, under which the status-quo would have been maintained till the dispute was settled in arbitration.

40. We, accordingly, allow the Appeals, set aside the impugned judgment and order of the learned Single Judge of the High Court impugned in the Appeals and restore that of the District Judge, Khurda in ARBP No.576 of 2007.

41. However, before parting with the matter, we have to refer to the order passed by us on 28th January, 2011, whereby the Respondent had been allowed to continue with the running

of the business, but she was directed to maintain a separate account in respect of the transaction and to place the same before us at the time of hearing of the matter. Such account does not appear to have been filed, but since we are disposing of the matter by restoring the order of the District Judge, Khurda, in ARBP No.576 of 2007, we further direct the Respondent, as and when arbitral proceedings may be taken, to furnish such account upto this day before the learned Arbitrator so that the claims of the parties can be fully decided by the learned Arbitrator.

42. Having regard to the facts of the case, the parties will bear their own costs in these appeals all throughout.

N.J. Appeals allowed.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10465 of 2011.

From the Judgment and Order dated 21.10.2010 of the High Court of Judicature at Bombay in W.P. No. 5772 of 2009.

L.N. Rao and A.V. Savant, R.N. Govilkar, Nitin S. Tambwekar, B.S. Rai, Santosh Krishnan, K. Rajeev Sunil Upadhyay, Sudhanshu S. Chaoudhari, Asha Gopalan Nair, S. Sukumaran, Anand Sukumar, Bhupesh Kumar Pathak and Meera Mathu for the Appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. The principal question which arose for consideration in this appeal is whether "Namdeo Shimpi" caste is a sub-caste within the meaning of Entry 153 (Shimpi) in the Government Notification notifying list of Other Backward Classes (OBC) relating to the State of Maharashtra, even though it is not specifically mentioned as such?

3. This appeal is filed against the final judgment and order dated 21.10.2010 passed by the High Court of Judicature at Bombay in Writ Petition No. 5772 of 2009 whereby the Division Bench of the High Court dismissed the writ petition filed by the appellant herein.

4. **Brief Facts:**

(a) On 18.01.1997, the Additional District Deputy Collector, Mumbai Suburban District, Mumbai issued a Caste Certificate to the appellant herein certifying that she belongs to Hindu Shimpi Caste which is recognized as Other Backward Class (Sr. No. 153) under Government Resolution No. CBC 1467/M dated 13.10.1967, Education and Social Welfare Department and as amended from time to time. In the year 2007, the appellant herein along with Mrs Safia Parveen Abdul Munaf-Respondent No. 6 contested the elections of Municipal Corporation of Greater Mumbai from Ward No. 62 reserved for women candidate belonging to the other backward classes and the appellant won the election. As per the policy of the State Election Commission, the Caste Certificate of the appellant herein was sent to the Scrutiny Committee to scrutinize the caste claimed and issue of validity certificate.

(b) After the elections, Respondent No. 6 forwarded a complaint to the Caste Scrutiny Committee (in short 'the Committee') alleging that the appellant's claim of belonging to caste "Hindu Shimpi" was not proper. The appellant herein also submitted the documents in support of her claim. By order dated 20.04.2007, the Committee certified that the Caste Certificate issued to the appellant was valid and accepted that she belongs

to 'Shimpi' of Other Backward Class (OBC).

(c) Challenging the said order, Respondent No. 6 filed Writ Petition No. 5112 of 2007 before the High Court of Bombay. By order dated 15.09.2008, the High Court set aside the order dated 20.04.2007 passed by the Committee and remanded the matter back to it for de novo consideration and decision in accordance with law. By order dated 19.06.2009, the Committee declared the claim of the appellant herein as invalid and cancelled the Caste Certificate issued to her.

(d) Aggrieved by the order dated 19.06.2009, the appellant herein filed Writ Petition No. 5772 of 2009 before the High Court of Bombay. By order dated 21.10.2010, the Division Bench of the High Court dismissed the writ petition.

(e) Aggrieved by the said decision, the appellant herein has preferred this appeal by way of special leave petition before this Court.

5. Heard Mr. L. Nageswara Rao, learned senior counsel for the appellant and Ms. Asha Gopalan Nair, learned counsel for respondent Nos. 1 to 3, Mr. S. Sukumaran, learned counsel for respondent No.5 and Mr. A.V. Sawant, learned senior counsel for the contesting respondent No.6.

6. Mr. Rao, learned senior counsel for the appellant by drawing our attention to the Government Resolution dated 03.06.1996 issued by Social Welfare, Cultural Affairs and Sports Department, Government of Maharashtra, submitted that in view of illustration given in Clause 25, the Committee and the High Court ought to have accepted the claim of the appellant and declared that she belongs to 'Namdeo Shimpi', which is one of the castes included in Other Backward Classes (OBCs). In the above-mentioned Government Resolution, Clauses 25 and 31 have been pressed into service. They are as follows:

"**Clause 25**

If in the list of O.B.C.'s if there is a clear reference of the main caste, the competent authorities should issue caste certificate to the sub-caste or the similar caste of the main caste i.e., in the list of list of O.B.Cs' caste Kunbi is included. If in the documents of any person the word used are Tillori Kunbi or Khaire Kunbi then since the caste Kunbi is in the list of the O.B.C's and since the said caste is a main caste, such person be granted certificate of the caste Kunbi. If only the word/names Tillori, Khaire are mentioned, the caste certificate cannot be issued to such person as on the bases of the name Tillori, Khaie the main caste does not get clarified.

Clause 31

In the list of O.B.C's, eligible for the benefits in the state of Maharashtra, main castes are included and the sub-castes of such caste are also held eligible for issuance of the caste certificate. Persons belonging to such sub-castes be issued caste certificate in the name of the main caste."

It is not in dispute that the reference mentioned in Clause 25, namely, caste 'Kunbi' is only an illustration. It is, no doubt, true that in terms of Clause 31 in the list of OBCs eligible for the benefits in the State of Maharashtra, if main castes are included, in that event, the sub-castes are also eligible for issuance of the caste certificate. According to the learned senior counsel for the appellant, based on Clause 31, persons belonging to such sub-castes can be issued caste certificate in the name of the main caste. Per contra, Mr. A.V. Sawant, learned senior counsel for the contesting respondent No.6 submitted that first of all, the reference made by the appellant is not a full extract and admittedly it is only a portion thereof and in the absence of full details about the Government Resolution, it is not safe to rely upon and, more particularly, in the light of Constitutional judgments of this Court clarifying the position regarding issuance of caste certificate.

7) On a complaint being made by Respondent No. 6, regarding the validity of the caste certificate produced by the appellant, the matter was referred to the Regional Caste Certificate Verification Committee (RCCVC). The Verification Committee, consisting of the President, Member and Research Officer, on receipt of the complaint issued notice to both the parties, afforded opportunity to them and after relying on various materials including the Government Notifications, Regulations etc., by order dated 19.06.2009, declared the claim of the appellant invalid and cancelled the Caste Certificate issued by the Additional District Deputy Collector, Mumbai Suburban District dated 18.01.1997.

8) The said order of the Verification Committee was challenged before the Division Bench of the High Court and by order dated 21.10.2010, it concluded that the appellant belongs to 'Namdeo Shimpi' caste which does not fall under Entry 153 of the relevant Government Resolution dated 01.03.2006 issued by the Government of Maharashtra. It is relevant to point out that though some other sub-castes of caste 'Shimpi' in (OBC) have been mentioned in Entry 153, admittedly, 'Namdeo Shimpi' has not been included under the original caste 'Shimpi'. The relevant protion of the Entry 153 is as under:

S.No.	Original caste and Serial no. Synonym caste/sub-caste
In the category of Other Backward Class	and Serial Number of its original caste included

afresh

6. Shimpi — 153
Jain Shimpi, Shravak Shimpi,

Shetaval, Shetawal, Saitaval,

Saitawal — 153

In view of the fact that there is no reference to 'Namdeo Shimpi' in Entry 153, the appellant who belongs to the same caste cannot claim the benefit meant for 'Other Back-ward Classes' of 'Shimpi' caste.

9. The issue relating to caste certificate, scrutiny by the Committee, inclusion or deletion etc. have been considered by the Constitution Bench of this Court in *State of Maharashtra vs. Milind and Others,* (2001) 1 SCC 4. Relying upon two earlier Constitution Bench decisions in (i) *B. Basavalingappa vs. D. Munichinappa,* AIR 1965 SC 1269 = (1965) 1 SCR 316 and (ii) *Bhaiya Lal vs. Harikishan Singh,* AIR 1965 SC 1557 = (1965) 2 SCR 877, the Constitution Bench in *Milind's case* (supra) has clearly held that an enquiry as to whether any other caste or sub-caste can be included in the caste or tribe specifically mentioned in the Presidential Order was wholly impermissible.

10. The factual position in the *Milind's case* (supra) is as follows:-

The respondent, on the basis of the School Leaving Certificate and other records of himself and his close relative obtained a caste certificate from the Executive Magistrate, Nagpur on 20.08.1981 as belonging to "Halba", Scheduled Tribe. On the basis of that certificate, he was selected in the Government Medical College for MBBS degree course for the

year 1985-86 in the reserved category meant for Scheduled Tribes. The certificate was sent for verification to the Scrutiny Committee constituted under the Directorate of Social Welfare. After necessary inquiry, the Scrutiny Committee recorded a finding to the contrary and rejected the certificate. The Appellate Authority, after detailed examination of evidence dismissed the respondent's appeal and held that the respondent belonged to "Koshti" caste and not to "Halba/Halbi", Scheduled Tribe. However, the High Court allowed the respondent's writ petition and quashed the impugned orders *inter alia* holding that it was permissible to inquire whether any subdivision of a tribe was a part and parcel of the tribe mentioned therein and that "Halba-Koshti" was a subdivision of main tribe "Halba/Halbi" as per Entry 19 in the Constitution (Scheduled Tribes) Order, 1950 (for short "Scheduled Tribes Order") applicable to Maharashtra. Before the Constitution Bench, learned senior counsel for the appellant-State of Maharashtra contended that:

(a) it was not permissible to hold an inquiry whether a particular group was a part of the Scheduled Tribe as specified in the Scheduled Tribes Order;

(b) the decision in *Bhaiya Ram Munda vs. Anirudh Patar & Ors.* (1970) 2 SCC 825, did not lay down the correct principle of law as to the scope of inquiry and the power to amend the Scheduled Castes/Scheduled Tribes Order; [this contention involved the specific question as to whether "Halba-Koshti" caste was a sub-tribe within the meaning of Entry 19 (Halba/Halbi) of the Scheduled Tribes Order relating to the State of Maharashtra, even though not specifically mentioned as such].

(c) the High Court misinterpreted the report of the Joint Committee of Parliament placed before it when representations for inclusion of "Halba-Koshti" in the Scheduled Tribes Order were rejected;

(d) the High Court also committed an error in invoking and applying the principle of stare decisis to the facts of the present case;

(e) & (f) the High Court erred in setting aside the orders of the Scrutiny Committee and the Appellate Authority which were made on proper and full consideration of evidence and authorities;

(g) the High Court gave undue importance to the resolutions/circulars issued by the State Government which were contrary to law;

(h) the High Court erred in treating the issue involved in the present case to have been closed in Abhay caste.

On the other hand learned senior counsel for the respondent contended that the old records relating to the period when there was no controversy, clearly supported the case of the respondent and the School Leaving Certificate issued to the respondent was valid. He also submitted that it was open to show that a particular caste was part of the Scheduled Tribes coming within the meaning and scope of tribal community even though it was not described as such in the Presidential Order.

11. Allowing the appeal but moulding the relief, the Constitution Bench held thus:

> "11. By virtue of powers vested under Articles 341 and 342 of the Constitution of India, the President is empowered to issue public notification for the first time specifying the castes, races or tribes or part of or groups within castes, races, or tribes which shall, for the purposes of the Constitution be deemed to be Scheduled Castes or Scheduled Tribes in relation to a State or Union Territory, as the case may be. The language and terms of Articles 341 and 342 are identical. What is said in relation to Article 341 mutatis mutandis applies to Article 342. The laudable object of the said articles is to provide additional protection to the members of the Scheduled Castes and

Scheduled Tribes having regard to social and educational backwardness from which they have been suffering since a considerable length of time. The words "castes" or "tribes" in the expression "Scheduled Castes" and "Scheduled Tribes" are not used in the ordinary sense of the terms but are used in the sense of the definitions contained in Articles 366(24) and 366(25). In this view, a caste is a Scheduled Caste or a tribe is a Scheduled Tribe only if they are included in the President's Orders issued under Articles 341 and 342 for the purpose of the Constitution. Exercising the powers vested in him, the President has issued the Constitution (Scheduled Castes) Order, 1950 and the Constitution (Scheduled Tribes) Order, 1950. Subsequently, some orders were issued under the said articles in relation to Union Territories and other States and there have been certain amendments in relation to Orders issued, by amendment Acts passed by Parliament.

15. Thus it is clear that States have no power to amend Presidential Orders. Consequently, a party in power or the Government of the day in a State is relieved from the pressure or burden of tinkering with the Presidential Orders either to gain popularity or secure votes. Number of persons in order to gain advantage in securing admissions in educational institutions and employment in State services have been claiming as belonging to either Scheduled Castes or Scheduled Tribes depriving genuine and needy persons belonging to Scheduled Castes and Scheduled Tribes covered by the Presidential Orders, defeating and frustrating to a large extent the very object of protective discrimination given to such people based on their educational and social backwardness. Courts cannot and should not expand jurisdiction to deal with the question as to whether a particular caste, sub-caste; a group or part of tribe or sub-tribe is included in any one of the entries mentioned in the Presidential Orders issued under Articles 341 and 342 particularly so when in clause (2) of the said article, it is expressly stated that the said Orders cannot be amended or varied except by law made by Parliament. The power to include or exclude, amend or alter Presidential Order is expressly and exclusively conferred on and vested with Parliament and that too by making a law in that regard. The President had the benefit of consulting the States through Governors of States which had the means and machinery to find out and recommend as to whether a particular caste or tribe was to be included in the Presidential Order. If the said Orders are to be amended, it is Parliament that is in a better position to know having the means and machinery unlike courts as to why a particular caste or tribe is to be included or excluded by law to be made by Parliament. Allowing the State Governments or courts or other authorities or Tribunals to hold inquiry as to whether a particular caste or tribe should be considered as one included in the schedule of the Presidential Order, when it is not so specifically included, may lead to problems. In order to gain advantage of reservations for the purpose of Article 15(4) or 16(4) several persons have been coming forward claiming to be covered by Presidential Orders issued under Articles 341 and 342. This apart, when no other authority other than Parliament, that too by law alone can amend the Presidential Orders, neither the State Governments nor the courts nor Tribunals nor any authority can assume jurisdiction to hold inquiry and take evidence to declare that a caste or a tribe or part of or a group within a caste or tribe is included in Presidential Orders in one entry or the other although they are not expressly and specifically included. A court cannot alter or amend the said Presidential Orders for the very good reason that it has no power to do so within the meaning, content and scope of Articles 341 and 342. It is not possible to hold that either any inquiry is permissible or any evidence can be let in, in

relation to a particular caste or tribe to say whether it is included within Presidential Orders when it is not so expressly included.

36. Finally, the Constitution Bench has concluded that:

1. It is not at all permissible to hold any inquiry or let in any evidence to decide or declare that any tribe or tribal community or part of or group within any tribe or tribal community is included in the general name even though it is not specifically mentioned in the entry concerned in the Constitution (Scheduled Tribes) Order, 1950.

2. The Scheduled Tribes Order must be read as it is. It is not even permissible to say that a tribe, sub-tribe, part of or group of any tribe or tribal community is synonymous to the one mentioned in the Scheduled Tribes Order if they are not so specifically mentioned in it.

3. A notification issued under clause (1) of Article 342, specifying Scheduled Tribes, can be amended only by law to be made by Parliament. In other words, any tribe or tribal community or part of or group within any tribe can be included or excluded from the list of Scheduled Tribes issued under clause (1) of Article 342 only by Parliament by law and by no other authority.

4. It is not open to State Governments or courts or tribunals or any other authority to modify, amend or alter the list of Scheduled Tribes specified in the notification issued under clause (1) of Article 342.

5. Decisions of the Division Benches of this Court in Bhaiya Ram Munda v. Anirudh Patar and Dina v. Narain Singh did not lay down law correctly in stating that the inquiry was permissible and the evidence was admissible within the limitations indicated for the purpose of showing what an entry in the Presidential Order was intended to be.

As stated in Position (1) above no inquiry at all is permissible and no evidence can be let in, in the matter."

12.In *Kumari Madhuri Patil & Another vs. Additional Commissioner, Tribal Development & Ors.* (1994) 6 SCC 241, this Court has given elaborate directions for deciding the claim of persons who belong to the Scheduled Castes, Scheduled Tribes or Other Backward Classes. These directions have been reiterated in a recent decision by a larger Bench of three Judges of this Court in *Dayaram vs. Sudhir Batham & Ors.* 2011 (11) Scale 448.

13. Mr. Rao, learned senior counsel, by relying on the position prevailing in the State of Karnataka, namely, that caste 'Namdeo Shimpi' has been included in OBC submitted that the same analogy may be applied to the State of Maharashtra. We have already noted the elaborate discussion and the ultimate order of the Committee as well as the Division Bench of the High Court. We are satisfied that before arriving at such conclusion they considered the entire material on record including the distinction between the list of OBCs in the State of Karnataka as against the list of OBCs in State of Maharashtra and recorded a finding that the appellant who belongs to 'Namdeo Shimpi' caste does not belong to OBC of 'Shimpi' caste in Maharashtra. In view of the same, we reject the contention of the learned senior counsel for the appellant.

14. Ms. Asha Gopalan Nair, learned counsel appearing for the State took us through various averments in the counter affidavit filed by the State of Maharashta. The counter affidavit filed by the Secretary to the Government of Maharashtra in this Court shows that pursuant to the recommendations made by the Maharashtra State Backward Class Commission, the list of castes falling under OBC 'Shimpi' has been amended from time to time. However, even the Government Resolution dated 01.03.2006 does not include 'Namdeo Shimpi' under the heading 'Shimpi' as OBC.

15. It is brought to our notice that the Maharashtra State Backward Class Commission has been constituted in terms of the judgment of this Court in *Indra Sawhney vs. Union of India,* 1992 Supp (3) SCC 212, which is headed by a retired Judge of the Bombay High Court and assisted by experts in the field. Further, the said Commission undertakes extensive studies and make recommendations from time to time or suggest additions and alterations in the list of OBCs and it is after such elaborate exercise the final list has emerged as per the Government Resolution dated 01.03.2006. The details furnished in the counter affidavit filed by the Secretary to the Government of Maharashtra show that the above referred Government Resolution is being updated from 1961 on several occasions. We have already explained that the extract of the Government Resolution dated 03.06.1996 relied on by Mr. Rao, learned senior counsel for the appellant dealing with caste 'Kunbi' (OBC), has no relevance to the facts of the present case. We are also satisfied that the said Committee has considered the distinction between the list of OBCs in the State of Karnataka and in State of Maharashtra and has taken note of the fact that though the Karnataka State has thought it fit to include 'Namdeo Shimpi' under the category of 'Shimpi' (OBC), the Government of Maharashtra has not done so. This has also been rightly highlighted in the impugned order by the Division Bench of the High Court.

16. When it is not so expressly or specifically included in the Government Resolution/order along with the main caste, in such case, even if it is synonymous to the one mentioned in the order, it is not permissible to avail such benefit of reservation. It is well known that a caste may fall under the category of OBCs in one State, but the said caste may not be classified as OBC in other State. At any rate, we are of the view that no specific evidence was led by the appellant to discharge the burden of proof on her under Section 8 of the Maharashtra Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Other Backward Classes and Special Backward Category (Regulation of Issuance and Verification of) Caste Certificate Act, 2001. Inasmuch as the burden of proof under Section 8 of the said Act being on the person who claims to belong to that caste, tribe, or class, in view of the factual conclusion by the Committee based on relevant acceptable material and the decision of the Division Bench, we are unable to accept the claim of the appellant. On the other hand, we are satisfied that the Committee and the Division Bench of the High Court have considered the entire material in the light of the decisions of this Court and came to a finding of fact that the appellant does not belong to caste 'Shimpi' (OBC) and belongs to 'Namdeo Shimpi' caste which is not OBC in the State of Maharashtra.

17. Under these circumstances, we do not find any valid ground for interference with the impugned order of the High Court. Consequently, the appeal fails and the same is dismissed with no order as to costs.

N.J. Appeal dismissed.

CRIMINAL APPELLATE JURISDICTION : SLP (Crl.) No. 4606 of 2011.

From the Judgment & Order dated 6.5.2011 of the High Court of Judicature at Bombay in Criminal Revision Application No. 441 of 2008.

WITH

SLP (Crl.) No. 4672 of 2011.

K.K. Venugopal, Altaf Ahmed, Siddhartha Dave, Jemtiben AO, Vibha Datta Makhija, Ankur Tomer, Navkesh Betia, Sandeep Narain, S. Narain & Co for the Petitioner.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. These Special Leave Petitions arise out of an order dated 6th May, 2011, passed by the High Court of Judicature at Bombay in Criminal Revision Application No.441 of 2008 whereby the High Court has set aside order dated 13th August, 2008 passed by the Additional Sessions Judge, Greater Bombay in Revision Applications No.449, 460 and 853 of 2007 and restored that made by the Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai taking cognizance of offences allegedly committed by the petitioners.

2. Respondent No.1, Rajeev Sawhney filed Criminal Complaint No.20/SW/2007 before Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai, alleging commission of offences punishable under Sections 417, 420, 465, 467, 468, 471 read with Section 120B of IPC by the petitioners. The complaint set out the relevant facts in great detail and made specific allegations to the effect that petitioners had entered into a conspiracy to defraud him and for that purpose Shri Pawan Kumar, arrayed as accused No.4 in the complaint, had played an active role apart from fabricating a Board resolution when no such resolution had, in fact, been passed. On receipt of the complaint the Additional Chief Metropolitan Magistrate recorded prima facie satisfaction about the commission of offences punishable under Sections 417, 420, 465, 467, 468, 471, read with Section 120B of IPC, took cognizance and directed issuance of process against the accused persons. Aggrieved by the said order, Revision Petitions No.449, 460, 853 of 2007 were filed by the accused persons before the Additional Sessions Judge, Greater Bombay, challenging the order taking cognizance and the maintainability of the complaint on several grounds. The revision petitions were eventually allowed by the Additional Sessions Judge, Greater Bombay by his order dated 13th August, 2008 and the summoning order set aside. The Additional Sessions Judge came to the conclusion that although the allegations regarding fabrication of a resolution, taken at their face value, made out a prima facie case of fraud against the accused persons yet the minutes of a subsequent meeting allegedly held on 19th July, 2005, a photocopy of which was filed along with Criminal Revision No.460/2007 ratified the resolution allegedly passed on 28th June, 2005. The Court on that premise concluded that no fraud or cheating was made out against the accused persons. The Court observed:

> "The question *is only in respect* of the incident 28/06/2005 *if this incident averred in* the complaint is *taken as it is without any more facts then certainly leads a prima facie case of playing fraud.* However, in this case, it is seen from the record that the *complainant had meeting on 19/07/2005, the minutes of the meeting are produced at* page No.293 in Criminal Revision No.460/2007. *This meeting and its minutes are not disputed. The relevant portion of the minutes on 19/07/2005 relevant for our purposes are as under:*
>
> > "Mr. Rajeev Sawhney has agreed to approve and sign the circular resolution for opening the Bank Account of VMoksha Mauritius with State Bank of Mauritius and obtaining the loan facility for the purposes of receiving the purchase consideration and remittance of the subscription money for the issue of preference shares in favour of VMoksha Mauritius with effect from the time of execution and exchange of the above Undertaking and the modification letter for the Escrow Arrangement."
>
> *This ratifies the act of 28/06/2005, therefore the minutes of the meeting which is signed by the complainant himself and accused No.4. Mr. Pawan Kumar and other directors etc. if perused the act of 28/06/2005 is ratified* and the complainant thus consented to that act. Therefore,

there remained nothing of the cheating to the complainant by the accused."

(emphasis is supplied)

3. The Court also found fault with the complainant suppressing the fact of a complaint having been filed before the Additional Chief Metropolitan Magistrate at Bangalore and the alleged non-observance of the provisions of Section 202 of the Cr.P.C.

4. The above order was then challenged by the complainant, Shri Rajeev Sawhney before the High Court of Bombay in Criminal Revision Application No.441 of 2008. The High Court came to the conclusion that the Additional Sessions Judge had fallen in error on all three counts. The High Court noticed that the complaint filed before the IV Additional Chief Metropolitan Magistrate at Bangalore had been quashed by the Karnataka High Court on account of a more comprehensive complaint having been filed before the Additional Chief Metropolitan Magistrate at Mumbai. Consequently, on the date the Additional Chief Metropolitan Magistrate took cognizance of the offence alleged against the accused persons there was no complaint other than the one pending before the said Court. The complainant could not, therefore, be accused of having suppressed any material information from the trial Court to call for any interference by the Sessions Court on that count.

5. As regards the alleged non-observance of the provisions of Section 202 Cr.P.C. the High Court came to the conclusion that the provision of Section 202 Cr.P.C. had been complied with by the Magistrate while taking cognizance and issuing process.

6. On the question of ratification of the resolution allegedly passed on 28th June, 2005, the High Court held that the Sessions Judge was not justified in entertaining a photocopy of the document relied upon by the accused at the revisional stage, placing implicit reliance upon the same and interfering with the on-going proceedings before the Magistrate. The High Court observed:

"The third ground on which the learned Addl. Sessions Judge had allowed the revision of the accused persons and quashed the process was that the acts in dispute were ratified in the meeting dated 19.7.2001. It appears that during the arguments before the Addl. Sessions Judge, a photocopy of a document purporting to be minutes of the meeting of the advisers of the complainant and accused No.4 Pawan Kumar held on 19.7.2005 was produced to show that the parties had approved the act of opening the account in the name of the Company and securing the loan on 28.6.2005. Firstly, this document was produced for the first time before the Addl. Sessions Judge in the revision application. This document could be treated as a defence of the accused persons. That document was not available before the Addl. C.M.M. when he passed the order. Secondly, this document being the defence could not be taken into consideration for the purpose of deciding whether prima facie case is made out for issuing process. The learned Addl. Sessions Judge observed that signature on the document was not disputed. In fact, the stage of proving that document or admitting signature on that document had never arisen. The original document was not before the Court and only a photocopy of the document purporting to be minutes of the meeting was filed and on the basis of such photocopy produced during the revision application by the accused persons, the learned Addl. Sessions Judge jumped to the conclusion that such a resolution was passed and the acts of 28.6.2005 were ratified. In my opinion, it will not be appropriate for the Addl. Sessions Judge."

7. The present Special Leave Petitions assail the correctness of the view taken by the High Court.

8. Appearing for the petitioners M/s. K.K. Venugopal and Altaf Ahmed, learned senior counsels strenuously argued that the High Court was not justified in reversing the view taken by the Sessions Judge and in remitting the matter back to the trial Court. We do not think so. The reasons are not far to seek. We say so because the averments made in the complaint when taken at their face value, make out a case against the accused. We have gone through the averments made in the complaint and are of the view that the complaint does contain assertions with sufficient amount of clarity on facts and events which if taken as proved can culminate in an order of conviction against the accused persons. That is, precisely the test to be applied while determining whether the Court taking cognizance and issuing process was justified in doing so. The legal position in this regard is much too well-settled to require any reiteration.

9. Learned counsel for the petitioners made a valiant attempt to argue that the Revisional Court was justified in receiving documents from the accused persons at the hearing of the revision and decide the legality of the order taking cognizance on that basis. Before the High Court a similar contention was raised but has been turned down for reasons that are evident from a reading of the passage extracted by us above. We see no error or perversity in the view taken by the High Court that in a revision petition photocopies of documents produced by the accused for the first time, could not be entertained and made a basis for setting aside an order passed by the trial Court and dismissing a complaint which otherwise made out the commission of an offence. The accused is doubtless entitled to set up his defence before the trial Court at the proper stage, confront the witnesses appearing before the Court with any document relevant to the controversy and have the documents brought on record as evidence to enable the trial Court to take a proper view regarding the effect thereof. But no such document, the genuineness whereof was not admitted by the parties to the proceedings, could be introduced by the accused in the manner it was sought to be done. We may in this regard gainfully refer to the decision of this Court in *Minakshi Bala v. Sudhir Kumar and Ors.* (1994) 4 SCC 142 where one of the questions that fell for consideration was whether in a revision petition challenging an order framing charges against the accused, the latter could rely upon documents other than those referred to in Sections 239 and 240 of the Cr.P.C. and whether the High Court would be justified in quashing the charges under Section 482 of the Cr.P.C. on the basis of such documents. Answering the question in the negative this Court held that while an order framing charges could be challenged in revision by the accused persons before the High Court or the Sessions Judge, the revisional Court could in any such case only examine the correctness of the order framing charges by reference to the documents referred to in Sections 239 and 240 of the Cr.P.C and that the Court could not quash the charges on the basis of documents which the accused may produce except in exceptional cases where the documents are of unimpeachable character and can be legally translated into evidence. The following passage is, in this regard, apposite:

> **"7.** If charges are framed in accordance with Section 240 CrPC on a finding that a prima facie case has been made out — as has been done in the instant case — the person arraigned may, if he feels aggrieved, invoke the revisional jurisdiction of the High Court or the Sessions Judge to contend that the charge-sheet submitted under Section 173 CrPC and documents sent with it did not disclose any ground to presume that he had committed any offence for which he is charged and the revisional court if so satisfied can quash the charges framed against him. To put it differently, once charges are framed under Section 240 CrPC the High Court in its revisional jurisdiction would not be justified in relying upon documents other than those referred to in Sections 239 and 240 CrPC; nor would it be justified in invoking its inherent jurisdiction under Section 482 CrPC to quash the same except in those rare

cases where forensic exigencies and formidable compulsions justify such a course. We hasten to add even in such exceptional cases the High Court can look into only those documents which are unimpeachable and can be legally translated into relevant evidence."

10. It is interesting to note that even in the present SLPs the petitioner has filed an unsigned copy of the alleged minutes of the meeting dated 19th July, 2005. We do not think that we can possibly look into that document without proper proof and without verification of its genuineness. There was and is no clear and unequivocal admission on the record, at least none was brought to our notice, regarding the genuineness of the document or its probative value. The complainant-respondent in this petition was also not willing to concede that the document relied upon could possibly result in the ratification of an act which was *non est* being a mere forgery. At any rate the document could not be said to be of unimpeachable character nor was there any judicial compulsion much less an exceptional or formidable one to allow its production in revisional proceedings or to accept it as legally admissible evidence for determining the correctness of the order passed by the trial Court. That apart whether or not document dated 19th July, 2005, could possibly have the effect of ratifying the resolution allegedly passed on 28th June, 2005 was also a matter that could not be dealt with summarily, especially when the former did not even make a reference to the latter.

11. The alternative contention urged by learned counsel for the petitioners that there was suppression of information by the complainant as regards filing of a previous complaint before the Magistrate at Bangalore is also without any substance. The fact that the complaint previously filed had been quashed by the High Court on account of filing of a comprehensive complaint out of which these proceedings arise is, in our opinion, a complete answer to the charge of suppression. As on the date the Additional Chief Metropolitan Magistrate, Mumbai, took cognizance of the offences in the complaint filed before him no other complaint was pending in any other Court, the complaint before the Magistrate at Bangalore having had been quashed without a trial on merits. Mere filing of a previous complaint could not in the above circumstances be a bar to the filing of another complaint or for proceedings based on such complaint being taken to their logical conclusion. So also the High Court was, in our opinion, correct in holding that there was no violation of the provision of Section 202 Cr.P.C. to warrant interference in exercise of revisional powers by the Sessions Judge.

12. Reliance placed by learned counsel for the petitioners upon the decisions of this Court in *Pepsi Foods Ltd. and Anr. v. Special Judicial Magistrate and Ors.* (1998) 5 SCC 749 and *State of Orissa v. Debendra Nath Padhi* (2005) 1 SCC 568 is of no avail. In the former case this Court simply recognized that taking of cognizance is a serious matter and that the magistrate must apply his mind to the nature of the allegations in the complaint, and the material placed before him while issuing process. The complaint in the present case, as noticed earlier, does make specific allegations which would call for a proper inquiry and trial and the magistrate had indeed recorded a prima facie conclusion to that effect. So also the decision in *Debendra Nath Padhi* (supra) does not help the petitioner. That was a case where the question was whether at the stage of framing of charge, the accused could seek production of documents to prove his innocence. Answering the question in the negative this Court held:

"The law is that at the time of framing charge or taking cognizance the accused has no right to produce any material. No provision in the Code of Criminal Procedure, 1973 (for short the "Code") grants to the accused any right to file any material or document at the stage of framing of charge. That right is granted only at the stage of the trial. Satish Mehra case, (1996) 9 SCC 766 holding that the trial court has powers to consider even materials which the

accused may produce at the stage of Section 227 of the Code has not been correctly decided. It is well settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence."

13. In the result, we see no reason to interfere with the order passed by the High Court in exercise of our jurisdiction under Article 136 of the Constitution of India. The Special Leave Petitions are accordingly dismissed.

R.P. Special Leave Petitions dismissed.

CRIMINAL APPELLATE JURISDICTION : SLP (Crl.) No. 4606 of 2011 etc.

From the Judgment & Order dated 06.05.2011 of the High Court of Judicature at Bombay in Criminal Revision Application No, 441 of 2008.

WITH

SLP (Crl.) No. 4672 of 2011.

K.K. Venugopal, Altaf Ahmed, Siddharth Dave, Jemtiben AO, Vibha Datta Makhija, Ankur Tomer, Navkesh Betia, Sandeep Narain, S. Narain & Co. for the Petitioner.

The following Judgment of the Court was delivered by

T.S. THAKUR, J. 1. These Special Leave Petitions arise out of an order dated 6th May, 2011, passed by the High Court of Judicature at Bombay in Criminal Revision Application No.441 of 2008 whereby the High Court has set aside order dated 13th August, 2008 passed by the Additional Sessions Judge, Greater Bombay in Revision Applications No.449, 460 and 853 of 2007 and restored that made by the Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai taking cognizance of offences allegedly committed by the petitioners.

2. Respondent No.1, Rajeev Sawhney filed Criminal Complaint No.20/SW/2007 before Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai, alleging commission of offences punishable under Sections 417, 420, 465, 467, 468, 471 read with Section 120B of IPC by the petitioners. The complaint set out the relevant facts in great detail and made specific allegations to the effect that petitioners had entered into a conspiracy to defraud him and for that purpose Shri Pawan Kumar, arrayed as accused No.4 in the complaint, had played an active role apart from fabricating a Board resolution when no such resolution had, in fact, been passed. On receipt of the complaint the Additional Chief Metropolitan Magistrate recorded prima facie satisfaction about the commission of offences punishable under Sections 417, 420, 465, 467, 468, 471, read with Section 120B of IPC, took cognizance and directed issuance of process against the accused persons. Aggrieved by the said order, Revision Petitions No.449, 460, 853 of 2007 were filed by the accused persons before the Additional Sessions Judge, Greater Bombay, challenging the order taking cognizance and the maintainability of the complaint on several grounds. The revision petitions were eventually allowed by the Additional Sessions Judge, Greater Bombay by his order dated 13th August, 2008 and the summoning order set aside. The Additional Sessions Judge came to the conclusion that although the allegations regarding fabrication of a resolution, taken at

their face value, made out a prima facie case of fraud against the accused persons yet the minutes of a subsequent meeting allegedly held on 19th July, 2005, a photocopy of which was filed along with Criminal Revision No.460/2007 ratified the resolution allegedly passed on 28th June, 2005. The Court on that premise concluded that no fraud or cheating was made out against the accused persons. The Court observed:

> "The question *is only in respect* of the incident 28/06/2005 *if this incident averred in* the complaint is *taken as it is without any more facts then certainly leads a prima facie case of playing fraud.* However, in this case, it is seen from the record that the *complainant had meeting on 19/07/2005,* the minutes *of the meeting are produced at* page No.293 in Criminal Revision No.460/2007. *This meeting and its minutes are not disputed. The relevant portion of the minutes on 19/07/2005 relevant for our purposes are as under*:
>
> > "Mr. Rajeev Sawhney has agreed to approve and sign the circular resolution for opening the Bank Account of VMoksha Mauritius with State Bank of Mauritius and obtaining the loan facility for the purposes of receiving the purchase consideration and remittance of the subscription money for the issue of preference shares in favour of VMoksha Mauritius with effect from the time of execution and exchange of the above Undertaking and the modification letter for the Escrow Arrangement."
>
> *This ratifies the act of 28/06/2005, therefore the minutes of the meeting which is signed by the complainant himself and accused No.4. Mr. Pawan Kumar and other directors etc. if perused the act of 28/06/2005 is ratified* and the complainant thus consented to that act. Therefore, there remained nothing of the cheating to the complainant by the accused."

(emphasis is supplied)

3. The Court also found fault with the complainant suppressing the fact of a complaint having been filed before the Additional Chief Metropolitan Magistrate at Bangalore and the alleged non-observance of the provisions of Section 202 of the Cr.P.C.

4. The above order was then challenged by the complainant, Shri Rajeev Sawhney before the High Court of Bombay in Criminal Revision Application No.441 of 2008. The High Court came to the conclusion that the Additional Sessions Judge had fallen in error on all three counts. The High Court noticed that the complaint filed before the IV Additional Chief Metropolitan Magistrate at Bangalore had been quashed by the Karnataka High Court on account of a more comprehensive complaint having been filed before the Additional Chief Metropolitan Magistrate at Mumbai. Consequently, on the date the Additional Chief Metropolitan Magistrate took cognizance of the offence alleged against the accused persons there was no complaint other than the one pending before the said Court. The complainant could not, therefore, be accused of having suppressed any material information from the trial Court to call for any interference by the Sessions Court on that count.

5. As regards the alleged non-observance of the provisions of Section 202 Cr.P.C. the High Court came to the conclusion that the provision of Section 202 Cr.P.C. had been complied with by the Magistrate while taking cognizance and issuing process.

6. On the question of ratification of the resolution allegedly passed on 28th June, 2005, the High Court held that the Sessions Judge was not justified in entertaining a photocopy of the document relied upon by the accused at the revisional stage, placing implicit reliance upon the same and interfering with the on-going proceedings before the Magistrate. The High Court observed:

"The third ground on which the learned Addl. Sessions Judge had allowed the revision of the accused persons and quashed the process was that the acts in dispute were ratified in the meeting dated 19.7.2001. It appears that during the arguments before the Addl. Sessions Judge, a photocopy of a document purporting to be minutes of the meeting of the advisers of the complainant and accused No.4 Pawan Kumar held on 19.7.2005 was produced to show that the parties had approved the act of opening the account in the name of the Company and securing the loan on 28.6.2005. Firstly, this document was produced for the first time before the Addl. Sessions Judge in the revision application. This document could be treated as a defence of the accused persons. That document was not available before the Addl. C.M.M. when he passed the order. Secondly, this document being the defence could not be taken into consideration for the purpose of deciding whether prima facie case is made out for issuing process. The learned Addl. Sessions Judge observed that signature on the document was not disputed. In fact, the stage of proving that document or admitting signature on that document had never arisen. The original document was not before the Court and only a photocopy of the document purporting to be minutes of the meeting was filed and on the basis of such photocopy produced during the revision application by the accused persons, the learned Addl. Sessions Judge jumped to the conclusion that such a resolution was passed and the acts of 28.6.2005 were ratified. In my opinion, it will not be appropriate for the Addl. Sessions Judge."

7. The present Special Leave Petitions assail the correctness of the view taken by the High Court.

8. Appearing for the petitioners M/s. K.K. Venugopal and Altaf Ahmed, learned senior counsels strenuously argued that the High Court was not justified in reversing the view taken by the Sessions Judge and in remitting the matter back to the trial Court. We do not think so. The reasons are not far to seek. We say so because the averments made in the complaint when taken at their face value, make out a case against the accused. We have gone through the averments made in the complaint and are of the view that the complaint does contain assertions with sufficient amount of clarity on facts and events which if taken as proved can culminate in an order of conviction against the accused persons. That is, precisely the test to be applied while determining whether the Court taking cognizance and issuing process was justified in doing so. The legal position in this regard is much too well-settled to require any reiteration.

9. Learned counsel for the petitioners made a valiant attempt to argue that the Revisional Court was justified in receiving documents from the accused persons at the hearing of the revision and decide the legality of the order taking cognizance on that basis. Before the High Court a similar contention was raised but has been turned down for reasons that are evident from a reading of the passage extracted by us above. We see no error or perversity in the view taken by the High Court that in a revision petition photocopies of documents produced by the accused for the first time, could not be entertained and made a basis for setting aside an order passed by the trial Court and dismissing a complaint which otherwise made out the commission of an offence. The accused is doubtless entitled to set up his defence before the trial Court at the proper stage, confront the witnesses appearing before the Court with any document relevant to the controversy and have the documents brought on record as evidence to enable the trial Court to take a proper view regarding the effect thereof. But no such document, the genuineness whereof was not admitted by the parties to the proceedings, could be introduced by the accused in the manner it was sought to be done. We may in this regard gainfully refer to the decision of this Court in *Minakshi Bala v. Sudhir Kumar and Ors.* (1994) 4 SCC 142 where one of the questions that fell for consideration was

whether in a revision petition challenging an order framing charges against the accused, the latter could rely upon documents other than those referred to in Sections 239 and 240 of the Cr.P.C. and whether the High Court would be justified in quashing the charges under Section 482 of the Cr.P.C. on the basis of such documents. Answering the question in the negative this Court held that while an order framing charges could be challenged in revision by the accused persons before the High Court or the Sessions Judge, the revisional Court could in any such case only examine the correctness of the order framing charges by reference to the documents referred to in Sections 239 and 240 of the Cr.P.C and that the Court could not quash the charges on the basis of documents which the accused may produce except in exceptional cases where the documents are of unimpeachable character and can be legally translated into evidence. The following passage is, in this regard, apposite:

> **"7.** If charges are framed in accordance with Section 240 CrPC on a finding that a prima facie case has been made out — as has been done in the instant case — the person arraigned may, if he feels aggrieved, invoke the revisional jurisdiction of the High Court or the Sessions Judge to contend that the charge-sheet submitted under Section 173 CrPC and documents sent with it did not disclose any ground to presume that he had committed any offence for which he is charged and the revisional court if so satisfied can quash the charges framed against him. To put it differently, once charges are framed under Section 240 CrPC the High Court in its revisional jurisdiction would not be justified in relying upon documents other than those referred to in Sections 239 and 240 CrPC; nor would it be justified in invoking its inherent jurisdiction under Section 482 CrPC to quash the same except in those rare cases where forensic exigencies and formidable compulsions justify such a course. We hasten to add even in such exceptional cases the High Court can look into only those documents which are unimpeachable and can be legally translated into relevant evidence."

10. It is interesting to note that even in the present SLPs the petitioner has filed an unsigned copy of the alleged minutes of the meeting dated 19th July, 2005. We do not think that we can possibly look into that document without proper proof and without verification of its genuineness. There was and is no clear and unequivocal admission on the record, at least none was brought to our notice, regarding the genuineness of the document or its probative value. The complainant-respondent in this petition was also not willing to concede that the document relied upon could possibly result in the ratification of an act which was *non est* being a mere forgery. At any rate the document could not be said to be of unimpeachable character nor was there any judicial compulsion much less an exceptional or formidable one to allow its production in revisional proceedings or to accept it as legally admissible evidence for determining the correctness of the order passed by the trial Court. That apart whether or not document dated 19th July, 2005, could possibly have the effect of ratifying the resolution allegedly passed on 28th June, 2005 was also a matter that could not be dealt with summarily, especially when the former did not even make a reference to the latter.

11. The alternative contention urged by learned counsel for the petitioners that there was suppression of information by the complainant as regards filing of a previous complaint before the Magistrate at Bangalore is also without any substance. The fact that the complaint previously filed had been quashed by the High Court on account of filing of a comprehensive complaint out of which these proceedings arise is, in our opinion, a complete answer to the charge of suppression. As on the date the Additional Chief Metropolitan Magistrate, Mumbai, took cognizance of the offences in the complaint filed before him no other complaint was pending in any other Court, the complaint before the Magistrate at Bangalore having had been quashed

without a trial on merits. Mere filing of a previous complaint could not in the above circumstances be a bar to the filing of another complaint or for proceedings based on such complaint being taken to their logical conclusion. So also the High Court was, in our opinion, correct in holding that there was no violation of the provision of Section 202 Cr.P.C. to warrant interference in exercise of revisional powers by the Sessions Judge.

12. Reliance placed by learned counsel for the petitioners upon the decisions of this Court in *Pepsi Foods Ltd. and Anr. v. Special Judicial Magistrate and Ors.* (1998) 5 SCC 749 and *State of Orissa v. Debendra Nath Padhi* (2005) 1 SCC 568 is of no avail. In the former case this Court simply recognized that taking of cognizance is a serious matter and that the magistrate must apply his mind to the nature of the allegations in the complaint, and the material placed before him while issuing process. The complaint in the present case, as noticed earlier, does make specific allegations which would call for a proper inquiry and trial and the magistrate had indeed recorded a prima facie conclusion to that effect. So also the decision in *Debendra Nath Padhi* (supra) does not help the petitioner. That was a case where the question was whether at the stage of framing of charge, the accused could seek production of documents to prove his innocence. Answering the question in the negative this Court held:

> "The law is that at the time of framing charge or taking cognizance the accused has no right to produce any material. No provision in the Code of Criminal Procedure, 1973 (for short the "Code") grants to the accused any right to file any material or document at the stage of framing of charge. That right is granted only at the stage of the trial. Satish Mehra case, (1996) 9 SCC 766 holding that the trial court has powers to consider even materials which the accused may produce at the stage of Section 227 of the Code has not been correctly decided. It is well settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence."

13. In the result, we see no reason to interfere with the order passed by the High Court in exercise of our jurisdiction under Article 136 of the Constitution of India. The Special Leave Petitions are accordingly dismissed.

R.P. Special Leave Petitions dismissed.

CIVIL APPELLATE JURISDICTION :

CIVIL APPEAL NO. 11200 OF 2011

DALVEER BHANDARI, J. 1. Leave granted.

2. This appeal is directed against the judgment dated 11th August, 2009 delivered in Letters Patent Appeal No.296 of 2009 by the Division Bench of the High Court of Delhi upholding the judgment dated 6th May, 2009 passed by the learned Single Judge in Writ Petition (Civil) No.2927 of 2005.

3. The main issue which arises for adjudication in this appeal pertains to the termination of the dealership of the appellant in an illegal and arbitrary manner.

4. According to the appellant, it had been operating the petrol pump for the last 30 years and during this period it was given 10 awards from time to time declaring its dealership as the best petrol pump in the entire State of NCT of Delhi. On a number of occasions, samples of the appellant were tested by the respondent-Corporation and on each occasion its samples were found to be as per the specifications.

5. According to the appellant, it had maintained highest standards and norms of an excellent petrol pump, yet, the respondent-Corporation, in a clandestine manner, terminated its dealership in the most arbitrary manner and in total violation of the principles of natural justice.

6. It was further urged by the appellant that its dealership was terminated without even issuing any show cause notice and/or giving an opportunity of hearing to it. The termination of dealership was contrary to the mandatory procedural provisions of law. According to the appellant, the said termination was mala fide, arbitrary and illegal.

7. It may be pertinent to mention that in the morning of 15th May, 2000, an unauthorized police officer accompanied by the officials of the respondent conducted a raid at the appellant's petrol pump. According to the appellant, the raid was illegal as an unauthorized police officer could not conduct a search and seize the samples of the appellant.

8. The appellant urged that the samples taken in this raid were in complete violation of the mandatory procedural provisions of law as provided under the Motor Spirit and High Speed Diesel (Regulation of Supply and Distribution and prevention of Malpractices) Order, 1999 (hereinafter referred to as "Order"). The appellant while reproducing the relevant provisions of law has submitted as under:-

(a) Clause 4 of the said Order provides for power of search and seizure. Sub-Clause (A) of the section authorizes any police officer not below the rank of the Deputy Superintendent of Police (for short, DSP) duly authorized or any Officer of the concerned Oil Company not below the rank of Sales Officer to take samples of the products and/or seize any of the stocks of the product which the officer has reason to believe has been or is being or is about to be used in contravention of the said Order.

9. In the present case, however, the samples were collected in complete violation of the aforesaid provisions. The Police official who had conducted the raid and collected the samples was admittedly below the rank of DSP. This is also recorded in the Metropolitan Magistrate's order dated 27.5.2002 passed in FIR No.193 of 2000 wherein it is stated as under:

"In the present case the search and seizure was conducted by an unauthorized police officer of the rank of Inspector which is totally contrary to the mandatory provisions of the said Clause 4."

(b) Sub-Clause (B) of Clause 4 of the said Order provides that while exercising the power of seizure under Clause 4 (A) (iv) the authorised officer shall record in writing the reasons for doing so, a copy of the which shall be given to the dealer.

10. According to the appellant, in the present case, no such reasons in writing were provided.

(c) Clause 5(2) of the said Order lays down the procedure for sampling of product which provides that "the Officer authorised in Cl. 4 shall take, sign and seal six samples of 1 litre each of the Motor Spirit or 2 of 1 lit. each of the High Speed Diesel, 2 samples of the Motor Spirit (or one of High Speed Diesel) would be given to the Dealer or

transporter or concerned person under acknowledgement with instruction to preserve the sample in his safe custody till the testing or investigations are completed, 2 samples of MS (and/or one of HSD), would be kept by the concerned Oil Company or department and the remaining two samples of MS (and/or one of HSD) would be used for laboratory analysis."

11. The appellant urged that in the present case, samples were allegedly taken from 6 sources. Therefore, the respondent Corporation as per the provision should have taken 36 samples (6 samples from each of the source) and handed over 12 samples (2 from each of the 6 sources) to the appellant, being the dealer, under acknowledgement. The respondent Corporation however, neither took 36 samples, nor did it hand over the prescribed number of 12 samples to the appellant. This is clear from the counter affidavit filed by the respondent in Writ Petition (C) No.7382 of 2001 placed on record. It is clearly stated in the counter affidavit filed by the respondent Corporation that it is pertinent to state that two samples from each of the tanks containing adulterated products were drawn by the answering respondent in the presence of the police officials of the crime branch and the representative of the appellant as well.

12. Out of these two samples, one sample was retained by the crime Branch of Delhi Police and another by the respondent, Bharat Petroleum Corporation Limited (for short BPCL). It has, therefore, been clearly admitted that only 2 samples as opposed to 6 samples were drawn from each tank and that no sample was handed over to the appellant. Furthermore, the learned counsel appearing for the respondent in the proceedings before the Division Bench in LPA No.296 of 2009, has specifically admitted, as is also recorded in page 8 of the impugned order that "there was no receipt of two samples from each source being handed over to appellant". It is also relevant to state that in all previous representations made by the appellant to the respondent and previous writ petitions filed, the respondent has never denied the averment that 2 samples were not handed over to the appellant.

(d) Clause 5(3) of the said Order provides that "Samples shall be taken in clean glass or aluminium containers. Plastic containers shall not be used for drawing samples."

13. According to the appellant, in the present case, plastic containers were used for drawing samples in complete violation of the said provision. This is also recorded in the Metropolitan Magistrate's order dated 27.5.2002 wherein it is stated that in Clause 5 of the order it was specifically legislated that the sample shall be taken in clean glass or aluminium containers and plastic containers would not be used for drawing out the samples. But in clear contravention to the mandatory provisions, plastic containers were used by the police officer while drawing samples. From the file, it is clear that sample Nos.7, 8 and 9 were drawn from the car of the complainant in plastic containers by the police and therefore, the report on the basis of the samples taken in the plastic containers cannot be relied upon at all.

(e) Clause 5(4) of the said Order provides that "The sample label should be jointly signed by the officer who has drawn the sample, and the dealer or transporter or concerned person or his representative and the label shall contain information as regards the product, name of retail outlet, quantity of sample, date, name and signature of the officer, name and signature of the dealer or transporter or concerned person or his representative."

According to the appellant, this was not done.

14. The Metropolitan Magistrate's order dated 27.5.2002 passed in FIR No.193 of 2000 specifically records as follows:

> "The law being as noticed above, it is very clear that the search and seizure is bad in law and is in contravention of mandatory provisions of the Essential Commodities Act and contravention of Motor Spirits (High Speed Diesel Act) and in any case the prosecution cannot establish its case against any of the accused and accused persons are liable to be discharged on this very ground and no charge should be framed… There is no evidence whatsoever to show that petrol supplied was adulterated or not."

15. The appellant referred to section I (c) of Chapter 6 of the Guidelines of 1998 which provides as follows:

> "Wherever samples are drawn, either pursuant to random checks or where adulteration is suspected, 3 sets of signed and sealed samples (6x1 ltr of MS and 3x1 ltr of HSD) should be collected from the RO, out of which one set should be kept with the dealer, one with the company and the third to be sent for laboratory resting within 10 days. For the sample kept with the dealer, proper acknowledgement will be obtained and the dealer will be instructed to preserve the same in his safe custody till the testing/investigation are completed."

16. According to the appellant, it is clear that the samples were collected in violation of mandatory procedure of law as provided under the said Order and therefore the termination order passed on the basis of test reports of samples so collected is completely illegal and liable to be set aside.

17. The appellant relied on the case of *Harbanslal Sahnia and Another v. Indian Oil Corporation Ltd. and Another* (2003) 2 SCC 107, wherein the Indian Oil Corporation terminated the dealership of Harbanslal Sahnia on the basis that the sample drawn from the petrol pump did not meet the standard specification. This Court found that two government orders providing for the procedure for taking samples had been violated and in view of the same found that the failure of the sample taken became irrelevant and non-existent fact which could not have been relied upon for terminating dealership, and quashed the order terminating the dealership and restored possession. It is submitted that the fact that two samples were not left with the appellant is not only a violation of the mandatory principles of law but also of fair play and natural justice as the appellant is deprived of its valuable right to contest the veracity of the test reports. This provision of law is the single most important check on arbitrary action by the respondent.

18. According to the appellant, these samples were taken in violation of the mandatory provisions of law. The test reports, given on 16.5.2000, formed the basis for the termination of the appellant's dealership. The termination was in clear violation of the procedures prescribed by law. The termination was also in violation of mandatory Marketing Discipline Guidelines and the prescribed procedures. The termination was also in violation of the principles of natural justice and fairplay. According to the appellant, this is clear from the following facts:-

(a) Clause (d) of Section 1 of the Marketing Disciplines provides that: If the samples is certified to be adulterated, after laboratory test, a show cause notice should be served on the dealer and explanation of the dealer sought within 7 days of the receipt of the show cause notice. Thus under the said provision seven days is to be given to the dealer to provide an explanation and only if explanation is found unsatisfactory can appropriate action be taken. In the instant case, however, no show cause notice was given and no opportunity was given to the appellant to provide any explanation. Instead appellant's dealership was summarily terminated on the very date the alleged

test reports certifying the sample to be adulterated was received i.e. 16.5.2000, the very next day after the samples were taken. It is relevant to state that the premeditated nature and mala fide of the test reports was writ large as the test reports on the basis of which the appellant's dealership was allegedly terminated itself indicated "terminated dealer".

(b) Clause (d) of Section 1 of the Marketing Discipline Guidelines further provides that if the explanation of dealer is not satisfactory, the Company should take action as follows:

a. Fine of Rs.1 lakh and suspension of sales and supplies for 45 days in the first instances;

b. Termination in the second instance.

19. It is thus clear from the above provision that the Guidelines prescribe termination only in case of second instance of adulteration of Motor Spirits. It is an admitted case that this was the first instance of alleged adulteration of Motor Spirits.

20. One of the grounds taken by the respondent-Corporation for termination in its letter dated 16.5.2000 was that "in the past also a product sample collected from the retail outlet was found to have failed specification." This earlier offence in respect of the "product sample" referred to in the order of 16.5.2000, was, however, in respect of lube sample and not petrol/MS. This is clear from the Delhi High Court's order dated 9.9.2004 passed in WP (C) No.7382 of 2001, which records respondent Corporation's counsel's submission in that respect as below: "It was also emphasized that there was a past history where inspection of the outlet had been carried out on 12.12.1998 and Lubes samples were collected which were found off-specifications."

21. It is also submitted that a previous alleged case of off-spec lube, does not make the first alleged case of motor spirit adulteration, a second offence of motor spirit adulteration. Off-spec lube is not a case of adulteration which is clear from the definition of "adulteration" set out in the Marketing Discipline Guidelines which defines "adulteration" as "the introduction of any foreign substance into motor spirit/high speed diesel illegally or unauthorizedly." Lube falls into a completely different category and is in a separate chapter in the Marketing Discipline Guidelines being Chapter 7 as contrasted from Chapter 6 which deals with "Adulteration of Product". Chapter 7 of the said guidelines separately provides for prevention of irregularities at retail outlet in respect of lubes. Clause 9 of the said Chapter provides the following punishments in case of sales of adulterated lubes.

a. Suspension of sales and supplies of all products for 15 days along with a fine of Rs.20,000/- in the first instance.

b. Suspension of sales and supplies for 30 days along with a fine of Rs.50,000/- in the second instance.

c. Termination in the third instance.

22. Thus while the guidelines provide for termination of dealership in the second instance of adulteration of petrol/MS, the punishments prescribed for adulteration of lubes provides for termination only in case of third instance.

23. Further, the fourth note provided at the end of this Chapter 6 provides as under:

"In case, two or more irregularities are detected at the same time at the same RO, action will be taken in line with what is listed in MDG under the relevant category for each

irregularity."

24. According to the appellant, the respondent has clearly acted in violation/contravention of, or at the very least in departure from, the Motor Spirits High Speed Diesel Order and the Marketing Discipline Guidelines and has also acted contrary to the principles of natural justice and fair play both in respect of taking samples which formed the basis of termination, as also in respect of the termination of dealership.

25. The appellant referred to the decision in *Bharat Filling Station and Another v. Indian Oil Corporation Ltd.* 104 (2003) DLT 601 wherein the Delhi High Court specifically referred the Market Discipline Guidelines. Relevant part of the judgment is reproduced as under:-

> "As noted above, IOC, whenever enters into dealership agreement, executes memorandum of agreement which lays down standard terms and conditions. These conditions, *inter alia*, include provisions for termination of the dealership as well. It is provided that the agreement can be terminated by giving required notice. It may however be mentioned that at the same time in order to ensure that such agreements with the dealers are worked out in a systematic manner and the respondent IOC does not invoke the termination clause arbitrarily, Government of India has issued Marketing Discipline Guidelines.

26. The appellant also referred to the decision of this Court in *Ramana Dayaram Shetty v. International Airport Authority of India and Others* (1979) 3 SCC 489, wherein this Court held that "it is well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them." It is submitted that the respondent was bound to act in accordance with the Marketing Discipline Guidelines.

27. It is further submitted that in the case of *Ramana Dayaram Shetty* (supra), this Court held that "the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including awards of jobs, contracts, quotas, licenses etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

28. The appellant further submitted that in the present case the respondent has departed from the standard norms laid down in the Marketing Discipline Guidelines and the standard norms of natural justice and fairplay and that such departure was clearly arbitrary, irrational, unreasonable and discriminatory.

29. The appellant urged that the respondent Corporation terminated the dealership without even issuing show-cause notice and/or providing any opportunity of hearing. The termination is clearly in violation of the principles of natural justice.

30. The appellant also asserted that the termination was mala fide is further strengthened by the fact of an internal email of the respondent dated 3 days after the raid on May 18, 2000 stating that "the samples were taken as complaint samples but the comments on the test result were given due to reasons explained to you over the phone."

31. It is also stated that another email dated 22nd May, 2000 recorded that "Delhi Territory had drawn samples regularly from the retail outlet. All 10 samples drawn in 1999-2000 were

found on spec." Despite this, the dealership had already been terminated the very day after the raid.

32. The appellant also urged that the order of the Delhi High Court in Writ Petition (Civil) No.7382 of 2001 dated 9.9.2004 directed the respondent to give a show cause notice, personal hearing and pass a reasoned order. It was not given and the appellant was constrained once again to approach the High Court who then directed the respondent to grant the appellant a personal hearing at a higher level. The action of the respondent is *mala fide* which is reflected from the fact that at various stages the respondent-Corporation has tried to improve its case by supplanting reasons in support of the termination. This is clear from the following facts:

i. The first notice dated 16.5.2000 terminating the dealership points out the following three grounds for termination:

   a. One of the samples during the raid and taken from the laboratory testing had failed specification of U.L.P.

   b. In the past also a product sample collected from the retail outlet was found to have failed specification; and

   c. Breach of agreement between the parties vide which the appellant had covenanted not to adulterate petroleum products.

ii. Despite the fact that termination order was quashed by the High Court vide its order dated 9.9.2004 passed in W.P. (C) No.7328 of 2001, with specific direction to the respondent to give the appellant personal hearing and pass a reasoned order, the respondent Corporation vide letter 22.11.2004 confirmed the original order of termination without granting the appellant an opportunity of hearing. Further despite Court's specific order to treat the original termination order dated 16.5.2005 as the show-cause notice, the respondent added additional grounds of termination and terminated the dealership on these grounds in addition to the grounds taken in 16.5.2000. The additional grounds were:

   d. Loss of Market Share in 1997.

   e. Non-availability of density record during routine mobile inspection on 28.4.1998 and 30.5.1995;

   f. Failure to meet specifications during a routine inspection on 12.12.1998;

   g. Two complaints received in 1997.

33. The appellant submitted that it is pertinent to note that all the grounds pertain to a period prior to the termination of the dealership in 2000 and hence were known to the respondent even at the time it issued its termination order dated 16.5.2000. Despite the same these were taken as grounds for the first time in the year 2004 making it abundantly clear that these grounds were added as an after thought only with a view to improve its case of termination.

34. The appellant further urged that in the order dated 16.5.2000 it was simply stated that one of the samples drawn had failed specification of ULP without clarifying which ULP specification it had failed. However, as per the order dated 22.11.2004, the ULP specification that the samples were said to have failed were in respect of Research Octane Number and ASTM distillation which were co-incidentally the only two tests that IIP Dehradun had not carried out when the samples were sent to IIP Dehradun pursuant to Delhi High Court's order dated

6.12.2000 passed in W.P. (Crl.) No.877 of 2000. In fact since these two tests were not carried out by IIP Dehradun in its order dated 22.11.2004, the test reports were not considered as being irrelevant.

35. The appellant further urged that the mala fide intention of the respondent is clearly evident that even at the stage of final disposal and two years after the filing of the present special leave petition, the respondent has made serious effort to improve its case by filing a supplementary affidavit dated 19.8.2011, vide which the respondent has sought to allege for the first time that it handed over requisite number of samples to the appellant. The supplementary affidavit states that "Samples of products were collected from five tanks of petrol/ motor spirit. From each of the five tanks of petrol/motor spirit, six sets of samples in aluminium bottles (i.e. total of thirty 30 sample bottles) were taken. In addition to this, six samples in aluminium bottles were taken from the tank lorry which was found to be decanting petrol/motor spirit in the underground tanks for petrol/motor spirit. As such, the total number of samples taken in bottles were 36. Out of the 36 sample bottles collected, 12 were retained by the BPCL, 12 were handed over to the dealer and 12 were sent for testing to the specified laboratory.

36. The appellant further submitted that the said averment is completely false and contradictory to its own pleadings before the High Court in WP (C) No.7382 of 2001 produced on record by the respondent itself with the counter filed by it in the present proceedings. It is stated that "it is pertinent to state that two samples from each of the tanks containing adulterated products were drawn by the answering respondent in the presence of the police officials of crime branch and representative of the petitioner as well. Out of these two samples one sample was retained by the crime branch of Delhi Police and the other by BPCL."

37. The appellant further submitted that it is also pertinent to mention that in the proceedings before the Division Bench of the High Court in LPA No.296 of 2009 the learned counsel appearing for the respondent Corporation has specifically admitted and is also recorded in page 8 of the impugned order that "there was no receipt of two samples from each of source being handed over to the appellant-petitioner."

38. The appellant submitted that it is clear that the termination of the dealership by the respondent Corporation was pre-determined and mala fide and hence liable to be set aside.

39. On behalf of the respondent, Shri Arjun Hira, General Manager (Retail), North, Bharat Petroleum Corporation Ltd., has filed an affidavit before this Court refuting the allegation that the termination of the agency was predetermined or mala fide. The respondent Corporation submitted that because of adulteration in the petrol, the respondent-Corporation had taken swift action in order to save its reputation. The respondent-Corporation referred to clause 10(g) of the DPSL Agreement dated 28.1.1971 which reads thus:

> "Not to adulterate the Petroleum products supplied by the Company and at all times to take all reasonable precautions to ensure that the Motor Spirit or H.S.D. is kept free from water, dirt and other impurities and served from the pumps in such conditions."

40. The respondent-Corporation submitted that the termination was in line with the terms and conditions of the Agreement entered into between the parties and the breach of trust has been committed by the appellant. It is also mentioned that since the respondent-Corporation had not received any response to the letter dated 16.5.2000 it was assumed that the appellant had accepted the wrong deeds and had no grievances.

41. The respondent also submitted that the respondent-Corporation did not show any haste in getting the samples tested. The samples were drawn and tested as per the procedure laid down and on the receipt of the results indicating the adulteration of products. Thus, the action contemplated under the provisions of the DPSL Agreement dated 28.01.1971 was taken.

42. The respondent-Corporation denied that the action initiated against the appellant was in any manner mala fide or manipulated for grabbing the business outlet on the false pretext. The respondent-Corporation also submitted that reliance cannot be placed upon the Report submitted by the IIP Dehradun as the tests conducted by them do not comply the specifications laid down by the Bureau of Indian Standards. Moreover, the IIP, Dehradun did not conduct the RON Test. Not following the specifications and conducting of the RON Test was essential for testing the quality and the specification of the ULP for meeting specifications of the Motor Spirit.

43. According to the respondent, the report submitted by the IIP, Dehradun is sacrosanct. The said sample was sent much after the incident of adulteration and the same is not in accordance with the MS/HSD Control October, 1998 issued by the Government of India.

44. In the rejoinder affidavit, the appellant reiterated its submissions mentioned in the petition and denied the allegations levelled in the counter affidavit.

45. The appellant submitted that the accuracy and veracity of the original test report also comes into question as the results of the independent laboratory, the IIP Dehradun report indicated no adulteration. In addition, the original test report on the basis of which the appellant's dealership was terminated can also not be relied upon in view of the conclusive finding of the Metropolitan Magistrate that the samples had been taken in violation of mandatory provisions of law.

46. According to the appellant, as per the report submitted by IIP, Dehradun the samples were not adulterated though the report had not gone into the aspect of RON on account of which the samples were alleged to have failed the specification. Thus, even assuming, though not conceding, that there was no test report which conclusively established that the petrol was not adulterated there was also no test report which conclusively established that the petrol was in fact adulterated.

47. The appellant urged in the rejoinder that the Metropolitan Magistrate vide his order dated 27.5.2002 discharged all the accused persons as the Court was satisfied that prima facie there was no material on record even to frame charges against them. The order clearly records that the search and seizure carried out was unlawful and in complete contravention and disregard of the mandatory provisions of law inasmuch as the raid was conducted by an official below the rank of Sub-Inspector and the samples were drawn in plastic containers. The Court also observed that there was no evidence whatsoever to show that the petrol supplied was adulterated. The finding of the Metropolitan Magistrate reads thus:

> "the law being as noticed above, it is very clear that the search and seizure is bad in law and is contravention to the mandatory provisions of Essential Commodities Act and contravention to the Motor Spirits (High Speed Diesel) Act and in any case the prosecution cannot establish its case against any of the accused and accused persons are liable to be discharged on this ground alone and no charges can be framed.
>
> It is very clear that the search and seizure is bad in law and is in contravention to the mandatory provisions of Essential Commodities Act and contravention to the Motor Spirits (High Speed Diesel) Act and in any case the prosecution cannot establish its case against any of the accused and accused persons are liable to be discharged

on this ground alone and no charges can be framed. Further, it is an admitted that that there was no receipt of two samples from each source being handed over to the petitioner. This is clear evidence of the fact that the samples were never handed over. In addition, the High Court in its order dated 9.9.2004 held that ".. there is no manner of doubt that the principles of law applied to the given facts of the present case are squarely covered by the judgment of the Supreme court in *Harbanslal Sahnia's case.*"

48. Mr. Mukul Rohtagi, learned Senior Advocate appearing for the appellant in support of his contentions placed reliance on some of the following judgments.

49. In *Harbanslal Sahnia and Another* (supra), the Court dealt with the question of termination of dealership by the Indian Oil Corporation Ltd. In this case, it was asserted before this Court that dealership has been terminated on irrelevant and non-existent grounds, therefore, the order of termination is liable to be set aside. In this case, there has not been compliance of the procedure. The failure of the sample taken from appellants' outlet on 11.2.2000 becomes an irrelevant and non-existent fact which could not have been relied on by the respondent Corporation for cancelling the appellants' licence.

50. In the above case, the Court came to the conclusion that the dealership was terminated on irrelevant and non-existent cause. The Court while allowing the appeal quashed and set aside the Corporation's order terminating dealership of the appellants.

51. Reliance has been placed on the celebrated judgment of the Privy Council in *Nazir Ahmad v. King Emperor* AIR 1936 PC 253 wherein the principle has been enunciated that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.

52. Reliance has also been placed on decision in *Ramana Dayaram Shetty* (supra) wherein this Court has held thus:

"The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

53. In this case, the Court held that the action of the respondent was invalid. The acceptance of the tender was invalid as being violative of equality clause of Constitution as also of the rule of administrative law inhibiting arbitrary action.

54. Reliance has been placed on *Kumari Shrilekha Vidyarthi and Others v. State of U.P. and Others* (1991) 1 SCC 212, the Court observed thus:

"48. .....Non-arbitrariness, being a necessary concomitant of the rule of law, it is imperative that all actions of every public functionary, in whatever sphere, must be guided by reason and not humour, whim, caprice or personal predilections of the persons entrusted with the task on behalf of the State and exercise of all power must be for public good instead of being an abuse of the power."

55. Reliance has also been placed on *Karnataka State Forest Industries Corporation v. Indian Rocks* (2009) 1 SCC 150, the Court observed thus:

"38. Although ordinarily a superior court in exercise of its writ jurisdiction would not enforce the terms of a contract qua contract, it is trite that when an action of the State is arbitrary

or discriminatory and, thus, violative of Article 14 of the Constitution of India, a writ petition would be maintainable (*See: ABL International Ltd. v. Export Credit Guarantee Corpn. Of India Ltd.* (2004) 3 SCC 553).

56. Reliance has also been placed on *Gujarat State Financial Corporation v. M/s. Lotus Hotels Pvt. Ltd.* (1983) 3 SCC 379. In this case the Court held that the public corporation dealing with public cannot act arbitrarily and its action must be in conformity with some principles which meets the test of reason and relevance.

57. We have heard the learned counsel for the parties at length and have perused the decisions relied on by the parties.

58. In the instant case, samples were taken on 15th May, 2000. On the very next day i.e. on 16th May, 2000, without even giving a show-cause notice and/or giving an opportunity of hearing, the respondent-Corporation terminated the dealership of the appellant. The appellant had been operating the petrol pump for the respondent for the last 30 years and was given 10 awards declaring its dealership as the best petrol pump in the entire State of NCT Delhi. During this period, on a number of occasions, samples were tested by the respondent and were found to be as per specifications.

59. In the instant case, the haste in which 30 years old dealership was terminated even without giving show-cause notice and/or giving an opportunity of hearing clearly indicates that the entire exercise was carried out by the respondent Corporation non-existent, irrelevant and on extraneous considerations. There has been a total violation of the provisions of law and the principles of natural justice. Samples were collected in complete violation of the procedural laws and in non-adherence of the guidelines of the respondent Corporation.

60. On consideration of the totality of the facts and circumstances of this case, it becomes imperative in the interest of justice to quash and set aside the termination order of the dealership. We, accordingly, quash the same. Consequently, we direct the respondent-Corporation to handover the possession of the petrol pump and restore the dealership of petrol pump to the appellant within three months from the date of this judgment.

61. The appeal is consequently allowed with costs which is quantified at Rs.1,00,000/- (Rupees one Lakh only) to be paid by the respondent Corporation to the appellant within four weeks from today.

R.P. Appeal allowed.

CRIMINAL APPELLATE JURISDICTION : SLP (Crl.) No. 4010 of 2011.

From the Judgment & Order dated 13.09.2010 of the High Court of Gujart at Ahmedabad in Criminal Misc. Application No. 9119 of 2010.

D.N. Ray, Lokesh K. Choudhary, Sumita Ray for the Petitioner.

Meenakshi Arora, Hemantika Wahi, Jesal, Ashwini Kumar for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. The High Court of Gujarat at Ahmedabad has by its order dated 13th September, 2010 allowed Criminal Misc. -Application No.9119/2010 and enlarged the respondent, Ganga Maldebhai Odedara on bail

under Section 439 of Code of Criminal Procedure. The present Special Leave Petition has been filed by the complainant assailing the said order.

2. Briefly stated, the prosecution case is that 14th January, 2007, being Makar Sankranti Day, the complainant-Jetha Bhaya Odedara, the petitioner before us, was sitting at the house of one Abha Arjan, along with Navgan Arasi, Rama Arasi Jadeja, Suresh Sanghan Odedara and a few ladies of the house, named, Aarsi Munja, Maliben and Puriben. At around 8.00 p.m. one Ramde Rajsi Odedara, one of the accused persons is alleged to have come to the place where the complainant was sitting and started using abusive language. He was asked not to do so, thereupon he left the place only to return a few minutes later with accused Punja Ram, Lakha Ram, Devsi Rama, Vikram Keshu Odedara, Gangu Ranmal, Vikram Devsi Odedara, Ramde Rajsi Odedara and the respondent and some others armed with knives and a pistol which the -- respondent was allegedly carrying with him. The accused persons started abusing and assaulting the complainant and others who were sitting with him resulting in knife injuries to Vikram Keshu, Navgan Arasi, Rama Arasi and Puriben. Respondent Ganga Maldebhai Odedara is alleged to have fired multiple rounds from the pistol in the air exhorting his companions to kill the complainant and others with him. Navgan Arasi died in the hospital on account of the injuries sustained by him leading to the registration of FIR No. I Cr.No.4/2007 in the Kirti Mandir Police Station, Porbandar City against the respondent and his companions for offences punishable under Sections 302, 307, 324, 147, 148, 149, 323, 504, 507 (2) of IPC read with Section 25(1) of the Arms Act and Section 135 of the Bombay Police Act. With the death of the deceased, Navgan Arasi, in due course the investigation was completed and a charge sheet for the offences mentioned above filed before the Sessions Judge, Porbandar, who made over the case to Fast Track Court, Porbandar for trial and disposal in accordance with law.

3. An application, being Crl. Misc. Application No.3/2010 was then filed by the respondent before the trial Court for grant of bail which was opposed by the prosecution and eventually dismissed by its order dated 11th February, 2010. The trial Court was of the view that no case for the grant of bail to the respondent-applicant had in the facts and circumstances of the case been made out particularly in view of the fact that the respondent was involved in several criminal cases apart from the one in which he was seeking bail. The trial Court was also of the view that the respondent was a member of the gang operating in Porbandar area and that he had absconded for a month before he was arrested. It was also of the view that the role played by the respondent and his association with the other accused persons was likely to affect the smooth conduct of the trial.

4. Aggrieved by the order passed by the trial Court the respondent filed Criminal Misc. Application No.9119/2010 before the High Court of Gujarat at Ahmedabad which application as noticed earlier, was allowed by the High -Court in terms of the impugned order in this petition. The High Court has without scrutinizing and appreciating the evidence in detail come to the conclusion that the respondent had made out a case for grant of bail. The High Court also noticed the fact that no injury was caused with the help of the firearm which the respondent was allegedly carrying with him. The High Court accordingly allowed the application subject to the condition that the respondent shall not take undue advantage of his liberty, tamper with or pressurize the witnesses and that he shall maintain law and order and mark his presence before the concerned police station once in a month. He was also directed to surrender his passport and not to enter Porbandar Taluka limits for a period of six months. The present special leave petition assails the correctness of the above order.

5. We have heard learned counsel for the parties at some length. We have also gone through the record. While the petitioner-complainant has described the respondent and other